UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	:	Civ. No. 1:18-cv-00007-TSC

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant U.S. Department of Justice moves for summary judgment, in accordance with Federal Rule of Civil Procedure 56 and Local Civil Rule 7. The reasons for this motion are set forth in the attached memorandum of points and authorities in support of Defendant's motion, the statement of material fact as to which there is no genuine dispute, and the declarations of Vanessa R. Brinkmann and Deborah M. Waller. A proposed order is also attached.

Dated: October 26, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this Freedom of Information Act ("FOIA") action, *see* 5 U.S.C. § 552, Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") challenges the adequacy of the search and the decision to redact and withhold certain records by the Office of Information Policy ("OIP") and the Office of the Inspector General ("OIG") of Defendant U.S. Department of Justice ("DOJ"). CREW's FOIA request sought records concerning DOJ's decision to allow reporters to view a set of text messages sent between two former FBI investigators on Special Counsel Robert Mueller's team, Lisa Page and Peter Strzok. OIG and OIP have conducted an adequate search of agency records and have produced all responsive documents that are not exempt from release under the FOIA.

In support of this Motion, DOJ proffers declarations by Vanessa R. Brinkmann and Deborah M. Waller, which detail the searches that OIG and OIP performed and explain OIP's and OIG's withholdings of exempt materials. Ms. Brinkmann and Ms. Waller amply describe their respective agency components' (1) thorough searches for responsive records, (2) careful determination of what constituted an agency "record" for the purposes of responding to this request, and (3) painstaking review of records to determine which information was properly subject to the FOIA exemptions, particularly FOIA Exemption 5. Ms. Waller and Ms. Brinkmann also explain that OIG and OIP went line-by-line thorough their FOIA productions to ensure that all reasonably segregable, non-exempt information was properly provided to CREW. This Court should accordingly grant DOJ's Motion for Summary Judgment.

BACKGROUND

In December 2017, CREW sent the FOIA requests at issue in this case to OIG and OIP. *See* Brinkmann Decl. ¶ 3; Waller Decl. ¶ 2. Both requests sought the following records: (1) "all

communications concerning the decision to invite reporters to DOJ on December 12, 2017, for the purpose of sharing with them private text messages sent during the 2016 presidential campaign by two former FBI investigators on Special Counsel Robert Mueller's team," Lisa Page and Peter Strzok; and (2) "documents reflecting who made the decision to release this material to reporters on the evening of December 12, 2017." Brinkmann Decl. ¶ 3 and Ex. A; Waller Decl. ¶ 2 and Ex. 1. CREW's request to OIP further specified that it "includes, but is not limited to: (1) communications with reporters regarding this meeting; (2) communications within DOJ about whether, when, and how to share the text messages with reporters including, *inter alia*, the Office of the Inspector General, the Attorney General, the Office of Legislative Affairs, the Deputy Attorney General, the Associate Attorney General, the Office of Public Affairs, and any individual within the senior leadership offices of DOJ; and (3) communications with any member of Congress and/or their staff regarding this matter." Brinkmann Decl. ¶ 3 and Ex. A. CREW asked the agencies to order expedited processing of its requests. *See* Brinkmann Decl. ¶ 4; Waller Decl. ¶ 3.

The agencies acknowledged receipt of the requests. Brinkmann Decl. ¶ 4; Waller Decl. ¶ 3. OIG was able to immediately begin processing the request. Waller Decl. ¶ 3. OIP, meanwhile, granted CREW's request for expedited processing, Brinkmann Decl. ¶ 6, and began its search that same day. *Id.* ¶ 18.

On January 3, 2018, CREW brought suit under the FOIA, 5 U.S.C. § 552, seeking the release of the requested records. Compl., ECF No. 1. On January 16, CREW amended its complaint after it received notification that OIP had granted CREW's request for expedited processing. Am. Compl., ECF No. 4; *see also id.* ¶ 25. DOJ timely answered the Complaint. ECF

No. 6. OIG completed its production on April 23, 2018, *see* Waller Decl. ¶ 17, and OIP completed its productions on October 12, 2018. Brinkmann Decl. ¶ 13.

When producing responsive records, the principal basis on which the OIG and OIP redacted and withheld information was FOIA Exemption 5, which protects from disclosure certain information that generally would not be discoverable in litigation. *See* 5 U.S.C. § 552(b)(5). OIP also redacted certain information, including email addresses and other contact information, pursuant to FOIA Exemption 6, which protects against disclosures that would cause "clearly unwarranted invasion of personal privacy," *id.* § 552(b)(6), and Exemption 7(C), which protects personal information in law enforcement records, *id.* § 552(b)(7)(C). *See* Brinkmann Decl. ¶¶ 7–10; *see also id.* ¶ 34 n.3. Further, OIP redacted certain information pursuant to Exemption 6 from a small batch of responsive records that OIG sent to OIP for consultation. *See* Waller Decl. ¶¶ 15–16.

CREW notified DOJ that it was challenging (1) the adequacy of DOJ's search; (2) "all Exemption 5 claims"; (3) "the names of those DOJ officials above the career level whose names were redacted pursuant to Exemption 6"' (4) "all redactions of non-responsive material and records, including the issue of how DOJ has defined certain 'records' in making such redactions"; and (5) all redactions of duplicative material. Since neither OIG nor OIP redacted the names of DOJ officials above the career level pursuant to Exemption 6, *see* Brinkmann Decl. ¶ 36; *see* Waller Decl. ¶ 26, DOJ limits the focus of its briefing on summary judgment to the other four issues that CREW identified as being in dispute.

LEGAL STANDARDS

"FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). "A court may grant summary judgment . . .

if there is 'no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Aguiar v. DEA*, 865 F.3d 730, 734 (D.C. Cir. 2017) (quoting Fed. R. Civ. P. 56(a)). Generally, an agency is entitled to summary judgment in a FOIA case if it shows that "its search for responsive records was adequate, that any exemptions claimed actually apply, and that any reasonably segregable non-exempt parts of records have been disclosed after redaction of exempt information." *Light v. U.S. Dep't of Justice*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013) (citation omitted). "To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations." *Miller v. U.S. Dep't of Justice*, 872 F. Supp. 2d 12, 18 (D.D.C. 2012).

A court may award summary judgment in a FOIA action solely on the basis of information provided by the agency through declarations that describe "the documents and the justifications for nondisclosure with reasonably specific detail," that "demonstrate that the information withheld logically falls within the claimed exemption[s]," and that are "not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (footnote omitted). The agency's justification "is sufficient if it appears 'logical' or 'plausible,'" *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007) (citation omitted), and agency declarations are accorded "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).

ARGUMENT

I. OIG and OIP's search was reasonable, adequate, and satisfies its obligations under the FOIA.

OIG and OIP have submitted reasonably specific declarations describing the reasonable searches they conducted for records responsive to CREW's FOIA request. Accordingly, the Court should grant summary judgment in favor of DOJ on the adequacy of the search.

On a motion for summary judgment, "the agency must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (citation omitted). It is well-established that "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Id.* (citation omitted); *see also SafeCard Servs.*, 926 F.2d at 1201 ("Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." (citations omitted)). The adequacy of the search "is judged by a standard of reasonableness and depends . . . upon the facts of each case." *Weisberg*, 745 F.2d at 1485 (citation omitted). Particularly because FOIA requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise," the D.C. Circuit counsels that it "is hardly an area in which the courts should attempt to micro manage the executive branch." *Schrecker v. DOJ*, 349 F.3d 657, 662 (D.C. Cir. 2003) (quoting *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002)).

A. OIG conducted an adequate search for responsive records.

Ms. Waller's declaration demonstrates that OIG conducted a search reasonably calculated to uncover all relevant documents by interviewing the individuals likely to have responsive records, searching for those individuals' emails during the appropriate time period, and manually

reviewing all potentially responsive records. Upon reviewing CREW's FOIA request, OIG realized that it was already aware of one responsive document from prior FOIA record searches: a letter that OIG's Inspector General sent in response to a Congressional inquiry about whether OIG had been consulted before DOJ decided to release the text messages in question to the media. Waller Decl. ¶ 4. OIG released this responsive record to Plaintiff a mere two days after having received CREW's request. *Id.*

OIG then undertook a thorough search for any additional responsive records. OIG contacted its Inspector General, Michael Horowitz, and then-Deputy Inspector General, Robert Storch, to determine who from OIG would be reasonably likely to have responsive records. *See id.* ¶ 5. According to Mr. Storch and Mr. Horowitz, Mr. Storch was the only individual to communicate with DOJ leadership about its decision to release the text messages at issue to the media, and then-Associate Deputy Attorney General Scott Schools was the only individual in DOJ leadership with whom he communicated about this issue. *Id.* ¶ 6. Mr. Storch and Mr. Horowitz, meanwhile, were the only individuals who communicated within OIG about the issue. *Id.* ¶ 10. Mr. Horowitz and Mr. Storch further indicated that OIG had no advance knowledge of DOJ's decision to invite reporters to DOJ on December 12, 2017, and did not learn of the decision until December 13. *Id.* ¶ 10.

Thereafter, OIG's Cyber Investigations Office conducted an email search of Mr. Storch's and Mr. Horowitz's email accounts for the time frame between December 13, 2018, and December 15, 2018, using Mr. School's email address as a search term. *Id.* ¶ 9. OIG chose that time frame because Mr. Horowtiz and Mr. Storch indicated that OIG was not informed about DOJ's decision until December 13, 2017, and OIG's involvement in communications concerning DOJ's decision to share the text messages in question with the media ended on December 15.

See id. ¶ 10. Further, OIG determined that the only communications that OIG had with DOJ regarding the decision occurred between Mr. Schools, Mr. Storch, and the only internal OIG communications about the decision occurred between Mr. Storch and Mr. Horowitz. Waller Decl. ¶ 10. OIG then conducted a manual review of Mr. Storch's emails during this time period to locate responsive records. *Id.* ¶ 11. OIG ultimately produced 10 pages of responsive records. *Id.* ¶ 16.

By taking the steps described above, OIG employed a reasonable and adequate search "using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (citations omitted). OIG appropriately searched for responsive records by speaking to the individuals most likely to have responsive records and by manually reviewing records located as a result of those discussions. *JMP v. DOJ*, 267 F. Supp. 3d 154 (D.D.C. 2017) (concluding that a search for responsive records under FOIA was reasonable where agency "identif[ied] the individuals likely to have responsive records and intervi[ewed] them to determine where all [relevant] records . . . would be located and then review[ed] each of those records individually"). OIG's decision to limit its search to records possessed by Mr. Storch and Mr. Horowitz was also reasonable, in light of the information they received from those two individuals and the fact that their review of potentially responsive records located no other potential custodians. *See Cause of Action Inst. v. Internal Revenue Serv.*, 316 F. Supp. 3d 99, 108 (D.D.C. 2018) (concluding that the agency's search was not unduly constrained where the agency had explained why it limited its search to certain custodians). Accordingly, OIG's search was adequate.

B. OIP conducted an adequate search.

OIP conducted a search reasonably calculated to uncover all relevant documents. As set forth in Mr. Brinkmann's declaration, OIP satisfied its obligations under the FOIA because it

made a good-faith effort to search for the requested records, using search methods that were reasonably expected to produce the information requested. Further, OIP searched all locations likely to contain responsive records.

OIP processes FOIA requests on behalf of itself and six DOJ senior leadership offices. Brinkmann Decl. ¶ 14; *see also id.* ¶ 1. After receiving a FOIA request, OIP determines which DOJ offices are likely to possess responsive information and which records repositories and search methods are most likely to yield responsive information. *Id.* OIP makes these determinations based on (1) the nature of the FOIA request, (2) its knowledge of the records that each senior leadership office maintains, (3) conversations with personnel in each leadership office, and (4) independent research it conducts. *Id.*

OIP initially determined that it was appropriate to search the five senior leadership offices identified in CREW's request: the Office of the Attorney General ("OAG"), the Office of the Deputy Attorney General ("ODAG"), the Office of the Associate Attorney General ("OASG"), the Public Affairs Office ("PAO"), and the Office of Legislative Affairs ("OLA"). *Id.* ¶ 22. As its search progressed, OIP determined that an additional office, the Office of Privacy and Civil Liberties ("OPCL"), which provides legal advice and guidance to DOJ components regarding privacy issues, may also have responsive records, and accordingly conducted an additional search within that office. *Id.*

In performing its search, OIP conducted a remote electronic search of the unclassified email records and computer files of 71 custodians in the six DOJ offices mentioned above. *Id.* ¶ 23. OIP selected those custodians because they included every staff member employed in OAG, ODAG, OASG, PAO, OLA, and OPCL, at the time of OIP's search for records, as well as certain senior officials who were employed at DOJ during the relevant time period but had since

left the Department. *Id.* ¶ 23. OIP initially conducted a broad search of these custodians' email accounts using the following search terms: (1) "Strzok"; (2) "Lisa Page"; (3) "text" (and any variation thereof) in combination with the terms "FBI," "Federal Bureau of Investigation," "OSC," or "Special Counsel"; and (4) "message" (and any variation thereof) in combination with the terms "FBI," "Federal Bureau of Investigation," "OSC," or "Special Counsel." Brinkmann Decl. ¶ 24. OIP also used an initial time frame of January 20, 2017 to January 4, 2018. *Id.*

OIP's search for OPCL records occurred after it had finished its search for OAG, ODAG, OASG, PAO, and OLA email records. OIP had only later determined that it was appropriate to search for records in that office. *See* Brinkmann Decl. ¶ 22. After reviewing the results of the initial search for OAG, ODAG, OASG, PAO, and OLA records and after consulting with PAO personnel, OIP used a more targeted search terms and a narrower time frame to search for responsive email and hard drive records within OPCL. *Id.* ¶ 25. Regarding the appropriate search terms, OIP determined that searching for the term "message" was not reasonably likely to capture any additional responsive records because each responsive record including the term "message" also included the term "text." *Id.* Further, searching for the term "message" captured a substantial number of nonresponsive records. *Id.* Therefore, OIP used only the following search terms for OPCL: the terms "Strzok"; "Lisa Page"; and the term combinations "text" (and any variation thereof) in combination with the terms "FBI," "Federal Bureau of Investigation," "OSC," or "Special Counsel." *Id.* Regarding the appropriate time frame, OIP determined that responsive records were not reasonably likely to surface from records dated before December 12, 2017, the date the text messages were released to the media. This determination was based upon OIP's initial review of potentially responsive records from its initial search. *Id.* Accordingly, OIP searched OPCL records from December 12, 2017, to January 4, 2018. *Id.*

After OIP's email searches were completed, OIP became aware of a problem with the data on which some of its searches were run, *see* Brinkmann Decl. ¶ 27, stemming from the migration of DOJ email onto new servers. *See* Aug. 10, 2018 Decl. of Vanessa R. Brinkmann, ECF No. 15-1. OIP worked with DOJ's Justice Management Division's Office of the Chief Information Officer to re-run the search for responsive email records in OAG, ODAG, OASG, PAO, and OLA.[1] Brinkmann Decl. ¶ 27. OIP processed the additional records returned from the re-run search and produced the records to CREW. *Id.* ¶ 12.

OIP also sent search notifications to the six offices that it searched, with instructions to identify any additional records that would not be captured by this remote electronic search, including text and voice messages and material maintained in a classified system. *Id.* ¶ 18. Meanwhile, in the course of searching for text messages in response to another FOIA request, OIP located potentially responsive text messages belonging to a custodian at PAO. *Id.* ¶ 19. After learning of the potentially responsive PAO text messages, OIP initiated an additional search for text messages within PAO for that custodian's responsive text messages and further conferred with its PAO contact to confirm that no other custodians in the office possessed additionally responsive records. *Id.* OIP had no indication that the other DOJ offices for which it was responsible had any responsive text messages. *Id.* OIP's PAO contact conducted a manual review of the custodian's text message conversations during a period of time leading up to and following DOJ's meeting with reporters on December 12, 2017. *Id.* ¶ 29.

[1] OIP determined that its search for OPCL email records did not need to be re-run. OIP determined, based on its discussions with JMD's OCIO, that the technical issue did not affect the search for OPCL email records. Brinkmann Decl. ¶ 28. Further, given OPCL's limited size, and the limited scope of their work, OIP had had direct conversations with OPCL to ensure that it located all records, including email and electronic files. *Id.* OIP was therefore confident it had already taken all steps reasonably necessary to capture responsive OPCL records. *Id.*

Finally, OIP conducted a search of the Departmental Executive Secretariat ("DES"), the official records repository of all formal correspondence for the following offices: OAG, ODAG, OASG, and OLA. *Id.* ¶ 30. OIP set appropriate parameters on its DES search to locate responsive records: it used the search terms "text message" and "text messages," because it determined that formal correspondence regarding the released text messages were reasonably expected to include those phrases. *Id.*

As a result of its various searches, OIP initially identified 343 pages containing records responsive to CREW's request. *Id.* ¶ 31. After its search for OAG, OASG, ODAG, PAO, and OLA email records was re-run, OIP located an additional 46 pages of responsive records, although multiple records contained in those pages were duplicates of records located and produced earlier. *Id.* OIP also produced 49 pages containing text message responsive to CREW's request. *Id.* ¶ 31.

The efforts detailed in Ms. Brinkmann's declaration and as set forth above demonstrate OIP's "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. As such, there can be little doubt—and no dispute of material fact—that OIP conducted a search consistent with its obligations under the FOIA.

II. OIG's and OIP's decisions to treat distinct emails and text messages as separate records was consistent with American Oversight's FOIA request and permissible under FOIA, as was the decision to not produce non-responsive and duplicative records.

When OIG and OIP identified and reviewed emails responsive to CREW's FOIA request, they processed each email as a distinct record. That approach was suggested by the requests themselves, which sought only communications concerning the discrete decision to invite reporters to view the FBI text messages on December 12, 2017. *See* Waller Decl., Ex. 1 at 1;

Brinkmann Decl., Ex. A at 2 (seeking "communications *concerning the decision* to invite reporters to DOJ on December 12, 2017, for the purpose of sharing with them . . . messages sent during the 2016 presidential campaign by two former FBI investigators on Special Counsel Robert Mueller's team") (emphasis added)); *see also id.* (requesting "documents *reflecting who* made the decision" (emphasis added)). Emails or text messages that did not concern this decision, accordingly, were not responsive to the requests, and OIG and OIP generally did not produce them. And when unrelated or duplicative emails or text messages appeared in an email "thread," those separate emails and texts were withheld as non-responsive records. *See* Waller Decl. ¶ 12. Brinkmann Decl. ¶¶ 92–95. These decisions—to treat separate emails and text messages as distinct records, and to process and produce responsive records accordingly—were plainly permitted under FOIA.

FOIA instructs agencies to search for, locate, and (when appropriate) produce "those records which are *responsive* to a [FOIA] request." 5 U.S.C. § 552(a)(3)(D) (emphasis added). Once an agency determines that it will produce a responsive record, it cannot redact *information* from that record solely "on the basis that the information is non-responsive." *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review* ("AILA"), 830 F.3d 667, 677 (D.C. Cir. 2016). But when an agency determines that a *record* is non-responsive, there is generally no obligation to disclose the record. *See Parker v. DOJ, Office of Prof'l Responsibility*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017).

As the D.C. Circuit explained in its *AILA* decision, the initial responsibility for determining what constitutes a "record" rests with the "agency itself." *AILA*, 830 F.3d at 678 (emphasis omitted); *see also Shapiro v. CIA*, 247 F. Supp. 3d 53, 74 (D.D.C. 2017) ("[T]he *AILA* court grounded its analysis upon the agency's own definition of a responsive record."). An

agency "in effect define[s] a 'record' when [it] undertake[s] the process of identifying records that are responsive to a [FOIA] request." *AILA*, 830 F.3d at 678. The definition of a "record" thus depends on the particular context in which an agency conducts a search and processes potentially responsive material. In other words, there is no one-size-fits-all definition of a "record." Rather, as courts in this district have recognized, there are a number of factors that can guide agencies in determining what constitutes a "record" in a given case, including "the requester's intent, maintaining the integrity of the released documents, the scope of the request, the agency's own knowledge regarding storage and maintenance of documents, efficiency, cost, resource allocation, and maintaining the public's trust in transparency." *Shapiro*, 247 F. Supp. 3d at 74–75 (holding that the FBI's practice of identifying "responsive results [that were] contained on pages within larger documents" was consistent with these factors); *see also Parker*, 278 F. Supp. 3d at 451.

OIP's guidance, issued after the D.C. Circuit's decision in *AILA*, reinforces this context-dependent approach to the definition of a "record." *See OIP Guidance: Defining a "Record" Under the FOIA*, The United States Department of Justice, https://www.justice.gov/oip/oip-guidance/defining_a_record_ under_the_foia (last updated Feb. 15, 2017); *see also AILA*, 830 F.3d at 678 (relying on prior OIP guidance as a marker for what constitutes a "record"). That guidance addresses the specific question of whether to classify emails as distinct records, explaining that "an entire string of emails, a single email within a string of emails, or [even] a paragraph within a single email could potentially constitute a 'record' for purposes of the FOIA," depending on "the subject of a particular FOIA request." *OIP Guidance*, *supra*.

The process that OIP employed to identify records responsive to CREW's FOIA request appropriately treated each email reviewed as a distinct record. As explained in the Waller and

Brinkmann declarations, the agency reviewed each potentially responsive communication by its subject matter to identify whether the communication was responsive to CREW's requests. *See* Waller Decl. ¶ 12; Brinkmann Decl. ¶ 93; *see also Shapiro*, 247 F. Supp. 3d at 75 (noting that the "presumption of good faith" applies to an agency's "definition of a responsive record").

That process was consistent with factors identified in *Shapiro* and OIP's own guidance. *See Shapiro*, 247 F. Supp. 3d at 74–75; *OIP Guidance*, *supra*. First, and most significantly, the scope of the requests themselves (and the intent that is evident from the face of the requests) strongly support the agencies' decision to treat separate emails as separate records. CREW itself noted the types of records it was looking for, limiting its requests to communications "concerning the decision to invite reporters to DOJ" on a specific date and for a specific purpose. Waller Decl., Ex. 1 at 2; Brinkmann Decl., Ex. 1 at 2. That distinction is reinforced elsewhere in the requests, where CREW provides examples of the specific records it was looking for, such as "communications with reporters *regarding this meeting*" and "communications within DOJ *about whether, when, and how* to share the text messages with reporters." Waller Decl., Ex. 1 at 1 (emphasis added); Brinkmann Decl., Ex. A at 2 (emphasis added). When the agencies were deciding how to locate and process responsive records, it was reasonable—and indeed, desirable—for them to take into account what CREW was requesting. Discrete emails in a thread sometimes veered into unrelated topics. Waller Decl. ¶ 12; Brinkmann Decl. ¶ 93. OIG and OIP, therefore, appropriately divided the threads "covering multiple, unrelated topics into discrete records." *Shapiro*, 247 F. Supp. 3d at 75 (internal citation and quotation marks omitted).

Additionally, in light of the focus of CREW's request, it was more efficient for the agencies to consider each email they reviewed as a separate record. *See Shapiro*, 247 F. Supp. 3d at 75 (listing "efficiency, cost, [and] resource allocation" as relevant factors); *see also* Waller

Decl. ¶ 12; Brinkmann Decl. ¶ 93. Doing so ensured that the agencies did not devote unnecessary time and resources to reviewing non-responsive records for exempt material and engaging in consultations with other agency components on this non-responsive information—an obligation the agencies would have had if they grouped all the emails in a thread together as one record. *See AILA*, 830 F.3d at 679 (remanding for a determination as to whether information within a responsive record "might be permissibly redacted as statutorily exempt"). When agencies make a practice of shaping their responses to FOIA requests in light of these kinds of "practical considerations," it ensures they are not hindered in their "ability to process multiple requests efficiently or allocate [their] resources effectively." *Shapiro*, 247 F. Supp. 3d at 75.

Finally, for the records that OIG and OIP identified as responsive, the agencies "did not withhold single sentences, or even paragraphs, as non-responsive" within the record, consistent with the distinction between non-responsive records, which need not be produced, and non-responsive information (in an otherwise-responsive record), which must be. *Shapiro*, 247 F. Supp. 3d at 75; *see also OIP Guidance*, *supra* (explaining that agencies should consider whether a "document can reasonably be broken into discrete units" when determining what constitutes a "record" for purpose of a particular FOIA request).

Given OIG's and OIP's reasonable decisions to treat individual emails and text messages as separate records, OIG appropriately withheld a non-responsive email record from a thread of otherwise responsive emails, and OIP appropriately withheld non-responsive email records and text messages from its production. *See Shapiro,* 247 F. Supp. 3d at 75–76. Further, OIP properly withheld duplicative email records, since "FOIA does not require agencies to produce duplicate records." *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 241 F. Supp. 3d 14, 22–23 (D.D.C. 2017); *see also Jett v. FBI*, 139 F. Supp. 3d 352, 365 (D.D.C. 2015) ("The statute is not

a discovery tool that requires agencies to produce every conceivable copy in the possession of every governmental custodian."); *Defs. of Wildlife v. Dep't of Interior*, 314 F. Supp. 2d 1, 10 (D.D.C. 2004) ("[I]t would be illogical and wasteful to require an agency to produce multiple copies of the exact same document."); *see also Crooker v. State Dep't*, 628 F.2d 9, 11 (D.C. Cir. 1980) (per curiam) ("Where the records have already been furnished, it is abusive and a dissipation of agency and court resources to make and process a second claim").

In sum, the process that OIP employed for responding to CREW's request appropriately took account of the nature of the requests, the competing demands on agency resources, and the relevant factors identified by the D.C. Circuit, courts in this district, and OIP's own guidance. OIG and OIP are thus entitled to summary judgment with respect to its determination that separate emails constituted separate records, and their related decision not to produce non-responsive and duplicative emails contained in email threads.

III. OIG and OIP properly withheld records under applicable FOIA exemptions.

FOIA mandates disclosure of the requested records unless information falls within one of the statute's nine exemptions. 5 U.S.C. § 552(b). The district court has jurisdiction only to compel the production of agency documents that are "improperly withheld." *GTE Sylvania, Inc. v. Consumers Union of the U.S. Inc.*, 445 U.S. 375, 387 (1980); *see also* 5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'"). Although narrowly construed, FOIA's exemptions "are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989); *accord DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C.

Cir. 2015). Here, OIG and OIP properly withheld information pursuant to FOIA Exemptions (b)(5).

A. OIG and OIP Properly Withheld Privileged Information under Exemption 5

Exemption 5 protects from disclosure "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). Exemption 5 thus protects records and information that are "normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). To fall within the protections of Exemption 5, then, "a document must . . . satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). Exemption 5 "allows the government to withhold records from FOIA disclosure under at least three privileges: the deliberative-process privilege, the attorney-client privilege, and the attorney work-product privilege." *Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice Exec. Office for U.S. Att'ys*, 844 F.3d 246, 249 (D.C. Cir. 2016). Here, OIG and OIP properly applied Exemption 5 to intra-agency communications under the deliberative-process privilege, and OIP also properly applied Exemption 5 to intra-agency communications under the attorney-client privilege.

i. OIG and OIP properly withheld information under the deliberative process privilege.

The deliberative-process privilege aims "to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." *Klamath Water*, 532 U.S. at 9 (citations omitted). This privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item

of discovery and front page news." *Id.* at 8–9; *see also Dow Jones & Co., Inc. v. U.S. Dep't of Justice*, 917 F.2d 571, 573–74 (D.C. Cir. 1990).

To fall within the deliberative-process privilege, information in a record must be both "predecisional and deliberative." *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A document is pre-decisional if it was "prepared in order to assist an agency decisionmaker in arriving at his decision." *Petro. Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citation omitted). "To establish that a document is predecisional, the agency need not point to an agency final decision, but merely establish what deliberative process is involved, and the role that the documents at issue played in that process." *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing *Formaldehyde Inst. v. U.S. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1123 (D.C. Cir. 1989)). A document is deliberative if "it reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The deliberative-process privilege applies broadly to "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* When evaluating deliberative-process claims, courts "must give considerable deference to the agency's explanation of its decisional process, due to the agency's expertise in determining what confidentiality is needed to prevent injury to the quality of agency decisions, while the decisionmaking process is in progress." *Pfeiffer v. CIA*, 721 F. Supp. 337, 340 (D.D.C. 1989) (citation omitted).

In this case, OIG and OIP properly withheld pre-decisional and deliberative information records released to CREW.

OIG: OIG withheld a limited number of pre-decisional, deliberative communications from five documents. *See* Waller Decl. ¶¶ 19–23. The withheld material regarded how to respond to inquiries about the DOJ's decision to invite reporters to view the text messages at issue. *Id.* As Ms. Waller amply explains, OIG asserted the deliberative process privilege over these limited communications because their disclosure "would prevent the OIG's staff from engaging in meaningful documented discussion about policy matters in the future, which could have a negative effect on [OIG's] decisionmaking, and would potentially confuse the public about the reasons for the OIG's actions in this matter." Waller Decl. ¶ 25.

In the first document, OIG withheld lines of an email consisting of internal discussion in which Mr. Horowitz and Mr. Storch discuss how to gather information and communicate the information related to DOJ's decision to invite reporters to view the text messages at issue. OIG Vaughn Index at 1; *see also* Waller Decl. ¶ 21. In the second and fifth documents, OIG withheld lines of an email consisting of internal discussion, in which Mr. Storch updates Mr. Horowitz on the status of a response from DOJ's Office of the Deputy Inspector General related to DOJ's decision to invite reporters to view the text messages at issue. OIG Vaughn Index at 1; *see also* Waller Decl. ¶ 22. The information redacted from these records is pre-decisional because it consists of communications that discussed or related to actions that were under consideration, but had not yet been taken. *See Coastal States Gas Corp.*, 617 F.2d at 866. The information is deliberative because it "reveals what the agency was considering" with respect to taking action related to DOJ's decision to invite reporters to view the text messages at issue. *Pub. Emps. for Envtl. Responsibility v. Office of Sci. & Tech. Policy*, 881 F. Supp. 2d 8, 17 (D.D.C. 2012).

In the third and fourth documents, OIG withheld handwritten notes containing Mr. Storch's thoughts regarding matters unrelated to the subject of this FOIA request, taken while

Mr. Storch was listening to the Deputy Attorney General's testimony during an oversight hearing before the House Judiciary Committee on December 13, 2017. Waller Decl. ¶ 23; *see also id.* ¶ 7. The information is pre-decisional because the notes "reflect[s] the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866. The information is also deliberative because "the notes could reveal how the [then-DIG] prioritized different facts and considerations in deliberating" about potential actions relating to the DAG's testimony. *Judicial Watch of Fla., Inc. v. U.S. Dept. of Justice*, 102 F. Supp. 2d 6, 14 (D.D.C. 2000). Thus, "it is reasonable to expect that compelled public disclosure" of Mr. Storch's "personal notes would have just such a chilling effect on free deliberation." *Id.* at 15.

OIP: OIP redacted several categories of deliberative discussions from records that were otherwise released. First, OIP redacted internal communications among OLA staff and between FBI and ODAG staff regarding how to respond to Congressional requests that sought the text messages at issue in this request, among other matters. The redacted information includes suggestions for how to respond to the request, and requests for information to aid deciding how to respond to the request. Brinkmann Decl. ¶ 42. The redacted information is pre-decisional because it consists of discussions predating DOJ's final statements or responses to Congress regarding the FBI text messages at issue. The withheld material is deliberative because it contains "evaluative discussion, suggestions, and preliminary assessments" for how DOJ could respond to these Congressional requests. *Id.* ¶ 44. These records were properly redacted. *See Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec.*, 736 F. Supp. 2d 202, 208 (D.D.C. 2010) (upholding assertion of deliberative-process privilege over discussions of how to respond to inquiries from the press and Congress); *see also Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (same).

Second, OIP redacted information that relates to DOJ's deliberations regarding how to respond to press inquiries. Specifically, OIP redacted deliberations as to how best to respond to the following queries from the press: (1) a query asking for DOJ's response to a statement from a Member of Congress, (2) a query regarding the reasoning for a particular redaction decision in the Strzok/Page texts themselves, and (3) a query asking for a clarification regarding a statement by DAG Rosenstein. Brinkmann Decl. ¶ 46. In that vein, OIP further redacted deliberations about how to generally handle an ongoing and quickly-developing story and discussions of how to provide additional information to the public regarding press inquiries. The redacted information is pre-decisional because it consists of discussions that predate DOJ's final responses to press inquiries regarding DOJ's decision to share the FBI text messages at issue with the media or predates DOJ's final decisions regarding the best course of action to take in response to press coverage. The withheld material is deliberative because it "contains evaluative discussion, preliminary opinions based on limited information, and requests for additional information to aid in the decision-making process." *Id.* ¶ 47.

OIP also redacted deliberations regarding how to respond to a reporter's statement on Twitter that discussed the fact that DOJ invited reporters to view the FBI text messages. *Id.* ¶ 49. The redacted information is pre-decisional because it is a discussion predating DOJ's final response to the reporter's statement. *Id.* ¶ 50. The withheld material is deliberative because it consists of "impressions and proposals" for DOJ's responses to this reporter's statements, as well as for DOJ's responses to similar statements in the future. *Id.*

OIP also redacted deliberations and draft language regarding how to respond to reporters' inquiries into the DOJ decisionmaking process about how and with whom to share the text messages. *Id.* ¶ 50. The redacted information is pre-decisional because it consists of draft

language and discussions predating DOJ's final press statement on its decision to share the FBI text messages at issue with the media, DOJ's final responses to press inquiries on the topic, and final decisions regarding the best course of action to take in response to press coverage. *Id.* ¶ 53. The withheld material is deliberative because it contains "suggested draft language, proposed changes to that language, evaluative discussion, and opinions." *Id.*

These redactions, which relate to DOJ's communications regarding, and proposal for, how to respond to press inquiries; such communications are routinely found to fall within the deliberative process privilege. This Court has found that "ongoing decisionmaking about 'how the agency's activities should be described to the general public,' . . . appropriately fall[s] under the protection of Exemption 5." *Competitive Enter. Inst. v. U.S. Envt'l Prot. Agency*, 12 F. Supp. 3d 100, 118 (D.D.C. 2014) (quoting *Nat'l Sec. Archive v. FBI*, No. 88-1507, 1993 WL 128499, at *2 (D.D.C. Apr. 15, 1993)). Drafts, moreover, "are commonly found exempt under the deliberative process exemption." *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007).

Third, OIP redacted deliberations regarding a legal memorandum drafted to memorialize OPCL's Privacy Act Assessment, to aid in an ODAG decisionmaking process regarding the sharing of texts with reporters. Brinkmann Decl. ¶ 55. The redacted communications include discussion between OPCL and ODAG about the steps being taken to prepare for the final memorialization of the memorandum. *Id.* This category of redactions contains pre-decisional information because the redacted email predates OPCL's final legal memorandum that provides advice to ODAG regarding the Privacy Act implications of sharing the text messages at issue with the media. *See id.* ¶ 56. The information is deliberative because it "contains the advice, suggestions, evaluative discussions, and commentary on draft language, all of which were part of

a process to create a final, advisory memorandum" and memorializes OPCL's advice, meant to aid in ODAG's final decision-making. *Id.* Accordingly, OIP properly withheld this information as exempted. *See, e.g.*, *Life Extension Found., Inc. v. I.R.S.*, 915 F. Supp. 2d 174, 183 (D.D.C. 2013), *aff'd,* 559 Fed. Appx. 3 (D.C. Cir. 2014) (upholding the agency's assertion of the deliberative-process privilege to communications "generated as part of a continuous process of agency decision-making, namely what determination the IRS should make with regard to plaintiff's tax-exempt status"); *see also Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) ("There can be no doubt that . . . legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative-process rationale. . . .").

Fourth, OIP redacted a summary of FBI staff recommendations regarding how to process certain personal privacy information within the Page/Strzok texts that related to the text participants and third parties. Brinkmann Decl. ¶ 58. The communications originated as discussion between FBI and ODAG; ODAG subsequently forwarded the discussion to OPCL. *Id.* The redacted information is pre-decisional because it consists of the FBI's recommendations that precede ODAG's final decision on how to release and redact the Page/Strzok text messages. *See* Brinkmann Decl. ¶ 59. The withheld material is deliberative because it contains FBI's opinions and recommendations about how to process personal information about Strzok and Page that were contained in the text messages, which informed ODAG's final decision about how to treat that information. *Id.* "Recommendations on how best to deal with a particular issue are themselves the *essence* of the deliberative process." *Sierra Club v. U.S. Dept. of Interior*, 384 F. Supp. 2d 1, 22 (D.D.C. 2004) (quoting *Nat'l Wildlife Fed'n v. U.S. Forest Serv.,* 861 F.2d 1114, 1121 (9th Cir. 1988)).

Fifth, OIP redacted handwritten notes written by the then-Deputy Inspector General, which contain his impressions and assessments while he watched the testimony of Deputy Attorney General Rosenstein as part of the December 13, 2017, oversight hearing before the House of Representatives Judiciary Committee and also reflect a discussion between the DIG and Scott Schools of ODAG, discussing proposed ideas for how to respond to potential reactions to DAG Rosenstein's testimony.[2] Brinkmann Decl. ¶ 61. The redacted information is pre-decisional because it predates DOJ's final response to DAG Rosenstein's testimony as well as DOJ's responses to press inquiries about DAG Rosenstein's testimony. *Id.* ¶ 62. The withheld material is deliberative because it consists of the DIG's personal evaluations, impressions, and selectively chosen information, which he further discussed with Schools. *Id.* The subsequent discussion reflected in the notes was also deliberative because it analyzed these subjective impressions, weighed proposals for potential actions to be taken in light of the DIG's opinions regarding the testimony and in response to inquiries the DIG and Schools anticipated receiving about the testimony. *Id.* Notes, even that contain factual information, are protected by the deliberative process privilege when any facts are "culled . . . from a much larger universe of facts presented to the notetaker and therefore reflect an 'exercise of judgment as to what issues are most relevant to the pre-decisional findings and recommendations." *Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 3d 155, 169 (D.D.C. 2017) (quoting *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513–14 (D.C. Cir. 2011).

OIP also withheld in full a record containing a combination of contemporaneous notes and incomplete, shorthand transcription of a portion of Deputy Attorney General Rosenstein's

[2] OIG located these notes and processed them along with OIP, because they contained shared OIG and ODAG equities. Ms. Waller's declaration addresses the portions of this record that OIG redacted. *See* Waller Decl. ¶ 23.

testimony in a December 13, 2017, oversight hearing before the House of Representatives Judiciary Committee. Brinkmann Decl. ¶ 71. This record was created by a PAO staff member who watched the hearing and was shared with other components of DOJ. *Id.* OIP conducted a line-by-line review of this record and determined that these notes were substantially different from fulsome transcripts taken of DAG Rosenstein's testimony. *Id.* This record is pre-decisional because it merely reflects an initial gathering of information, which could potentially be used by Department employees when making future decisions in internal briefings and responding to press or public inquiries. *Id.* It is deliberative because it reflecting the preliminary notes and assessments of one individual, in the form of selectively chosen information, which was then shared with other Department employees to provide them the opportunity to digest this information and assess its importance. *Id.*; *see Hardy*, 243 F. Supp. 3d at 169. OIP was unable to release the record in part because the PAO staff member's notes and what was chosen to be transcribed reveals the staff member's deliberative process. Brinkmann Decl. ¶ 72.

Disclosure of the redacted and withheld information would be detrimental. As Ms. Brinkmann explains in her declaration, OIP invoked the privilege to protect these pre-decisional and deliberative materials because their disclosure "would seriously impair the Department's ability to foster forthright, internal discussions necessary for efficient and proper Departmental decision-making." *Id.* ¶ 31. Public dissemination of this information would cause agency officials to "temper candor with a concern for appearances . . . to the detriment of the decision making process." *Sears, Roebuck & Co.*, 421 U.S. at 150–51 (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)). As discussed, the deliberative-process privilege protects agencies from "operat[ing] in a fishbowl," and preserves "the frank exchange of ideas and opinions" that is necessary for effective decision-making. *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C.

Cir. 2014) (quoting *Dudman Commc'ns Corp. v. U.S. Dep't of Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987)). And here, disclosure of the challenged redactions would cause foreseeable harm by impairing the government decision-making that the deliberative-process privilege is meant to protect. Thus, OIP's deliberative-process-privilege withholdings were appropriate.

ii. OIP properly withheld a legal memorandum—as well as drafts and notes taken in connection with the preparation of the memorandum—under the attorney-client privilege and the deliberative process privilege.

***Attorney-client privilege**:* OIP also properly withheld attorney-client privileged information. The attorney-client privilege concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) (recognizing that the purpose of the privilege is "to encourage clients to make full disclosure to their attorneys"). And as the D.C. Circuit has explained:

> [T]he attorney-client privilege has a proper role to play in exemption five cases . . . . In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent. [There is] no reason why this same protection should not be extended to an agency's communications with its attorneys under exemption five.

In re Lindsey, 158 F.3d 1263, 1269 (D.C. Cir. 1998) (per curiam) (quoting *Mead Data Cent., Inc.*, 566 F.2d at 252). In short, Exemption 5 incorporates this privilege against disclosure in recognition that the government "needs the same assurance of confidentiality" as a private party "so it will not be deterred from full and frank communications with its counselors." *Coastal*

States Gas Corp., 617 F.2d at 863; *see also Judicial Watch, Inc. v. U.S. Dep't of Def.*, 245 F. Supp. 3d 19, 32 (D.D.C. 2017).

Although this privilege fundamentally applies to facts given to an attorney by a client, *see, e.g.*, *Vento v. IRS*, 714 F. Supp. 2d 137, 151 (D.D.C. 2010), it also protects "any opinions given by an attorney to his client based upon, and thus reflecting, those facts." *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005). In the agency context, privilege can be inferred where "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests." *Coastal States Gas Corp.*, 617 F.2d at 863. "The privilege applies to confidential communications made to an attorney by both high-level agency personnel and lower-echelon employees." *Elec. Privacy Info Ctr.*, 384 F. Supp. 2d at 114–15 (citing *Upjohn*, 449 U.S. at 392-97). To that end, circulation of information within an agency to relevant employees does not breach the confidentiality of any legal advice provided by counsel. *See, e.g.*, *Murphy v. Tenn. Valley Auth.*, 571 F. Supp. 502, 506 (D.D.C. 1983).

Here, the information withheld is protected by Exemption 5 because it "(1) involves 'confidential communications between an attorney and his client' and (2) relates to 'a legal matter for which the client has sought professional advice.'" *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004). ODAG contacted OPCL for the purposes of seeking legal advice related to the Privacy Act, and formed an attorney-client relationship with OPCL. Brinkmann Decl. ¶ 78; *see also Coastal States Gas Corp.*, 617 F.2d at 863.

OIP withheld three categories of records under this privilege, all of which contain legal advice requested from and/or provided by OPCL to ODAG regarding the privacy implications of sharing private text messages with reporters and Congress. *See* Brinkmann Decl. ¶ 75–77. First,

OIP withheld a five-page memorandum written by OPCL that provides legal advice to ODAG. Brinkmann Decl. ¶ 75. The advice was based on information that ODAG communicated to OPCL. *Id.* Second, OIP withheld multiple draft versions of that same memorandum, which substantively contain the same information that ODAG initially communicated to OPCL for the purpose of receiving that advice as well as OPCL staff's edits and suggestions on how to improve the draft.[3] *Id.* ¶ 76. Third, OIP withheld five pages of handwritten notes reflecting phone communications between OPCL and ODAG. *Id.* ¶ 77.

These communications include information shared in confidence by ODAG clients for the specific purpose of receiving OPCL's expert legal advice, in which ODAG and OPCL discussed drafting the above-described legal memorandum. *Id.* ¶ 78. These communications were confidential at the time they were made, have not been shared with third parties, and thus maintain their confidentiality. *Id.* ¶ 79. Therefore, they were properly withheld under the attorney-client privilege.

Deliberative process privilege: These records were also properly withheld under the deliberative-process privilege. All three categories of records are pre-decisional in that they memorialize and reflect the advice that OPCL provided ODAG prior to ODAG's decision to share FBI text messages with reporters. Brinkmann Decl. ¶¶ 84, 87. The draft memoranda, moreover, are also pre-decisional in that they contain proposed language that precedes the finalization and transmission to ODAG of the final legal memorandum. *Id.* ¶ 84. The legal memorandum and handwritten notes are deliberative in that they "they contain evaluative discussion and assessments by attorneys regarding a pending decision by senior leadership

[3] Substantial portions of these 116 pages of drafts are duplicative of preceding or subsequent drafts, created because identical versions of the drafts were circulated to various custodians. Brinkman Decl. ¶ 76.

officials, where these attorneys analyze, make recommendations, give legal advice, and provide opinions on issues relevant to this decision." *Id.* ¶ 87. The draft memoranda, meanwhile, are deliberative in that they "reflect successive versions of working drafts and as such, show the internal development of [DOJ's] decisions." *Id.* ¶ 85. As Ms. Brinkmann explains, "[d]isclosure of these records would severely hamper the advisory process by which senior leadership officials gather and assess information necessary for making decisions because individuals with relevant expertise would no longer feel free to candidly share their opinions or advice on important issues." *Id.* ¶ 88.

Because these records were "prepared in order to assist an agency decisionmaker in arriving at his decision," *Petro. Info. Corp.*, 976 F.2d at 1434 (citation omitted), and "reflect[] the give-and-take of the consultative process," *Coastal States Gas Corp.*, 617 F.2d at 866, the deliberative process privilege also applies.

B. OIG and OIP Released All Reasonably Segregable, Non-Exempt Materials.

Consistent with its obligations under the FOIA, OIG and OIP released all reasonably segregable, non-exempt information to CREW. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Accordingly, "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central, Inc.*, 566 F.2d at 260. Although factual information generally must be disclosed, courts have made clear that agencies may withhold factual material if "the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). An agency has no obligation to segregate non-exempt material that is so intertwined with exempt material that "the excision of exempt information would impose

significant costs on the agency and produce an edited document with little informational value." *Neufeld v. IRS*, 646 F.2d 661, 666 (D.C. Cir. 1981), *overruled on other grounds by Church of Scientology of Cal. v. IRS*, 792 F.2d 153 (D.C. Cir. 1986) (en banc).

Here, OIG conducted a "line-by-line review" and "carefully examined the information it withheld under Exemption 5" before determining that "the internal OIG information withheld, if disclosed, would violate the internal deliberative process privilege of the OIG." Waller Decl. ¶ 27. OIP also "conducted a line-by-line review of all of the records and released any portions thereof that were not protected by an applicable FOIA exemption, often redacting only portions of paragraphs within the e-mails disclosed to Plaintiff." Brinkmann Decl. ¶ 91. For the records withheld in full, OIP determined that "the disclosure of any portion of these materials would undermine the core advice and analysis that the deliberative-process and attorney-client privileges are meant to protect." *Id.* Records withheld in full under the attorney-client privilege, moreover, were "not appropriate for segregation inasmuch as that privilege applies to records in their entireties." *Id.*

Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). And a court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. U.S. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008). The presumption that OIG and OIP complied with its obligations should therefore apply.

CONCLUSION

For the foregoing reasons, DOJ respectfully requests that the Court grant summary judgment in its favor.

Dated: October 26, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, a true and correct copy of the foregoing was filed electronically via the Court's ECF system, which sent notification of such filing to counsel of record for all parties.

/s/ Vinita B. Andrapalliyal
Vinita B. Andrapalliyal