IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-cv-0007 (TSC)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

MEMORANDUM
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

In this suit under the Freedom of Information Act ("FOIA"), Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") seeks records concerning the decision of the Department of Justice ("DOJ") to secretly invite a small group of reporters to view private text messages sent during the 2016 presidential campaign by two former members of Special Counsel Robert Mueller's team. Based on the current record, CREW can narrow the matters remaining for adjudication to two issues.

First, the DOJ Office of Information Policy ("OIP") has failed to demonstrate that it is entitled to summary judgment on the adequacy of its search. Although OIP's declarations acknowledge that the agency experienced a serious data migration problem that cast doubt on the adequacy of its initial search, the declarations fail to sufficiently describe the "remedial efforts" OIP undertook to address that problem in conducting its follow-on search. Absent such an explanation, the agency's declarations do not support summary judgment.

Second, both OIP and the DOJ Office of Inspector General ("OIG") have engaged in a practice, pursuant to DOJ policy, whereby they have defined individual messages within email and text message chains as distinct "records," and then proceeded to withhold many of those purported "records" as "non-responsive" or "duplicative." *See DOJ, OIP Guidance: Defining a "Record" Under the FOIA*, Feb. 15, 2017, https://bit.ly/2OBg0pl. DOJ adopted this policy in the wake of the D.C. Circuit's decision in *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016), which squarely rejected agencies' practice of redacting non-responsive material from otherwise responsive records. DOJ's current efforts are nothing but a thinly-veiled attempt to circumvent the *AILA* decision by returning to the very practice disallowed in that case—this time through the tactical "defining" of

records, rather than the redaction of non-responsive material. In other words, it is the same practice under a different label.

As in *AILA*, DOJ's position conflicts with FOIA's text, purpose, and case law. Specifically, it conflicts with FOIA's definition of "record," which focuses on how records are actually "maintained" by the agency "in its normal course of operations, in the absence of pending FOIA-related litigation." 5 U.S.C. § 552(f)(2)(A); *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 217 (D.C. Cir. 2013). Consistent with this definition, an email or text message chain qualifies as one record, rather than a series of distinct records, because that is how such message chains are maintained in practice.

DOJ resists this conclusion, insisting that it should be able to define records based on agency officials' subjective interpretation of the scope of the FOIA request at issue. Under this approach, "an entire string of emails, a single email within a string of emails, or a paragraph within a single email could potentially constitute a 'record' for purposes of the FOIA." But this fuzzy, *ad hoc* approach to defining records invites arbitrary and inconsistent decision-making across agencies, and overlooks that a "record" for FOIA purposes has an objective meaning—tied to actual agency practice—that does not vary depending on which agency official is reviewing the document at issue. It also gives agency officials substantial power to withhold messages that, while seemingly non-responsive on their face, provide helpful context that elucidates the meaning of plainly responsive messages within the same exchange. In short, DOJ's position is plainly inconsistent with FOIA, and, if accepted, would significantly undermine the statute's primary goal of public disclosure.

The Court should therefore deny DOJ's motion for summary judgment as to the adequacy of OIP's search and DOJ's segmentation of email and text message chains into distinct records, and grant CREW's cross-motion for partial summary judgment.[1]

BACKGROUND

On the evening of December 12, 2017, DOJ secretly invited a select group of reporters to its headquarters to view private text messages exchanged by Peter Strzok and Lisa Page, former members of Special Counsel Robert Mueller's team. *See* Natasha Bertrand, In 'highly unusual' move, DOJ secretly invited reporters to view texts sent by ousted FBI agents, *Business Insider*, Dec. 13, 2017, *available at* http://www.businessinsider.com/peter-strzok-page-texts-mueller-russia-trump-2017-12. The texts were sent during the 2016 campaign and were critical of President Trump. *Id.* DOJ reportedly leaked the texts to ensure the press saw them in advance of a hearing the next day before the House Judiciary Committee, at which Deputy Attorney General Rod Rosenstein was scheduled to testify. *Id.* This decision was "highly unusual," given that the texts were the subject of an ongoing investigation. *Id.*

The next day, on December 13, 2017, CREW submitted FOIA requests to DOJ's OIG, OIP, and Office of Public Affairs ("OPA"). *See* Declaration of Vanessa R. Brinkmann, ECF No. 25-4 ("Brinkmann Decl.") Ex. A; Declaration of Deborah M. Waller, ECF No. 25-3 ("Waller Decl.") Ex. 1. The requests sought "from DOJ's senior leadership offices 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." *Id.* This included, without limitation, "(l) communications with reporters regarding this meeting; (2) communications

[1] CREW does not dispute the adequacy of OIG's search or any of DOJ's exemption claims.

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." *Id.* CREW further sought "documents reflecting who made the decision to release this material to reporters on the evening of December 12, 2017." *Id.*

The agencies acknowledged receipt of CREW's requests. Brinkmann Decl. ¶ 4; Waller Decl. ¶ 3. OIG provided a partial response on December 15, 2017. Waller Decl. Ex. 2.

After DOJ's statutory response deadlines elapsed, CREW filed this FOIA suit on January 3, 2018, ECF No. 1, and amended its complaint on January 16, after OIP granted its request for expedited processing, ECF No. 4.

OIG completed productions on April 23, 2018. Waller Decl. ¶ 18. OIP, on behalf of itself and OPA, made productions on April 30, June 1, June 29, and July 2, 2018. Brinkmann Decl. ¶¶ 7-10. OIP stated that the July 2 production would be its "final response to Plaintiff's FOIA request." *Id.* ¶ 10.

On July 9, 2018, the parties submitted a joint status report noting that "Defendant has issued its final responses" and requesting a briefing schedule under which Defendant's motion for summary judgment would have been due August 13, 2018. ECF No. 14 at 1. By Minute Order dated July 17, 2018, the Court entered the parties' proposed schedule.

On August 10, 2018, three days before its summary judgment motion was due, DOJ moved to stay the Court's briefing schedule, claiming that OIP needed to "re-run its search . . . in light of a recently-discovered technical issue concerning the data originally searched." ECF No.

15 at 1. DOJ explained that OIP "recently became aware of a problem with the data on which some of its searches were run that stems from the migration of DOJ email onto new servers"—namely, that "some emails were not migrated onto the new servers." *Id.* Consequently, OIP had been conducting FOIA searches of an "incomplete collection of some custodians' email records," which "may have affected the search that was completed in this case." *Id.* Neither DOJ's motion nor its supporting declaration stated when OIP discovered this "technical issue," described the scope of the issue, or explained specifically what steps DOJ was taking to remedy it. Rather, OIP sought an indefinite stay of the briefing schedule to give OIP additional time to re-run its search "once the data migration issue has been resolved." *Id.* at 2; *see also* Declaration of Vanessa R. Brinkmann, ECF No. 15-1 ("August 2018 Brinkmann Decl.") ¶¶ 3-10; Brinkmann Decl. ¶ 27.

Following two status conferences, the Court issued a Minute Order on October 5, 2018, directing OIP to complete its production by October 12, 2018. OIP completed its production by that deadline.

Both OIP's and OIG's productions contain numerous withholdings of individual emails and text messages within responsive message chains, which DOJ defined as distinct "records" and then withheld as "non-responsive" or "duplicative." *See, e.g.*, Pl.'s Exs. 1-3. For example:

- OIP withheld as a "nonresponsive record" the top email in a heated exchange between Sarah Isgur Flores, Director of OPA, and reporters from *Thomson Reuters*, with the subject line "Strzok texts." Pl.'s Ex. 1. In the unredacted portions of the email, a reporter presses DOJ on "who authorized [the] release" of the Strzok-Page text messages to reporters, and "what the legal rationale was for doing so, given the fact that the investigation is still open." *Id.*

- OIP withheld as a "nonresponsive record" the top email in an exchange between Ms. Flores and a *Politico* reporter, with the subject line "Seeking comment on criticism today DOJ is undermining the overall Mueller probe?" Pl.'s Ex. 2. The unredacted portions of the email discuss at length DOJ's decision to release the Strzok-Page texts to reporters. *Id.*
- OIP withheld as "nonresponsive records" several text messages between Ms. Flores and a *New York Times* reporter, in a chain where the reporter asks "can you please say who decided to put out the texts yesterday and why?" Pl.'s Ex. 3.

DOJ has now moved for summary judgment.

ARGUMENT

Two issues remain for adjudication. First, OIP has failed to demonstrate it is entitled to summary judgment on the adequacy of its search, because it has not provided enough details regarding the data migration problems it encountered in August 2018 to demonstrate that its search was reasonably calculated to uncover all responsive records. Second, DOJ's decision to segregate individual email and text message chains into multiple purported records, and its redaction of those purported records as "non-responsive" or "duplicative," violates FOIA, and CREW is entitled to summary judgment on that issue.

I. OIP Has Not Demonstrated That It Conducted A Reasonable Search For All Responsive Records

To obtain 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); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). The agency carries this burden through declarations denoting "which files were searched" and "reflect[ing] a systematic approach to document location." *Oglesby v. Dep't*

of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). "If a review of the record raises substantial doubt, particularly in view of 'well defined requests and positive indications of overlooked materials,' summary judgment is inappropriate." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (internal citation omitted). Ultimately, whether a particular search is adequate depends on "the circumstances of the case." *Davis v. DOJ*, 460 F.3d 92, 103 (D.C. Cir. 2006).

Here, OIP's declarations fall to demonstrate that the agency conducted a reasonable search under the peculiar circumstances of this case. OIP acknowledges that it experienced data migration problems that led to it initially conducting an inadequate search of an incomplete set of potentially responsive records. *See* August 2018 Brinkmann Decl. ¶¶ 3-10; Brinkmann Decl. ¶ 27. OIP further states that after learning of this technical issue, it "began remedial efforts to ensure that e-mail collections for records custodians are complete and captured in the appropriate records repository" so that it could then "identify and re-run searches against the full collections of e-mail custodians that were affected by" the data migration problem. August 2018 Brinkmann Decl. ¶ 8. Yet OIP's declarations provide no details on the scope of the data migration problem, when the problem was discovered, or the particular "remedial efforts" OIP undertook to address it. As a result, there is no way to gauge whether the agency's supplemental search efforts "reflect a systematic approach to document location," *Oglesby*, 920 F.2d at 68, or fall short of that standard. The agency's vague and conclusory assurances of unidentified "remedial efforts" fail to carry its burden, particularly since it has acknowledged that there were "positive indications of overlooked materials" in its initial search. *Valencia-Lucena*, 180 F.3d at 326 (internal citation omitted). At minimum, OIP needs to explain (1) the scope of the data migration problem and the particular systems of records it affected; (2) when and how the

problem was discovered; (3) the specific steps that OIP took to address the problem, including any testing or auditing OIP performed to ensure its supplemental search encompassed a complete set of potentially responsive documents. Viewed in the light most favorable to CREW, OIP's declarations fail to demonstrate that it is entitled to summary judgment on the adequacy of its search.

II. DOJ Violated FOIA By Segregating Responsive Email And Text Message Chains Into Multiple Records And Then Redacting Portions Of Those Chains As Non-Responsive Or Duplicative

Both OIP and OIG defined individual emails and text messages within responsive message chains as distinct "records," and then withheld many of those purported records as non-responsive or duplicative. *See* Pl.'s Ex. 1; Def.'s Mot. at 11-16. Because this practice plainly violates FOIA, CREW is entitled to summary judgment on this issue.

Prior to 2016, DOJ and other agencies routinely took the position that they could redact non-responsive or duplicative information within otherwise responsive records. But that practice was squarely rejected in *American Immigration Lawyers Ass'n ("AILA") v. Executive Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016), where the D.C. Circuit held that FOIA "does not provide for withholding responsive but non-exempt records or for redacting nonexempt information within responsive records." *Id.* The court's holding flowed from the basic principle that "FOIA calls for disclosure of . . . responsive *record[s]*, not disclosure of responsive *information* within . . . record[s]." *Id.* (emphasis added).

The *AILA* court stated that it had "no cause to examine" the "antecedent question of what constitutes a distinct 'record' for FOIA purposes," and thus issued no holding on that issue. *Id.* at 678. Seizing on this opening, DOJ has issued guidance stating that agencies can define portions of a single document as separate "records," and then redact those purported records as

non-responsive. *See DOJ, OIP Guidance: Defining a "Record" Under the FOIA*, https://bit.ly/2OBg0pl ("OIP Guidance"). DOJ invokes the OIP Guidance here in redacting individual email and text messages within responsive chains as non-responsive or duplicative. Def.'s Mot. at 13-16. This practice, however, conflicts with FOIA's text and purpose. It is also nothing more than a thinly-veiled attempt to circumvent the D.C. Circuit's decision in *AILA* by returning to the very practice disallowed in that case, albeit in a different form. DOJ's position should be rejected as a matter of law.

A. DOJ's Definition Of A "Record" Is Reviewed *De Novo*

As a threshold matter, DOJ's interpretation of what constitutes a "record" within the meaning of FOIA and the application of that interpretation raise a legal question that must be reviewed *de novo*. FOIA explicitly instructs courts "to determine the matter de novo," 5 U.S.C. § 552(a)(4)(A)(vii), and courts "owe no particular deference to [an agency's] interpretation of FOIA," *Cause of Action v. FTC*, 799 F.3d 1108, 1115 (D.C. Cir. 2015); *see also Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) ("[B]ecause FOIA's terms apply government-wide[,] . . . we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*."); *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) ("[W]e will not defer to an agency's view of FOIA's meaning" because "[n]o one federal agency administers FOIA," and "[o]ne agency's interpretation of FOIA is therefore no more deserving of judicial respect than the interpretation of any other agency."). Applying this principle, the D.C. Circuit has refused to accord deference to agency interpretations of various FOIA provisions. *See, e.g.*, *Cause of Action*, 799 F.3d at 1115 (no deference to agency interpretation of fee provisions); *Al-Fayed*, 254 F.3d at 307 (no deference to agency interpretation of "compelling need" for expedited treatment); *Reporters Comm. for Freedom of Press v. DOJ*, 816 F.2d 730,

734 (D.C. Cir. 1987) (no deference to agency interpretations of exemptions), *rev'd on other grounds*, 489 U.S. 749 (1989).

The Court should apply the same reasoning here. Since the definition of "record" is a statutory term, DOJ's interpretation of that term—as set forth in the OIP Guidance and elsewhere—is entitled to no deference. Whether DOJ applied the correct legal standards in defining "records" is instead a question of law reviewed *de novo*. *Cf. United States v. Deloitte LLP*, 610 F.3d 129, 134 (D.C. Cir. 2010) (the question whether correct legal standards were applied is reviewed *de novo*); *Palisades Gen. Hosp. Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005) (same).

DOJ insists that a "presumption of good faith" applies to an agency's definition of a record. Def.'s Mot. at 14. But DOJ is conflating agency interpretations of statutory terms (which are *not* entitled to deference) with factual statements made in agency affidavits (which *are* entitled to deference, *see SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). Again, the legal standard an agency applies in defining particular "records" is reviewed *de novo* review; no presumption of good faith applies.

DOJ relies on *Shapiro v. CIA*, 247 F. Supp. 3d 53, 75 (D.D.C. 2017), which concluded, without citing any authority, that the "burden will first rest with the agency to justify its actions when singling out a responsive record from a greater compilation of documents," and that "[i]f satisfactory, the agency's explanation will merit a presumption of good faith." This appears to be nothing more than a recognition of the settled proposition that a presumption of good faith applies to factual assertions made in an agency declaration, not a holding that courts must defer to the agency's legal position on what constitutes a "record" for FOIA purposes. Insofar as the

court's reasoning could be construed to support the latter proposition, it is inconsistent with the law of this Circuit.

B. DOJ's Segmentation Of Email And Text Message Chains Into Separate Records Violates FOIA

Agencies must process FOIA requests as follows: "first, identify responsive records; second, identify those responsive records or portions of responsive records that are statutorily exempt from disclosure; and third, if necessary and feasible, redact exempt information from the responsive records." *AILA*, 830 F.3d at 677. Although the D.C. Circuit in *AILA* had "no occasion" to consider the threshold question of what constitutes a "record" for FOIA purposes or "the range of possible ways in which an agency might conceive of a 'record,'" *id.* at 678, this case presents such an occasion.

1. Definition Of "Record" Under FOIA

FOIA defines "record" as "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2)(A). Congress added this definition through the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-123, § 3, 110 Stat. 3048, 3049. It did so to ensure that electronic records, in addition to paper documents and other tangible objects, were covered. *See* H.R. Rep. 104-795, 18 (1996) ("Records which are subject to the FOIA shall be made available under the FOIA when the records are maintained in electronic format. This clarifies existing practice by making the statute explicit on this point."); *id.* at 11 ("FOIA's efficient operation requires that its provisions make clear that the form or format of an agency record constitutes no impediment to public accessibility.").

Embedded in § 552(f)(2)'s definition of "record" is the term "agency record," a statutory term of art that predated the 1996 amendments. *See* 5 U.S.C. § 552(a)(4)(B) (authorizing courts

"to order the production of any *agency records* improperly withheld from the complainant") (emphasis added). Although FOIA "does not provide any definition of 'agency records,'" there was a well-developed body of case law construing that term when Congress passed the 1996 amendments. *See Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 219 (D.C. Cir. 2013) (citing cases). And it is presumed that Congress was aware and approved of these judicial interpretations of "agency record" when it enacted the definition of "record" in 1996. *See Gordon v. U.S. Capitol Police*, 778 F.3d 158, 165 (D.C. Cir. 2015) ("Where Congress 'adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.'" (quoting *Lorillard v. Pons*, 434 U.S. 575, 581 (1978)). For a document to be an "agency record," an agency must both "(1) 'create or obtain it, and (2) 'control[]' it at the time of the FOIA request." *Judicial Watch*, 726 F.3d at 217 (quoting *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989)) (alterations omitted).

Of particular relevance here, the D.C. Circuit has held that in "deciding whether a document is an agency record under FOIA, [courts] examine ***how the agency would treat the records in its normal course of operations***, in the absence of pending FOIA-related litigation." *Id.* at 219 (emphasis added). The Circuit's analysis conforms with § 552(f)(2)'s definition of "record," which refers to information as it is "maintained by an agency." Section 552(f)(2)'s legislative history likewise reinforces that Congress wanted records to be defined in accordance with how they were actually "maintained" in practice. *See* S. Rep. 104-272, 27 (1996) (FOIA "requires that Federal agencies provide records to requesters in any form or format *in which the agency maintains those records*.") (emphasis added). Focusing on how records are actually maintained is also consistent with the longstanding principle that FOIA "does not obligate

agencies to create" records; "it only obligates them to provide access to those which it in fact has created." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980); *see also Scudder v. CIA*, 25 F. Supp. 3d 19, 37 (D.D.C. 2014) (requester is entitled to a "copy of the requested records in a form already maintained by the defendant").

This standard helps to ensure that records are defined by objective criteria, not the vagaries of the requester's intent or the agency's interpretation of that intent. *See Tax Analysts v. IRS*, 117 F.3d at 613 ("The meaning of FOIA should be the same no matter which agency is asked to produce its records."). It also prevents agencies from exercising their "discretion" to artificially divide a single record into multiple records whenever it wishes to shield information it simply does not want to produce. Granting such discretion to agencies is flatly inconsistent with FOIA's purpose, which Congress enacted specifically "'to *curb* th[e] apparently unbridled discretion'" to decide "what information to disclose" that agencies possessed under FOIA's predecessor statute, as well as to achieve the "goal of broad disclosure." *DOJ v. Tax Analysts*, 492 U.S. at 150-51 (emphasis added).

In light of the above, a "record" under FOIA is properly understood as (1) any material containing information, (2) created or obtained by an agency, (3) within an agency's control when the request is submitted, and (4) in the full native form in which it is maintained by the agency at the time of the request. *See* 5 U.S.C. § 552(f)(2)(A); *Judicial Watch*, 726 F.3d at 217.

2. An Email Or Text Message Chain Is One "Record"

Applying the above principles, an email or text message chain ("Electronic Message Chain") constitutes one "record" for FOIA purposes. That is because the final message in an Electronic Message Chain incorporates the prior messages into a single whole, and that is the form in which DOJ "maintains" Electronic Message Chains "in its normal course of operations,

in the absence of pending FOIA-related litigation." *Judicial Watch*, 726 F.3d at 219. Indeed, there is no indication that, in the normal course, DOJ segregates each of the individual messages within the final message of an Electronic Message Chain and stores them separately. It instead appears, based on DOJ's productions, that the agency searches for and retrieves an Electronic Message Chain as a single cohesive document and that, only after being retrieved in this form, DOJ segregates the message chain into separate "records" solely for FOIA purposes. This *post hoc*, litigation-driven exercise—which was adopted solely to circumvent the result of the Circuit's decision in *AILA*—is fundamentally inconsistent with the realities of how Electronic Message Chains are maintained.

Defining individual messages in Electronic Message Chains as separate records also ignores the nature of that particular mode of communication. An Electronic Message Chain is a conversation. It encompasses a series of messages that build off one another, intertwined as part of a cohesive whole. Giving agencies discretion to segregate individual messages based on subjective interpretations of responsiveness invites over-withholding and abuse, which FOIA requesters have no effective means to refute. It also risks depriving the requester and the public of necessary context that could help elucidate the meaning of plainly responsive messages. *Cf. Bartholomew v. Avalon Capital Grp.*, 278 F.R.D. 441, 451 (D. Minn. 2011) (in civil discovery context, holding that "[r]edaction is an inappropriate tool for excluding alleged irrelevant information from . . . otherwise responsive" documents, because "[i]t is a rare document that contains only relevant information," and "irrelevant information within a document that contains relevant information may be highly useful to providing context for the relevant information"); *In re State St. Bank & Tr. Co. Fixed Income Funds Inv. Litig.*, 2009 WL 1026013, at *1 (S.D.N.Y. Apr. 8, 2009) (directing parties not to "redact any portion of a document on the ground that the

portion is non-responsive and irrelevant" because such redactions "breed suspicions" and "may deprive the reader of context").

A few examples of DOJ's redactions in this case illustrate the point:

- OIP withheld as a "nonresponsive record" the top email in a heated exchange between Sarah Isgur Flores, Director of OPA, and reporters from *Thomson Reuters*, with the subject line "Strzok texts." Pl.'s Ex. 1. In the unredacted portions of the email, a reporter presses DOJ on "who authorized [the] release" of the Strzok-Page text messages to reporters, and "what the legal rationale was for doing so, given the fact that the investigation is still open." *Id.*
- OIP withheld as a "nonresponsive record" the top email in an exchange between Ms. Flores and a *Politico* reporter, with the subject line "Seeking comment on criticism today DOJ is undermining the overall Mueller probe?" Pl.'s Ex. 2. The unredacted portions of the email discuss at length DOJ's decision to release the Strzok-Page texts to reporters. *Id.*
- OIP withheld as "nonresponsive records" several text messages between Ms. Flores and a *New York Times* reporter, in a chain where the reporter asks "can you please say who decided to put out the texts yesterday and why?" Pl.'s Ex. 3.

In each of these examples, DOJ withheld individual messages from a chain that was otherwise directly responsive to CREW's FOIA request, frequently where the subject line indicated that the entire message chain was responsive. And DOJ's withholding of the top, or most recent, message in an email chain is particularly problematic, because that is the email that ties together the entire record. Even accepting as true DOJ's assertions that the withheld messages are not directly responsive, they likely shed light on or provide context for the surrounding messages,

which indisputably are responsive. The FOIA officer reviewing the messages may not appreciate that context or may have misconstrued the scope of CREW's request in determining responsiveness. That is why FOIA does not authorize agencies to pick and choose what is and what is not responsive from within an otherwise responsive Electronic Message Chain, which, as outlined above, qualifies as a single record, not a series of separate records.

3. DOJ's Approach To Defining "Records" Is Untenable

As noted, DOJ's legal position on defining records is set forth in the OIP Guidance. *See* Def.'s Mot. at 13-16 (relying on OIP Guidance). That guidance was issued in response to the D.C. Circuit's decision in *AILA*, which rejected agencies' practice of redacting non-responsive information from otherwise responsive records. *See* OIP Guidance ("As a result of the D.C. Circuit's ruling in *AILA*, it will be important for agencies to carefully define what they consider to be the 'records' responsive to any given FOIA request."). The guidance, which is nothing but a transparent effort to circumvent *AILA*'s holding through the tactical "defining" of records, suffers from multiple legal flaws.

First, the OIP Guidance relies extensively on "some helpful principles" from *AILA* that it says should "guide agencies in making their determinations" of defining records. But the statements OIP relies upon from *AILA* are pure dicta. The D.C. Circuit could not have been clearer on this point. *See AILA*, 830 F.3d at 678 ("Here, the parties have not addressed the antecedent question of what constitutes a distinct 'record' for FOIA purposes, and we have no cause to examine the issue."); *id.* ("We have no occasion here to consider the range of possible ways in which an agency might conceive of a 'record.'").

Second, the OIP Guidance's first substantive principle is that "[a]gencies can use the definition of record found in the Privacy Act to guide their decisions as to what is a record for

purposes of the FOIA. Thus, each 'item, collection, or grouping of information' on the topic of the request can be considered a distinct 'record.'" But it is inappropriate to consult other statutes' definitions of the term "record" since, as outlined above, FOIA's own text, legislative history, and Circuit precedent provide a sufficient answer to the question. At any rate, OIP's analysis overlooks that FOIA and the Privacy Act serve fundamentally different purposes: "The Privacy Act—unlike the Freedom of Information Act—does not have disclosure as its primary goal. Rather, the main purpose of the Privacy Act's disclosure requirement is to allow individuals on whom information is being compiled and retrieved the opportunity to review the information and request that the agency correct any inaccuracies." *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1456–57 (D.C. Cir. 1996); *see also Alexander v. FBI*, 971 F. Supp. 603, 606 (D.D.C. 1997) (whereas the "chief purpose of FOIA is to provide citizens with better access to government records than first provided under the Administrative Procedures Act," the "Privacy Act was adopted in order to 'provide certain safeguards for an individual against an invasion of personal privacy.'"). The Privacy Act's "fine-tuned, content-based approach" to defining records, *see* OIP Guidance, may further *that* statute's goals of protecting personal privacy and ensuring accuracy in government records of individuals. But it thwarts *FOIA's* "primary goal" of public disclosure. The Privacy Act's definition of record thus is not an apt reference point for FOIA purposes.

The OIP Guidance suggests that the *AILA* court endorsed looking to the Privacy Act's definition of record, but that is false. Rather, the D.C. Circuit cited the Privacy Act, along with two other statutes, merely to illustrate its point that FOIA's definition of record is not as specific as other statutes' definitions of record. *See AILA*, 830 F.3d at 678. Nowhere did it suggest that the Privacy Act's definition of record should inform the FOIA definition.

Third, the OIP Guidance also states that "[t]he nature of a FOIA 'record' is defined by both the content of a document and the subject of the request." The guidance, tellingly, cites nothing in the statute, legislative history, or precedent supporting this principle, which DOJ appears to have conjured out of thin air. That is not surprising, since DOJ's position conflicts with the conclusion, discussed above, that FOIA defines the term record by reference to how records are actually "maintained" by the agency "in its normal course of operations, in the absence of pending FOIA-related litigation." 5 U.S.C. § 552(f)(2)(A); *Judicial Watch*, 726 F.3d at 219. In other words, records are defined objectively by reference to actual practice, not the after-the-fact whims of agency officials.

Fourth, DOJ's approach to defining records creates incongruities with other aspects of FOIA law. For starters, it conflicts with the rule that the "meaning of FOIA should be the same no matter which agency is asked to produce its records." *Tax Analysts v. IRS*, 117 F.3d at 613. That is because, under DOJ's approach, a single Electronic Message Chain could be treated differently by different agencies, or even by different components of the same agency, depending on how the various entities construed the chain or the FOIA request. *See* OIP Guidance ("[B]ased on the subject of a particular FOIA request, an entire string of emails, a single email within a string of emails, or a paragraph within a single email could potentially constitute a 'record' for purposes of the FOIA."). This is a natural consequence of granting agency officials discretion to define records based on their subjective interpretations of FOIA requests, rather than objective facts concerning how the records are maintained by the agency in its normal course of operations.

DOJ's position also conflicts with the rule that FOIA only applies to records in existence at the time of the request. *See Judicial Watch, Inc. v. Dep't of Commerce*, 583 F.3d 871, 874

(D.C. Cir. 2009) ("FOIA . . . applies only to existing records."); H.R. Rep. 104-795 at 6, 1996 U.S.C.C.A.N. at 3449 (congressional report accompanying 1996 amendments stating that "FOIA establishes a presumptive right for the public to obtain *identifiable, existing* records of Federal departments and agencies.") (emphasis added). If, as DOJ asserts, a "record" simply does not exist until the agency defines it *in response* to a FOIA request, the record necessarily did not "exist" at the time of the request. The OIP Guidance does not address this paradoxical consequence of DOJ's interpretation.

Fifth, DOJ insists that its approach is justified by "practical considerations" of efficiency, cost, and resource allocation. Def.'s Mot. at 14-15. But even if these concerns were valid, they are irrelevant to the statutory definition of a "record." Insofar as DOJ believes that the definition is too burdensome, its concerns are properly directed to Congress, not this Court. *See Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455 (D.D.C. 2014) (noting that "the dominant objective of FOIA is disclosure" and that the statute "anticipates that requests for records may . . . require an agency to carry an unusual workload"), *aff'd*, 2015 WL 4072055 (D.C. Cir. June 29, 2015).

CONCLUSION

For the foregoing reasons, the Court should deny DOJ's motion for summary judgment as to the adequacy of OIP's search and DOJ's segmentation of email and text message chains into distinct records, and grant CREW's cross-motion for partial summary judgment.

Dated: November 16, 2018

Respectfully submitted,

/s/ Nikhel Sus
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Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-cv-0007 (TSC)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, AND STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Local Civil Rule 7(h), Plaintiff Citizens for Responsibility and Ethics in Washington respectfully submits this Response to Defendant U.S. Department of Justice's ("DOJ's") Statement of Undisputed Material Facts, and Statement of Undisputed Material Facts in Support of Plaintiff's Cross-Motion for Partial Summary Judgment.

I. Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

1. Not disputed.

2. Not disputed.

3. Not disputed.

4. Not disputed.

5. Not disputed.

6. Not disputed.

7. Not disputed.

8. Not disputed.

9. Not disputed.

10. Not disputed.

11. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 145 (D.C. Cir. 2006) (discussing the asymmetrical distribution of knowledge between a requester and an agency in FOIA litigation).

12. Plaintiff lacks sufficient knowledge to confirm or deny the first sentence of this paragraph. *See Judicial Watch*, 449 F.3d at 145. The second sentence is not disputed.

13. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

14. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

15. Plaintiff lacks sufficient knowledge to confirm or deny the first four sentences of this paragraph. *See Judicial Watch*, 449 F.3d at 145. The last sentence is not disputed.

16. Not disputed.

17. Not disputed.

18. Not disputed.

19. Not disputed, except that Plaintiff disputes the propriety of Defendant's treatment of individual emails and text messages as distinct "records," and subsequent withholding of those purported records as either non-responsive or duplicative.

20. Not disputed, except that Plaintiff disputes the propriety of Defendant's treatment of individual emails and text messages as distinct "records," and subsequent withholding of those purported records as either non-responsive or duplicative.

21. The first sentence of this paragraph states a legal conclusion to which no response is required. Plaintiff lacks sufficient knowledge to confirm or deny the second sentence. *See Judicial Watch*, 449 F.3d at 145

22. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

23. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

24. This paragraph states legal conclusions to which no response is required. To the extent a response is deemed required, Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

25. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

26. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

27. Not disputed.

28. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

29. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

30. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

31. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

32. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

33. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

34. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

35. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

36. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

37. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

38. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

39. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

40. Plaintiff lacks sufficient knowledge to confirm or deny the first two sentences of this paragraph. *See Judicial Watch*, 449 F.3d at 145. The last sentence is not disputed.

41. Not disputed.

42. Not disputed.

43. Not disputed.

44. Not disputed.

45. Not disputed.

46. Not disputed.

47. Not disputed.

48. Not disputed.

49. Not disputed, except that Plaintiff disputes the propriety of Defendant's treatment of individual emails and text messages as distinct "records," and subsequent withholding of those purported records as either non-responsive or duplicative.

50. Not disputed.

51. The first sentence of this paragraph states a legal conclusion to which no response is required. To the extent a response is deemed required, Plaintiff lacks sufficient knowledge to confirm any sentence in this paragraph. *See Judicial Watch*, 449 F.3d at 145.

52. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

53. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

54. Plaintiff lacks sufficient knowledge to confirm or deny the first three sentences of this paragraph. *See Judicial Watch*, 449 F.3d at 145. The last two sentences state legal conclusions to which no response is required.

55. Plaintiff lacks sufficient knowledge to confirm or deny the first sentence of this paragraph. *See Judicial Watch*, 449 F.3d at 145. The last two sentences state legal conclusions to which no response is required.

56. Plaintiff lacks sufficient knowledge to confirm or deny the first sentence of this paragraph. *See Judicial Watch*, 449 F.3d at 145. The last two sentences state legal conclusions to which no response is required.

57. Plaintiff lacks sufficient knowledge to confirm or deny the first two sentences of this paragraph. *See Judicial Watch*, 449 F.3d at 145. The last sentence states legal conclusions to which no response is required.

58. Plaintiff lacks sufficient knowledge to confirm or deny the first two sentences of this paragraph. *See Judicial Watch*, 449 F.3d at 145. The last sentence states legal conclusions to which no response is required.

59. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

60. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

61. This paragraph states a legal conclusion to which no response is required.

62. This paragraph states a legal conclusion to which no response is required.

63. This paragraph states a legal conclusion to which no response is required.

64. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

65. This paragraph states legal conclusions to which no response is required.

66. This paragraph states legal conclusions to which no response is required.

67. This paragraph states legal conclusions to which no response is required.

68. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch*, 449 F.3d at 145.

69. This paragraph states legal conclusions to which no response is required.

II. Plaintiff's Statement of Undisputed Material Facts

1. On December 13, 2017, Plaintiff submitted Freedom of Information Act ("FOIA") requests to DOJ's Office of Inspector General ("OIG"), Office of Information Policy ("OIP"), and Office of Public Affairs ("OPA"). *See* Declaration of Vanessa R. Brinkmann, ECF No. 25-4 ("Brinkmann Decl.") Ex. A; Declaration of Deborah M. Waller, ECF No. 25-3 ("Waller Decl.") Ex. 1.

2. The requests sought "from DOJ's senior leadership offices 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," including, without limitation, "(l) 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. Ex. A; Waller Decl. Ex. 1.

3. Plaintiff further sought "documents reflecting who made the decision to release this material to reporters on the evening of December 12, 2017." Brinkmann Decl. Ex. A; Waller Decl. Ex. 1.

4. The agencies acknowledged receipt of Plaintiff's requests. Brinkmann Decl. ¶ 4; Waller Decl. ¶ 3.

5. OIG provided a partial response on December 15, 2017. Waller Decl. Ex. 2.

6. After DOJ's statutory response deadlines elapsed, Plaintiff filed this FOIA suit on January 3, 2018, ECF No. 1, and amended its complaint on January 16, after OIP granted its request for expedited processing, ECF No. 4.

7. OIG completed productions on April 23, 2018. Waller Decl. ¶ 18.

8. OIP, on behalf of itself and OPA, made productions on April 30, June 1, June 29, and July 2, 2018. Brinkmann Decl. ¶¶ 7-10. OIP stated that the July 2 production would be its "final response to Plaintiff's FOIA request." *Id.* ¶ 10.

9. On July 9, 2018, the parties submitted a joint status report noting that "Defendant has issued its final responses" and requesting a briefing schedule under which Defendant's motion for summary judgment would have been due August 13, 2018. ECF No. 14 at 1.

10. By Minute Order dated July 17, 2018, the Court entered the parties' proposed schedule.

11. On August 10, 2018, three days before its summary judgment motion was due, DOJ moved to stay the Court's briefing schedule, claiming that OIP needed to "re-run its search . . . in light of a recently-discovered technical issue concerning the data originally searched." ECF No. 15 at 1. DOJ's motion explained that OIP "recently became aware of a problem with the data on which some of its searches were run that stems from the migration of DOJ email onto new servers"—namely, that "some emails were not migrated onto the new servers." ECF No. 15 at 1. Consequently, OIP had been conducting FOIA searches of an "incomplete collection of some custodians' email records," which "may have affected the search that was completed in this case." *Id.*

12. Neither DOJ's motion nor its supporting declarations in this case explain when or how OIP discovered this "technical issue," describe the scope of the issue, or explain specifically

what steps DOJ was taking to remedy it. Rather, OIP sought an indefinite stay of the briefing schedule to give OIP additional time to re-run its search "once the data migration issue has been resolved." ECF No. 15 at 2; *see* Declaration of Vanessa R. Brinkmann, ECF No. 15-1 ¶¶ 3-10; Brinkmann Decl. ¶ 27.

13. Following two status conferences, the Court issued a Minute Order on October 5, 2018, directing OIP to complete its production by October 12, 2018. OIP completed its production by that deadline.

14. DOJ's productions contain numerous withholdings of individual emails and text messages within responsive message chains, which DOJ defined as distinct "records" and then withheld as "non-responsive" or "duplicative." *See* Pl.'s Exs. 1-3; Brinkmann Decl. ¶¶ 92-95; Waller Decl. ¶¶ 12, 18.

Dated: November 16, 2018

Respectfully submitted,

/s/ Nikhel Sus

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(D.C. Bar No. 1017937)
Anne L. Weismann
(D.C. Bar. No. 298190)
Citizens for Responsibility and Ethics in Washington
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Counsel for Plaintiff

Plaintiff's Exhibit 1

Flores, Sarah Isgur (OPA)

Nonresponsive Record

From: John.Walcott@thomsonreuters.com [mailto:John.Walcott@thomsonreuters.com]
Sent: Thursday, December 14, 2017 12:03 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Prior, Ian (OPA) <IPrior@jmd.usdoj.gov>
Subject: RE: Strzok texts

Thank you again, Sarah, and for last night's back-and-forth. While I'm still not clear about who authorized the release of texts that are part of an ongoing IG investigation (perhaps I'm dense, but former IGs I know have said they don't know of any precedent), but I can assure on two points:

1. We don't call people at 3 a.m. except in extremis (terrorist attacks, etc.) My mother's rule was never to call anyone after 9, and that still seems reasonable, although you should feel free to call me anytime (b) (6) H)
2. We always base our stories on our reporting from multiple credible sources, preferably supported by verifiable documents, and not on any preconceived notions, twisted facts, or fake news. Again, if you feel otherwise, just call or email me.
3. (b) (6)

All the best,
John

From: Flores, Sarah Isgur (OPA) [mailto:Sarah.Isgur.Flores@usdoj.gov]
Sent: Thursday, December 14, 2017 11:23 AM
To: Hosenball, Mark J. (Reuters); Prior, Ian (OPA)
Cc: Walcott, John (Reuters)
Subject: RE: Strzok texts

1) Please please look into these things before sending me questions like this based on a single tweet you found from over a day ago. It was answered by the DAG in the hearing when Jeffries asked about it and Shannon sent out this tweet just moments later clarifying that their producer saw the same thing that Congress saw and every other outlet:
https://twitter.com/ShannonBream/status/940990591915130880
2) On your point about historical practice, I don't know who you are talking to but I sent you the names of 3 national reporters yesterday who have all confirmed past practice publicly.

3) I have no clue why the time of day is relevant—I get calls from my reporters at 3am not infrequently. We all work long hours in these jobs over here at DOJ—as is evidenced by the fact that several of the DOJ reporters were still here when I left at 11pm last night.
4) I have confirmed that some outlets had the full set of tweets before we released them to Congress or showed them to reporters here after, which makes this all seem like a silly non story.

At this point, your emails feels like badgering and a waste of time for me to argue about something you've made your mind up on. No other reporter who actually works here seems to agree with your narrative. Throughout this conversation you have had the tone of an advocate and not a reporter. So I think we're done.

xxx

Sarah Isgur Flores
Director of Public Affairs
202.305.5808

From: Mark.Hosenball@thomsonreuters.com [mailto:Mark.Hosenball@thomsonreuters.com]
Sent: Thursday, December 14, 2017 10:55 AM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Prior, Ian (OPA) <IPrior@jmd.usdoj.gov>
Subject: Strzok texts

I have contacted one or two people with historical knowledge of such issues and they said they had never seen or heard of a previous case of DoJ late at night calling reporters in to look at private message-type evidence - EVIDENCE, not internal memoranda - which had been collected by DoJ or IG in what is still an active, open investigation. Also, assuming its accurate, the tweet below seems to raise a serious question as to how Fox News obtained a much larger cache of Strzok messages than was provided to Congress. So I am still seriously wondering who authorized such releases, what the legal rationale was for doing so, given the fact that the investigation is still open, and whether you can produce any valid evidence that similar such material has been released in this manner in the past by DoJ.

Natasha Bertrand Verified account @NatashaBertrand
FollowFollow @NatashaBertrand

Rep. Hakeem Jeffries now asking who authorized the DOJ to invite reporters to come view private texts between 2 DOJ employees who were subject of pending investigation. Also asked how it's possible that Fox News has 10k Strzok-Page texts when DOJ only gave Congress 375 texts.

8:50 AM - 13 Dec 2017

Many thanks for your attention to this inquiry. mh

Plaintiff's Exhibit 2

From: "Flores, Sarah Isgur (OPA)" <Sarah.Isgur.Flores@usdoj.gov>
Date: Wednesday, December 13, 2017 at 9:24 PM
To: Darren Samuelsohn <dsamuelsohn@politico.com>
Subject: RE: Seeking comment on criticism today DOJ is undermining the overall Mueller probe?

1. The Department ensures that its release of information from the Department to members of Congress or to the media is consistent with law, including the Privacy Act. As the Department's letter to Congress last night makes clear, this information was provided in response to requests from several Congressional committees for access to this information that was not subject to withholding exceptions. Notice and delivery of this information was made to the lawyers for the parties and the relevant congressional committees in advance of public release. Further, prior to release, career officials determined that the text messages could be released under both ethical and legal standards.
2. We followed past practice by including the attributable number in Note 3. I don't know where you heard that wasn't the case, but your information is incorrect.

Off the record:

1. Huh?! I'm a comms expert and can tell you the absolute worst way to sensationalize these tweets was to dump them all at once the night before a hearing. Truly. I could have let people say "Oh, I've read them and their ***really*** bad and then let R members have them just a little bit before the Ds and leaked out one at a time as we refused to release them and every cable news show would wonder when the next tweet was coming and cover it constantly. But instead I gave it to a dozen reporters all at once with the same embargo time because I thought it was the most fair way to treat

everyone involved in a difficult story. And, frankly, I find it offensive that anyone would think my motives were otherwise—I take my job and my responsibilities here seriously and hope you ask some of the beat reporters here who work with me every day.

2. Mueller's team made the call on not releasing his ethics form despite me telling them why we should—which should be obvious because if they wanted to release it, they are in possession of it and could do a voluntary release at any time (as we did with the AG's sf86 if you remember when that was subject to FOIA exemption but we did a voluntary release). So perhaps you should ask them to do that and see whether they give it to you. Otherwise, this theory will be particularly hilarious when its in your story to the SCO team that fought me on it.
3. I haven't even heard whatever youre talking about leaking to CNN? Do people actually think this? I watch a lot of tv and haven't seen it.
4. So what was RR thinking when he said he was satisfied with the job Mueller was doing? When he's constantly defended his hiring choices today and said employees were entitled to their political opinions? I mean, theres an equal opposite version of this story from the other side that would have just as much evidence that we're helping Democrats cement the Mueller probe.
5. This is a funny story to me only because republicans are hitting us CONSTANTLY for not providing them information like why Stroyk was removed from SCO in August when they asked back in October and covering up for the FBI, Mueller, etc. But I guess I should thank you for writing it since it might help us fend off those constant attacks…

S

xxx

Sarah Isgur Flores
Director of Public Affairs
202.305.5808

From: Darren Samuelsohn [mailto:dsamuelsohn@politico.com]
Sent: Wednesday, December 13, 2017 8:51 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>
Subject: Seeking comment on criticism today DOJ is undermining the overall Mueller probe?

Hi Sarah,

Writing a piece for tomorrow AM that raises the question that came out of today's hearing that DOJ is quietly helping Republicans put pressure on the Mueller probe. I know the DAG was asked about this several different ways today about this, in light of last night's news release on the Strozk-Page text messages.

We're also raising in this story several other subtle events that have given Mueller critics a chance to criticize the probe, including the addition of the $3.5 million in costs added to the overall Mueller budget probe for DOJ components that the report itself noted were not required to be included by law or past precedent; the DAG's unusual and vague media statement in June; DOJ refusing to

disclose details on the process that led up to the special counsel being granted an ethics waiver to serve as special counsel; DOJ not coming to Mueller's defense amid criticism that his office leaked the news to CNN on the first indictments in late October.

Does DOJ want to comment in any way beyond the DAG's remarks today, which I'm pulling from extensively in my story. You can get back to me until 11:30 pm this evening.

Thank you,

Darren Samuelsohn
Senior reporter, POLITICO
Desk: 703-842-1769
Cell (b) (6)
Dsamuelsohn@politico.com
@dsamuelsohn

Plaintiff's Exhibit 2

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S

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