

**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-00377 (CRC)

**GENERAL SERVICES)
ADMINISTRATION,)**

Defendant.)

_____)

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

More than 12 years ago, faced with an aging headquarters building badly in need of repairs that could no longer meet security and operational needs, the Federal Bureau of Investigation (“FBI”) began discussions within the federal government about consolidating and relocating its headquarters. In collaboration with defendant General Services Administration (“GSA”), the FBI examined a number of options that included modernizing its current headquarters, the J. Edgar Hoover Building (“JEH”); demolishing that building and constructing a new one on-site; and constructing a new headquarters on a new site. In November 2011, the U.S. Government Accountability Office (“GAO”) estimated that these alternatives would cost between \$850 million to over one billion dollars and take years to implement. One year later, GSA settled on a plan that would involve swapping the JEH site for a new site elsewhere in the District of Columbia-Maryland-Virginia vicinity, with the developer to receive the JEH site to use as a mixed-use complex, likely to include offices, apartments, and retail space. In the ensuing years, GSA accepted dozens of proposals for the project and spent millions of dollars evaluating

proposed sites. By July 2014, GSA had narrowed the field to three sites in Springfield, Virginia and Prince George's County, Maryland. Throughout the process the FBI sounded a common refrain: it needed a new building at a new site that would consolidate its workforce and meet its security needs – needs the JEH did not meet.

The years of progress toward a consolidated, relocated FBI came to an abrupt halt in July 2017, when GSA pulled the plug on the eve of an expected announcement of which relocation site it had selected. By February 2018, GSA made the even more surprising revelation that it would rebuild on the JEH site, notwithstanding the FBI's long-held view on the need for a consolidated FBI workforce at a more secure location. This prompted congressional outrage and raised suspicions that the real reason for the sudden change of plans was not to meet the needs of the FBI, but to prevent the likely construction of a hotel and restaurant on the JEH site that would compete with the Trump International Hotel, located just across the street.

This lawsuit represents an effort to get to the truth behind the FBI building machinations, a truth that may unmask GSA and the FBI as either witting or unwitting accomplices of President Donald J. Trump. Standing in the way of that truth is GSA, which claims to have only a handful of documents in response to plaintiff Citizens for Responsibility and Ethics in Washington's ("CREW") Freedom of Information Act ("FOIA") request for documents that explain the decision to cancel a project that was years in the making. This patently and woefully deficient response and the agency's explanation here as to why it has no additional documents fall well short of what the law requires. Further, GSA's actions and statements not only warrant no deference, but instead raise a serious question about the agency's good faith in meeting its statutory responsibilities under the FOIA to produce all responsive, non-exempt information.

FACTUAL BACKGROUND

The FBI Consolidated Headquarters Project

The decision to relocate FBI headquarters has been in the works for well over a decade and the history of that decision reveals complex decisions involving multiple federal agencies. Dating back to at least 2005, the FBI identified the need for a new headquarters facility that would accommodate its increased headquarters workforce and address security concerns of the FBI as an agency with an increased national security mission post September 11, 2001.¹ A 2011 GAO audit, referencing a 2005 GSA study, concluded the JEH did not meet “the FBI’s long-term security requirements,” was “inefficient and functionally obsolete,” and was “aging and showing signs of deterioration.”² Working with GSA, the FBI identified a number of alternatives that would address these deficiencies.³ They included modernizing the JEH at an estimated cost of \$1.7 billion,⁴ making it the most costly alternative; demolishing the JEH and building a new facility on that site at an estimated cost of more than \$850 million;⁵ and either constructing or leasing a new facility on a new site at an estimated cost of at least \$1.2 billion.⁶

In December 2012, GSA proposed swapping the JEH for a new headquarters to be constructed at another location in the Washington area. Then-Acting GSA Administrator Dan Tangherlini reportedly described this relocation proposal as “a prime opportunity for the

¹ See U.S. Gov’t Accountability Off., GAO-12-96, *Federal Bureau of Investigation: Actions Needed to Document Security Decisions and Address Issues with Condition of Headquarters Buildings 1* (2011) (“2011 GAO Report”).

² *Id.* at 11, 16, 21.

³ *Id.* at 28.

⁴ *Id.* at 28, 29.

⁵ 2011 GAO Report at 28, 30.

⁶ *Id.*

government to save money and reduce its space requirements.”⁷ On January 9, 2013, GSA issued a Request for Information (“RFI”) to developers concerning the proposed land swap.⁸ This was followed by a Request for Expressions of Interest in November 2013 seeking sites in the National Capital Region that could be used for a new FBI headquarters.⁹ By July 2014, the GSA had narrowed the potential sites for the FBI consolidated headquarters to three – Greenbelt, Landover, and Springfield – and announced it would be conducting National Environmental Policy Act reviews of each of the three sites.¹⁰

In September 2015, the *New York Times* reported that the FBI, GSA and the Office of Management and Budget (“OMB”) were “embroiled in a behind-the-scenes funding dispute” over the FBI relocation project.¹¹ At that time, renovation of the JEH was estimated at between \$850 million and \$1.1 billion, but that solution would house only 52 percent of the FBI headquarters workforce.¹² On the other hand, consolidating the workforce in one building would eliminate the \$168 million the government was paying to lease 21 different facilities, an estimated cost savings of \$50 million per year or about \$1 billion over a 20-year span.¹³ The

⁷ Jonathan O’Connell, GSA Proposes Trading Hoover Building for New FBI Campus, *Washington Post*, Dec. 3, 2012, available at https://www.washingtonpost.com/blogs/capital-business/post/gsa-proposes-trading-hoover-bilding-for-new-fbi-campus/2012/12/03/5b8c94b8-3d5e-11e2-bca3-aadc9b7e29c5_blog.html?utm_term=.9650b60038e.

⁸ GSA Request for Information – FBI Headquarters Consolidation, Solicitation No. FBI-HQ-FRI, (Jan. 9, 2013), available at https://www.fbo.gov/index?s=opportunity&mode=form&id=f15503675f671bb7e7a3e8b203d2eae3&tab=core&_cview=1.

⁹ GSA, FBI Headquarters Consolidation, News Release, available at <https://www.gsa.gov/about-us/regions/national-capital-region-11/buildingsfacilities/development-projects/fbi-headquarters-consolidation>.

¹⁰ GSA, GSA Releases Shortlist for FBI Consolidated Headquarters, Press Release, available at <https://www.gsa.gov/node/78753>.

¹¹ Eugene L. Meyer, Funding Dispute Over F.B.I. Headquarters Delays Next Step, *New York Times*, Sept. 22, 2015, available at <https://www.nytimes.com/2015/09/23/business/fbi-headquarters-replacement-is-mired-in-money-issues.html>.

¹² *Id.*

¹³ *Id.*

relocation project got a big boost when the FBI secured \$1.4 billion in proposed funding in President Obama's 2016 budget proposal.¹⁴ GSA, in turn, issued a second request for proposals to a small number of previously vetted real estate firms for the construction of a new FBI headquarters. Bill Dowd, the GSA manager for the project at the time, publicly expressed his confidence that the proposed funding from President Obama's budget request together with the value of the JEH "would be sufficient to afford the new campus."¹⁵

In May 2016, the Senate Environment and Public Works Committee voted to set aside \$759 million for the FBI relocation project that, together with its previously supported \$646 million and \$390 million, totaled about \$1.4 billion in funding.¹⁶ Nevertheless, in October 2016, GSA announced it was postponing until the following March the selection of a location and developer for the FBI headquarters project.¹⁷ This announcement was made at the same time that

¹⁴ See, e.g., Charles S. Clark, GSA Moves Closer to Picking a New FBI Headquarters, *Government Executive*, Jan. 22, 2016, available at <https://www.govexec.com/management/2016/01/gsa-moves-closer-picking-new-fbi-headquarters/125351/>; Sam Ufret, President to Propose \$1.4 Billion New FBI Building in 2017 Budget, *Federal News Radio*, Jan. 22, 2016, available at <https://federalnewsradio.com/facilities-construction/2016/01/1-4-billion-proposed-new-fbi-building-fy17-budget/>; Daniel J. Sernovitz, GSA Kicks Off Next Phase of FBI Project with Big Boost From Obama, *Washington Business Journal*, Jan. 22, 2016, available at https://www.bizjournals.com/washington/breaking_ground/2016/01/gsa-kicks-off-next-phase-of-fbi-project-with-big.html?s=print.

¹⁵ Jonathan O'Connell, Final Search Begins for New FBI Headquarters, *Washington Post*, Jan. 22, 2016, available at https://www.washingtonpost.com/news/digger/wp/2016/01/22/final-search-begins-for-new-fbi-headquarters/?utm_term=.97dcb4f3cbf.

¹⁶ Daniel J. Sernovitz, Senate Committee Backs Another \$759 Million for the FBI's Planned Headquarters, *Washington Business Journal*, May 19, 2016, available at https://www.bizjournals.com/washington/breaking_ground/2016/05/senate-committee-backs-more-fbi-hq-funding.html?s=print.

¹⁷ Jonathan O'Connell, FBI Headquarters Decision Delayed Until Next Year, *Washington Post*, Oct. 24, 2016, available at https://www.washingtonpost.com/news/digger/wp/2016/10/24/fbi-headquarters-decision-delayed-until-next-year/?utm_term=.329a5d392172.

GSA described the response from developers to the solicitation as “strong and overwhelmingly positive.”¹⁸

In the meantime, construction of the Trump International Hotel on Pennsylvania Avenue in Washington, D.C. was completed, and the hotel opened for business in September 2016, across the street from the JEH.¹⁹ Donald Trump’s assumption of the presidency in January 2017 triggered a dispute concerning whether the President, consistent with the lease terms, could continue to serve as the leaseholder of the hotel. By letter dated March 23, 2017, Kevin M. Terry, GSA’s contracting officer, advised the Trump Old Post Office LLC it was in full compliance with the terms of its lease,²⁰ meaning that the President’s company could continue to receive the profits from the hotel notwithstanding the provision of the lease prohibiting any elected government official from sharing or being part of the lease.²¹ For calendar year 2017, President Trump reported hotel-related revenue of \$40,408,037, illustrating just how lucrative the Trump Hotel has been.²²

Just two weeks prior to sending its March 23, 2017 letter to the Trump Old Post Office LLC, GSA announced it was suspending the long-promised selection of a new FBI headquarters site until it received sufficient congressional funding.²³ Until that point, the FBI and GSA had

¹⁸ *Id.*

¹⁹ *See, e.g.*, Ian Simpson, [Trump Luxury Hotel Opens Just Blocks from the White House](https://www.reuters.com/article/us-usa-trump-hotel/trump-luxury-hotel-opens-just-blocks-from-the-white-house-idUSKCN11I25L), *Reuters*, Sept. 12, 2016, available at <https://www.reuters.com/article/us-usa-trump-hotel/trump-luxury-hotel-opens-just-blocks-from-the-white-house-idUSKCN11I25L>.

²⁰ Letter from Kevin M. Terry, Contracting Officer, GSA to Donald J. Trump, Jr., Trump Old Post Office LLC, Mar. 23, 2017, available at https://www.gsa.gov/cdnstatic/Contracting_Officer_Letter_March_23_2017_Redacted_Version.pdf.

²¹ *See id.* at 2-3 for a full recitation of the lease provision.

²² *See* [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3730CE1E7F315D448525828F005E2C76/\\$FILE/Trump,%20Donald%20J.%20%202018Annual278.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3730CE1E7F315D448525828F005E2C76/$FILE/Trump,%20Donald%20J.%20%202018Annual278.pdf).

²³ *See, e.g.*, Meredith Somers, [GSA Postpones FBI HQ Announcement Until Funding Is Secure](https://federalnewsradio.com/facilities-construction/2017/03/gsa-postpones-fbi-hq-announcement-funding-secure/), *Federal News Radio*, Mar. 10, 2017, available at <https://federalnewsradio.com/facilities-construction/2017/03/gsa-postpones-fbi-hq-announcement-funding-secure/>.

secured \$390 million in funding for the project from the 2016 omnibus spending bill and President Obama had requested an additional \$1.4 billion for the proposal to be split between the FBI and GSA.²⁴ In April 2017, as part of a budget bill aimed at preventing a government shutdown, Congress proposed \$523 million in funding for the FBI consolidation project.²⁵ The following month, a House Appropriations subcommittee rescinded \$200 million of the funding that had been set aside over the years for the new FBI headquarters building.²⁶ Significantly, the Appropriations Committee's budget request for 2018 did not include *any* funding for the FBI consolidation plan, which was justified by the perplexing claim that unanswered questions remained regarding "the revision of longstanding security requirements and changes to headquarters capacity in the national capital region."²⁷

On July 11, 2017, GSA issued a statement announcing the "decision to cancel the procurement for the new FBI headquarters consolidation project."²⁸ The release stated: "The cancellation of the project does not lessen the need for a new FBI headquarters. GSA and FBI will continue to work together to address the space requirements of the FBI."²⁹ Following this cancellation, the Senate Committee on Environment and Public Works held a hearing entitled,

²⁴ *Id.*

²⁵ Daniel J. Sernovitz, Budget Deal Includes Funds for FBI Headquarters, But Not Nearly What the GSA Wanted, *Washington Business Journal*, May 1, 2017, available at <https://www.bizjournals.com/washington/news/2017/05/01/budget-deal-includes-funds-for-fbi-headquarters.html?s=print>.

²⁶ John Fritze, House Panel Approves Yanking Money for New FBI Headquarters, *Baltimore Sun*, June 29, 2017, available at <http://www.baltimoresun.com/news/maryland/politics/bs-md-congress-fbi-cut-20170629-story.html>.

²⁷ House Committee on Appropriations, 115th Cong., Report on Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2019, 40 (Comm. Print 2018).

²⁸ GSA, GSA Releases Statement on FBI Headquarters, Press Release, July 11, 2017, available at <https://www.gsa.gov/node/87972>.

²⁹ *Id.*

“FBI Headquarters Consolidation Project – What Happened and What’s Next?”³⁰ Witnesses included Michael Gelber, GSA’s public building service acting commissioner; Richard Haley, assistant director and chief financial officer for the Finance Division of the FBI; and David Wise, director of GAO’s physical infrastructure team.³¹ Mr. Gelber in his introductory remarks noted that GSA had

determined that an exchange of the Hoover Building for a new facility of up to 2.1 million square feet was the most viable funding mechanism to consolidate personnel from the Hoover Building and multiple leased locations at the lowest possible cost.³²

He explained, however that “[a]fter internal and interagency deliberations, GSA determined that moving forward without full funding would put the Government at risk for project cost escalations.”³³

Senator Tom Carper, a member of the committee, asked Mr. Haley who from OMB was involved in the cancellation decision.³⁴ In response, Mr. Haley stated that the FBI would have met with “our branch personnel and GSA’s branch personnel within OMB[.]”³⁵ Mr. Gelber in response to a question from Senator Ben Cardin confirmed that GSA had spent “around \$20 million to date” on the relocation project.³⁶ Mr. Wise from the GAO described the swap exchange as “a complicated mosaic of effort” that “just didn’t really work out,” but confirmed

³⁰ The transcript of the hearing can be found at <https://www.epw.senate.gov/public/cache/files/6/c/6c09ceb9-928e-4289-b46b-6f2d64907215/423BF419B517B8090FD002DB9A83A587.spw-080217.pdf> (“Aug. 2017 Transcript”).

³¹ Aug. 2017 Transcript.

³² Aug. 2017 Transcript at 19.

³³ *Id.* at 20.

³⁴ *Id.* at 37.

³⁵ *Id.* at 39.

³⁶ Aug. 2017 Transcript at 51.

the existing “very real security needs . . . which is a serious problem on the current facility, especially on its north side.”³⁷

In February 2018, after more than a decade of insisting it needed a new headquarters at a new location to consolidate all its personnel and create a more secure facility, the FBI announced it was proposing to instead build a new headquarters at the site of the JEH, a proposal that also would require moving 2,300 staff from headquarters to new facilities throughout the country.³⁸ The FBI estimated the total cost of this approach as \$3.3 billion.³⁹ According to the report, “[t]he Administration Is Seeking \$2.175B in Appropriations to Fully Fund Federal Construction to Demolish and Rebuild JEH.”⁴⁰ Criticism of the FBI’s about-face was nearly instantaneous, with one expert on the project quoted as criticizing the new proposal for “ignor[ing] multiple hundred-million-dollar costs,” and pointing out that five years earlier, “the GSA rightly said building in place was the most expensive option.”⁴¹

Congress also reacted swiftly. In a February 15, 2018 hearing before the House Oversight and Government Reform Subcommittee on Government Operations on the GSA Ranking Member Gerald E. Connolly described the newest proposal to rebuild on the site of the JEH as “full of contradictions” and one that “flies in the face of a decade’s worth of analysis by both the GSA and the [GAO].”⁴² As he noted, “one need only examine the economics and security

³⁷ *Id.* at 56.

³⁸ Jonathan O’Connell, In Abrupt Shift, Federal Government Proposes Keeping FBI Downtown, *Washington Post*, Feb. 12, 2018, available at https://www.washingtonpost.com/news/business/wp/2018/02/12/in-abrupt-shift-federal-government-proposes-keeping-fbi-downtown/?utm_term=.7048eee6c6a1.

³⁹ This figure and others were provided in a February 12, 2018 report the FBI and GSA released, *FBI Headquarters Revised Nationally-Focused Consolidation Plan*, that is available at <https://assets.documentcloud.org/documents/4377477/EPW-Presentation-Final-20180212.pdf>.

⁴⁰ *Id.* at 12.

⁴¹ O’Connell, *Washington Post*, Feb. 12, 2018.

⁴² Hearing Transcript at 3. Relevant portions of the hearing transcript are attached as Exhibit A.

aspects to raise serious questions about this decision,” pointing out that “all of the concerns about the physical security and the urban setback risk at the current site [are] also thrown out the window.”⁴³ Rep. Connolly also noted that the underlying motivation may be

the fact that if GSA had gone ahead with their original plan, the Hoover site would have been turned into a private development that would have directly competed with the Trump hotel for the entirety of the lease agreement. Developing the Hoover site into a mixed use retail hotel and residential development could have clearly impacted the bottom line of the president of the United States.⁴⁴

In response to questioning, Dan Mathews, commissioner of GSA’s public buildings service, admitted that the procurement for the long-planned building swap was cancelled *before* the FBI came up with the justification of changed program requirements, specifically the reduction in the number of FBI employees that needed to be housed at the main headquarters building from 10,600 to 8,300.⁴⁵ Other witnesses included GSA Administrator Emily W. Murphy; Alan Thomas Jr., GSA’s commissioner for the federal acquisition service; and GSA Inspector General (“IG”) Carol Ochoa.

On February 28, 2018, the Senate Committee on Environment and Public Works also held a hearing on the FBI Headquarters Consolidation Project.⁴⁶ Witnesses included GSA’s Dan Mathews and Richard Haley from the FBI. At the outset of the hearing, Chairman John Barrasso noted the failure of GSA and the FBI to provide the committee a plan for the FBI headquarters

⁴³ *Id.*

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 9-10.

⁴⁶ The transcript for that hearing is available at <https://www.epw.senate.gov/public/cache/files/e/4/e4aecea8-26ae-4a77-a38e-8b5e64abdbfb/5F5E110F96A85472F528A73274DCF52A.spw-022818.pdf>.

by January 29, 2018, and the failure of GSA to tell the Congress in advance of telling the media of the recommendation to rebuild on the JEH site.⁴⁷ He described the revised plan as

a significant departure from previous plans considered and put forward by GSA and FBI. The revised plan eliminates many of the FBI's security requirements: it scraps the concept of a consolidated campus; it abandons the need for a remote truck inspection facility; and it discards the requirement of a detached central utility plan.⁴⁸

Other committee members raised a variety of concerns with the latest proposal and how it conflicted with what the FBI had been saying for over a decade. Efforts by the committee to ascertain the extent to which the White House may have been involved in the decision were continually thwarted, with Mr. Mathews insisting he was “not in a position to answer” the question of whether such conversations had taken place.⁴⁹

On March 13, 2018, GSA IG Ochoa informed Ranking Member Connolly of the House Committee on Oversight and Government Reform Subcommittee on Government Operations that her office would be reviewing “GSA’s decision making process for the revised FBI Headquarters Consolidation project,” to include “whether the revised plan properly accounts for the full costs and security requirements of the project.”⁵⁰

On August 27, 2018, GSA’s Office of Inspector General released its promised report, *Review of GSA’s Revised Plan for the Federal Bureau of Investigation Headquarters Consolidation Project* (GSA IG Rpt.).⁵¹ After reviewing “over 50,000 GSA documents and

⁴⁷ Hearing Transcript at 3- 4.

⁴⁸ *Id.* at 5.

⁴⁹ *Id.* at 72-73.

⁵⁰ The letter is available at https://connolly.house.gov/uploadedfiles/gsa_ig_reply_to_connolly_on_fbi_hq.pdf.

⁵¹ The report is available at <https://www.gsaig.gov/sites/default/files/audit-reports/Review%20of%20GSA%E2%80%99s%20Revised%20Plan%20for%20the%20FBI%20Headquarters%20Consolidation%20Project%20REDACTED%20-%20508%20compliant.pdf>.

emails concerning the FBI headquarters consolidation project,”⁵² the IG reached three critical conclusions. First, contrary to the justification the FBI offered for rebuilding on the JEH site, the actual costs to demolish the JEH and rebuild on site “would cost more than the cancelled JEH exchange.” *Id.* at 22. Second, while the FBI has identified the need for a Level V security for any new building – the highest security rating – GSA is not yet able to determine how to meet the FBI’s “specific security needs and the requisite countermeasures” for a building on the JEH site. *Id.* Third, GSA’s IG characterized GSA Administrator Murphy’s April 2018 congressional testimony before the House Appropriations Committee concerning the FBI headquarters building as “incomplete and may have left the misleading impression that she had no discussions with the President or senior White House officials” about the FBI headquarters project. *Id.* During the hearing, Administrator Murphy, in response to a question of whether the President or anyone else at the White House was involved in discussions to rebuild on the JEH site, stated: “[t]he direction that we got came from the FBI,” and she acknowledged merely “coordinat[ing] that request with OMB to make sure that – to provide for funding[.]”⁵³ As the IG reported, however, in fact Administrator Murphy had two separate meetings with President Trump on January 24, 2018 – just weeks before the FBI announced its plan to rebuild on the JEH site – and June 15, 2018 concerning the FBI headquarters project, *id.* at 7, 11, and an earlier meeting with White House Chief of Staff John Kelly on December 20, 2017. *Id.* at 5.⁵⁴

These details about meetings with the President concerning the FBI Headquarters project follow reporting that President Trump has become “personally involved in plotting a new FBI

⁵² *Id.* at 1

⁵³ *Id.* at 20.

⁵⁴ The IG also reviewed an email from Public Buildings Service Commissioner Daniel Mathews to Administrator Murphy dated December 14, 2017, following a meeting with the FBI, that noted “WH has been talking to FBI too.” GSA IG Report at 5.

headquarters” at the JEH site.⁵⁵ Before becoming president he reportedly considered bidding on the FBI relocation project.⁵⁶ White House Press Secretary Sarah Huckabee Sanders justified the President’s interest in the FBI project as stemming from an “interest[] in making sure taxpayer dollars spent on new buildings are being spent wisely and appropriately,”⁵⁷ even though – as GSA’s IG found – rebuilding on the JEH site represents the most costly alternative.

CREW’s FOIA Request and This Litigation

In the midst of the unfolding scandal of the FBI headquarters project, CREW submitted a FOIA request to GSA by facsimile on July 12, 2017, seeking six categories of documents.⁵⁸ Specifically, CREW seeks (1) all records from January 20, 2017 to the present explaining the GSA’s July 11, 2017 decision to cancel the procurement for the FBI headquarters consolidation program; (2) communications between GSA Regional Commissioner Mary Gibert and then-acting GSA Administrator Tim Horne on that same topic and during the same time period; (3) email communications between Ms. Gibert and Mr. Horne and any individual at the eop.gov domain between January 20, 2017 and the present on the cancellation decision; (4) communications between FBI officials and GSA on the cancellation decision; (5) communications between OMB and GSA concerning the procurement cancellation decision; and

⁵⁵ Jonathan O’Connell, Trump Intervenes in FBI Headquarters Project, *Washington Post*, July 30, 2018, available at https://www.washingtonpost.com/business/2018/07/30/trump-intervenes-fbi-headquarters-project/?utm_term=.e90dcc92cada.

⁵⁶ *Id.* See also Jonathan O’Connell, Donald and Daughter Ivanka Trump Will Consider Acquiring FBI Headquarters, *Washington Post*, Sept. 11, 2013, available at https://www.washingtonpost.com/business/capitalbusiness/donald-and-daughter-ivanka-trump-will-consider-acquiring-fbi-headquarters/2013/09/11/cb353204-1afb-11e3-82ef-a059e54c49d0_story.html?utm_term=.c9694e47691e.

⁵⁷ O’Connell, *Washington Post*, Sept. 11, 2013.

⁵⁸ The request (“CREW FOIA”) is Exhibit A to the Declaration of Travis Lewis (“Lewis Decl.”) accompanying Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment (“D’s Mem.”) (Dkt. 16-2).

(6) records sufficient to show how much money had been expended to evaluate the final three locations designated as possible sites for the new FBI headquarters.⁵⁹

In its request, CREW explained why it was entitled to a waiver of fees associated with processing its request:

The sudden and unexpected decision of GSA to cancel what it termed the ‘new FBI headquarters consolidation project,’⁶⁰ announced on July 11, 2017, has generated criticism and controversy. Members of Congress described the cancellation as ‘put[ting] America’s national security at risk,’ while local officials commented on the significant amount of ‘time and energy wasted.’⁶¹ The cancellation has raised questions about its cause, specifically whether it is due to ‘uncertainty in the White House and Congress over whether to spend the necessary funds to build the new headquarters, and to delays in appointing top officials at the FBI and the [GSA].’ *Id.* The requested records will help answer these questions and assist the public in evaluating the merits of the cancellation decision, especially in light of the significant amount of money that already has been spent on this project.⁶²

By email dated July 20, 2017, GSA advised CREW its request for a fee waiver “has been determined to be not applicable as the request is not billable.”⁶³ Seven months later, hearing nothing further from GSA, CREW filed the complaint in this action on February 20, 2018 (Dkt. 1). On March 20, 2018, GSA finally responded to CREW’s request.⁶⁴ Remarkably, GSA claimed it had *no* responsive records to the first five items in CREW’s request. And in response to the sixth item, GSA provided a one-page document that indicated \$4,649,986.32 in federal funds had

⁵⁹ CREW FOIA at 1-2.

⁶⁰ GSA Statement on FBI Headquarters, July 11, 2017.

⁶¹ Robert McCartney, For D.C. Area, Demise of FBI Plan Means ‘a Lot of Time and Energy Wasted’, *Washington Post*, July 11, 2017, available at https://www.washingtonpost.com/local/for-dc-area-demise-of-fbi-plan-means-a-lot-of-time-and-energy-wasted/2017/07/11/c11c7cba-6632-11e7-9928-22d00a47778f_story.html?hpid=hp_local-news_fbi-headquarters-1145am%3Ahomepage%2Fstory&utm_term=.e951a48375c1.

⁶² CREW FOIA at 2-3.

⁶³ This email is attached as Exhibit B.

⁶⁴ This response is Exhibit B to Lewis Decl.

been spent to evaluate the final three locations GSA had designated as possible sites for the new FBI headquarters.⁶⁵

GSA supplemented this response by letter dated July 6, 2018.⁶⁶ GSA represented it had conducted a “subsequent search” that had yielded additional responsive records it was producing.⁶⁷ GSA also noted it was withholding some unidentified number of documents pursuant to Exemption 5 of the FOIA as within the deliberative process privilege, and had redacted “individuals’ signatures and cellphone [sic]” pursuant to FOIA Exemption 6.⁶⁸ The newly discovered documents consist of an FBI Headquarters Consolidation Exchange Project Fact Sheet dated April 25, 2017; a two-page FBI Headquarters Consolidation Project Fact Sheet and Recommendation dated February 21, 2017; an undated FBI Headquarters Consolidation Procurement Hill Briefing; accompanying emails forwarding these documents; a 13-page Findings and Determination dated July 10, 2017 and entitled, “Cancellation of Request for Proposals (Phase I and II) FBI Headquarters Consolidation”; a three-page undated question and answer sheet concerning the RFP; a one-page document, “FBI Headquarters Consolidation Procurement: Executive Questions & Responses,” dated May 23, 2017; and several pages of accompanying emails forwarding these documents.⁶⁹ Notably, all of these documents were created before CREW submitted its FOIA request on July 12, 2017.

GSA has now moved for summary judgment arguing that despite the paucity of responsive documents it has located it conducted a reasonable and adequate search and that it

⁶⁵ This document is attached as Exhibit C.

⁶⁶ This letter is Exhibit C to Lewis Decl.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ These documents are attached as Exhibit D.

properly invoked FOIA Exemptions 5 and 6. A two-page *Vaughn* index accompanies its motion.⁷⁰

ARGUMENT

I. ON ITS FACE GSA'S CLAIM TO HAVE ONLY 28 PAGES OF RESPONSIVE DOCUMENTS DEFIES CREDIBILITY.

In responding to FOIA requests GSA, like all other federal agencies, is held to a standard of reasonableness. *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885 (D.C. Cir. 1995). Under no stretch of the imagination does GSA's response here satisfy this standard. As outlined above, GSA and the FBI engaged in over a decade of planning and discussions concerning a new FBI headquarters building that would meet the FBI's long-identified physical and security needs. Those plans attracted significant congressional interest and cost the taxpayers millions of dollars to advance the project to a place where GSA was ready to award a contract to relocate the FBI in a new, high-security level building that would house all its employees. GSA's abrupt decision to cancel that project generated extensive criticism and raised concerns that the President may have exercised an undue influence on the relocation decision to protect his financial interest in the Trump International Hotel. Given the lengthy history of the FBI relocation project, it defies credibility that GSA would have only 28 pages of documents explaining that decision and including communications within GSA and between GSA, the FBI, and the White House about the decision. Yet that is precisely the response GSA has provided CREW, and then only after initially claiming to have *no* responsive documents. *See* Exhibits B and C to Lewis Decl.

⁷⁰ That index is Exhibit D to Lewis Decl.

To be sure, the possible existence of additional responsive documents standing alone will not defeat an agency's claim it conducted a reasonable search. *See, e.g., Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). GSA's response in this case, however, is facially and patently unreasonable and on that basis alone its summary judgment motion must be denied.

II. GSA HAS FAILED TO DEMONSTRATE IT CONDUCTED AN ADEQUATE SEARCH.

A. GSA's declaration does not meet the agency's burden of proof.

An agency is entitled to summary judgment only if it demonstrates "beyond material doubt[] that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "[T]he agency bears the burden of showing there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester." *Id.* at 1350. Further, "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)). In reviewing FOIA claims "courts must bear in mind that FOIA mandates a strong presumption in favor of disclosure." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citation omitted).

An agency satisfies this burden with "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "However, 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) (quoting *Founding Church of Scientology v. Nat’l Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979)). Further, an agency that limits its search to only certain record systems, excluding sources where records may exist, will be deemed to have conducted an inadequate search. *Oglesby*, 920 F.2d at 68.

While the substance alone of GSA’s response demonstrates the agency’s complete disregard for its statutory responsibilities under the FOIA, the record GSA has proffered here through its declarant Travis Lewis also raises substantial doubts about the adequacy of the agency’s search for responsive records. First, nowhere in his declaration does Mr. Lewis identify the date or dates of the search the agency conducted. The parameters of an agency’s search obligations, however, are defined by the date on which the agency conducts its search. *McGehee v. CIA*, 697 F.2d 1095, 1104 (D.C. Cir. 1983), *vacated on other grounds on panel reh’g & reh’g en banc denied*, 711 F.3d 1076 (D.C. Cir. 1983); *Public Citizen v. Dep’t of State*, 276 F.3d 634, 644 (D.C. Cir. 2002).⁷¹ Without that date, the Court has no way to assess whether the agency employed a reasonable time-period in searching for responsive records.⁷²

Second, Mr. Lewis explains that for the first five categories of requested records only GSA’s Office of the Chief Information Officer (“OCIO”) was searched because “OCIO is the office within GSA that has access to all of the agency’s electronic records and conducts all of the agency’s electronic discovery searches for potential responsive documents to FOIA requests.”

⁷¹ The issue in these cases was whether the agency should employ a date-of-search cut-off or a date-of-request cut-off in determining the temporal limits of a FOIA request. The D.C. Circuit found the date-of-search cut-off to be more reasonable because it “might . . . result[] in the retrieval of more documents[.]” *Public Citizen*, 276 F.3d at 644.

⁷² Mr. Lewis specifies GSA used the time frame of January 20, 2017 through February 23, 2018, Lewis Decl. ¶ 7, but does not explain the selection of that end date.

Lewis Decl. ¶ 6. CREW's request, however, was not limited to electronic records and instead specifically seeks "records of *any kind*, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material."⁷³ Moreover, CREW also specified that for the first requested category of records it was seeking, *inter alia*, "records from GSA Public Buildings Service, GSA Office of the Administrator, and the National Capital Region."⁷⁴ In other words, CREW did not limit that request to only electronic records.

Yet inexplicably, GSA searched only OCIO and then only for electronically stored records. GSA justified this limited search by claiming OCIO searched "both paper and electronic records in GSA's possession." But this claim is highly misleading, as Mr. Lewis admitted OCIO's actual search encompassed only "emails, calendar logs and shared drive files for responsive electronic records[.]" Lewis Decl. ¶ 9. Mr. Lewis justified OCIO's search of only email and documents on the agency's shared drive by the agency's record retention policy ("GSA Records Management Program"), which he represented requires any paper records to be stored electronically, *id.*, and for which he provided a general cite for where the agency's records management policy and procedure can be found. *Id.* ¶ 9 n.1.

Missing from Mr. Lewis' declaration, however, is precisely where within that policy the requirement that "all agency employee communications and documents [be] stored via email and/or on the agency's shared drive" may be found. Lewis Decl. ¶ 9. And with good reason: that cited policy contains no such explicit requirement. Indeed, the cited policy specifically references records created "in a variety of media," includes directions on how to store and label

⁷³ CREW FOIA at 2 (emphasis added). Only one of the categories of records CREW seeks (the third) consists of "email communications" between specified individuals and any individual at the eop.gov domain. *Id.* at 1. By contrast, the first category seeks "*all records* from January 20, 2017 to the present explaining" GSA's July 11, 2017 cancellation decision. *Id.* (emphasis added).

⁷⁴ *Id.* at 1.

“[e]very box of physical records,” directs that “[r]ecords (including those in email) that have a retention period longer than 180 days must be properly stored in an organized records management system,” and states that “[r]ecords, *regardless of media*, will be retained in accordance with the timeframes approved by the Archivist of the United States in GSA Records Schedules.”⁷⁵ This policy on which GSA relies to justify its limited search not only does not, contrary to Mr. Lewis’s representations, require all employees to store all paper records electronically, but it expressly recognizes and addresses the management of paper records in their original media.

Moreover, there is a world of difference between the format an agency uses to store and transfer to the National Archives and Records Administration its permanent records, and the everyday recordkeeping practices of individual agency employees. Absent evidence of 100 percent compliance with the as-yet unproven GSA policy that all paper records be stored electronically at all times, GSA’s decision to search for only electronically stored records falls wide of the mark.

GSA’s failure to look beyond OCIO represents a particularly glaring omission given Mr. Lewis’ separate description of GSA’s Public Building Service (“PBS”), which GSA contacted for records responsive to the last item in CREW’s request. As “the office within GSA that specifically acquires space on behalf of the federal government” and that “acts as a caretaker for federal properties across the country,” Lewis Decl. ¶ 11, PBS should have been tasked with searching for records responsive to all categories of CREW’s request. Yet inexplicably GSA

⁷⁵ GSA Records Management Program at 2, 4, 8 (emphasis added), *available at* https://www.gsa.gov/cdnstatic/insite/OAS_P_18201_Records_Management_Directive_%28Signed_3-7-2014%29_%28Rev_7-25-2018%29.pdf.

tasked it with searching only for records that show how much money had been expended to evaluate the final three locations designated as possible sites for the new FBI headquarters.

Third, GSA used under-inclusive search terms that fall short of the “standard of reasonableness” the agency must meet. *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 498 (D.D.C. 2017). GSA used the terms “FBI,” “FBI Headquarters,” and “FBI Headquarters procurement,” Lewis Decl. ¶ 7, but omitted the terms “JEH” and “the Hoover Building” even though they are the commonly used terms within the FBI and GSA for the FBI headquarters building. Further, GSA searched only two email addresses: those of Mary Gibert and Tim Horne. Lewis Decl. ¶ 7.⁷⁶ CREW’s request, however, seeks *all records* from January 20, 2017 to the present explaining the GSA’s July 11, 2017 decision to cancel the procurement for the FBI headquarters consolidation program; communications between FBI officials and GSA on the cancellation decision; and communications between OMB and GSA concerning the procurement cancellation.⁷⁷ Thus, on its face the request includes communications far beyond those sent to or from Ms. Gibert or Mr. Horne.⁷⁸ GSA’s decision to search only the email addresses of Ms. Gibert and Mr. Horne fails to comport with its obligation to conduct an adequate search “reasonably tailored to uncover documents responsive to the FOIA request.” *Agility Public Warehousing Co. v. NSA*, 113 F. Supp. 3d 313, 339 (D.D.C. 2015) (citation omitted).

Moreover, even accepting GSA’s search terms at face value, a serious question remains as to why its initial search did not uncover the 28 pages of documents yielded by a subsequent

⁷⁶ In its initial search GSA mistakenly searched for emails of “Mary Gilbert” rather than the requested emails of Mary Gibert,” but corrected this error in its subsequent search. Lewis Decl. ¶ 14.

⁷⁷ CREW FOIA at 1 (emphasis added).

⁷⁸ Two of the six categories of records CREW seeks specify communications to or from Ms. Gibert and Mr. Horne, but the remainder of the request contains no such limitations.

search, all of which include at least the term “FBI.” GSA offers no explanation for why the documents its second search belatedly uncovered were not located by its first search, beyond noting its initial misspelling of Mary Gibert’s name. *See* Lewis Decl. ¶ 14. But this misspelling fails to account for why GSA’s initial search did not uncover, for example, the 13-page explanation for the cancellation of the FBI headquarters consolidation project issued on July 10, 2017, or the question and answer sheet regarding the project dated May 23, 2017, or the Hill briefing concerning the project. The terms “FBI” and “FBI Headquarters” figure prominently in each of these documents, yet inexplicably GSA failed to uncover them initially using those two search terms.

While GSA need not have used every term that could possibly yield results, it does bear the burden on summary judgment of explaining why it failed to use terms likely to capture additional responsive documents, a burden it fails to meet here. And while GSA may, in appropriate circumstances, limit its search to only electronically stored records, those circumstances are not present here where CREW so clearly sought all records, not only those stored electronically, and GSA has failed to support its claim that all potentially responsive paper records are available through a search of the agency’s electronically shared files. At this stage, GSA’s failure to come forth with sufficiently detailed and justified declarations is fatal to its motion for summary judgment.

B. Publicly available information casts further doubt on the adequacy of GSA’s search.

Publicly available information CREW has been able to gather about the processes the FBI and GSA went through in cancelling the FBI consolidation project also calls into serious question the adequacy of GSA’s search and its representations it has no additional responsive documents. The most potent evidence is found in the recently released GSA IG report, which

examined “GSA’s decision-making process for the revised FBI headquarters project plan”⁷⁹ – the very subject of CREW’s FOIA request – and notes the office “reviewed *over 50,000 GSA documents and emails* concerning the FBI headquarters consolidation project[.]”⁸⁰ Here, by contrast, GSA provided CREW only 28 pages of responsive documents, and failed to account for the more than 49,000 pages of documents the IG reviewed.

Also missing from GSA’s production are the requested documents concerning OMB’s role. The Office of Management and Budget has been part of the process since at least September 2015, when the *New York Times* reported that the FBI, GSA and OMB were “embroiled in a behind-the-scenes funding dispute” over the FBI relocation project.⁸¹ Further, the FBI’s Richard Haley stated in congressional testimony that the FBI would have met with “our branch personnel and GSA’s branch personnel *within OMB*[.]”⁸² CREW’s request specifically sought all communications between OMB and GSA concerning the procurement cancellation, yet GSA produced no responsive documents. This omission is all the more egregious given the central role funding plays in the relocation project, and the fact that the project implicated budget requests from both Presidents Obama and Trump that necessarily would have involved OMB.

Further, GSA issued a public statement on July 11, 2017, announcing the decision to cancel the procurement for the FBI headquarters consolidation project.⁸³ The release stated: “The cancellation of the project does not lessen the need for a new FBI headquarters. GSA and FBI

⁷⁹ GSA IG Rpt. at 1.

⁸⁰ *Id.* (emphasis added).

⁸¹ Meyer, *New York Times*, Sept. 22, 2015.

⁸² Aug. 2017 Transcript at 39 (emphasis added).

⁸³ GSA, GSA Releases Statement on FBI Headquarters, Press Release, July 11, 2017, available at <https://www.gsa.gov/node/87972>.

will continue to work together to address the space requirements of the FBI.”⁸⁴ Yet in response to CREW’s request GSA produced neither the statement nor any communications – both internally and with the FBI – concerning this statement or continuing efforts by the two agencies to address the FBI’s space needs.

Following this cancellation, the Senate Committee on Environment and Public Works held a hearing at which Michael Gelber, GSA’s public building service acting commissioner, testified that “[a]fter *internal and interagency deliberations*, GSA determined that moving forward without full funding would put the Government at risk for project cost escalations.”⁸⁵ Yet in response to CREW’s request GSA neither produced these deliberations nor accounted for them as withheld documents under a FOIA exemption.

The public record also contains multiple transcripts of congressional testimony by GSA officials at hearings concerning the FBI consolidation project and the decision to cancel that project. Those documents and any discussion concerning that testimony plainly fall within CREW’s request, yet they noticeably are missing from GSA’s document production.

Taken as a whole, the record reveals GSA conducted a patently incomplete and unreasonable search for responsive records, seemingly designed to ensure that only a small piece of the decision to cancel the long-planned FBI consolidation project would become public. Underscoring this conclusion is the determination of GSA’s inspector general that GSA Administrator Murphy’s April congressional testimony before the House Appropriations Committee concerning the FBI headquarters building was “incomplete and may have left the misleading impression that she had no discussions with the President or senior White House

⁸⁴ *Id.*

⁸⁵ Aug. 2017 Transcript at 20 (emphasis added).

officials in the decision-making process” about the FBI headquarters project.⁸⁶ So, too, GSA’s FOIA production here leaves the misleading impression GSA had no discussions with the President – now known to have become personally involved in the FBI headquarters project – and other White House officials.

III. GSA HAS IMPROPERLY INVOKED EXEMPTION 5 TO PROECT FROM PUBLIC DISCLOSURE NON-DELIBERATIVE FACTUAL INFORMATION.

A. The FOIA’s presumption of disclosure requires GSA to make a detailed and specific showing that each responsive agency document is properly exempt from disclosure.

The FOIA safeguards the right of American citizens to know “what their Government is up to.” *U.S. Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). “[D]isclosure, not secrecy, is the dominant legislative objective of the [FOIA].” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

The statute requires disclosure of agency records when requested by the public unless the records fall within one of nine exemptions. 5 U.S.C. §§ 552(b)(1)-(9). If requested information does not fit squarely into one of these enumerated categories, the FOIA requires federal agencies to disclose the information. *NLRB v. Robbins*, 437 U.S. at 221. The FOIA’s exemptions “have been consistently given a narrow compass,” and requested agency records that “do not fall within one of the exemptions are improperly withheld[.]” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (internal quotation marks omitted).

⁸⁶ GSA IG Report at 20.

To be entitled to summary judgment – the mechanism by which most disputes involving the propriety of agency withholdings are resolved – an agency must prove that “each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act’s inspection requirements.” *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal citation and quotation omitted). When claiming one of the FOIA’s exemptions, the agency bears the burden of providing a “‘relatively detailed justification’ for assertion of an exemption, and must demonstrate to a review court that records are *clearly* exempt.” *Birch v. U.S. Postal Serv.*, 803 F.2d 1206, 1209 (D.C. Cir. 1986) (emphasis added) (quoting *Mead Data Ctr., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

Agencies meet their burden of proving the legality of their withholdings through a *Vaughn* Index, which typically is “a system of itemizing and indexing that would correlate statements made in the [agency’s] refusal justification with the actual portions of the document[.]” *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). The D.C. Circuit has described the *Vaughn* requirements as providing “a specific, detailed explanation of why the exemption applies to the withheld materials,” *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1185 (D.C. Cir. 2011) (citations omitted), and “correlating those claims with the particular part of a withheld document to which they apply.” *King v. Dep’t of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987). This enables the trial court “to make a rational decision [about] whether the withheld material must be produced without actually viewing the documents themselves . . . [and] to produce a record that will render [its] decision capable of meaningful review on appeal.” *Id.* Further, while there is no prescribed format that an agency must follow in preparing a *Vaughn* Index, “[s]pecificity is the defining requirement of the *Vaughn* Index and affidavit[.]” *Id.*

B. GSA’s *Vaughn* Index fails to provide the requisite specificity and to justify its Exemption 5 withholdings.

Like the declaration that accompanies it, GSA’s *Vaughn* Index falls far short of these requirements. GSA has relied on the deliberative process privilege as the basis for its Exemption 5 withholdings. To invoke that exemption GSA must show the withheld information is both predecisional and deliberative. *See, e.g., Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). Predecisional material is “generated before the adoption of an agency policy.” *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Deliberative material “reflects the give-and-take of the consultative process” and “covers recommendations, draft documents, proposals, suggestion, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Factual material generally is not covered by the deliberative process privilege and must be segregated from deliberative material and produced. *See, e.g., EPA v. Mink*, 410 U.S. 73, 91 (1973). In determining whether contested material falls within the deliberative process privilege, courts look to the decision-making authority vested in the document’s author or issuer and whether that individual has legal decisional authority. *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184-85 (1975). Finally, deliberative material loses its protection from disclosure under the FOIA if the decisionmaker expressly adopts or incorporates it by reference. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

With respect to the Exemption 5 withholdings at issue here, Mr. Lewis offers two short phrases to describe the withheld material: “documents that reflect agency communications that were pre-decisional,” Lewis Decl. ¶ 16, and “documentation subject to the deliberative process

privilege.” *Id.* ¶ 19. These self-serving descriptions provide no basis from which the Court can determine whether GSA properly has withheld material protected by the deliberative process privilege. They offer no explanation of the role the withheld documents played in the decision-making process or the level of authority exercised by the documents’ authors and provide no evidence the withheld material is deliberative in nature, rather than factual, and was part of a predecisional process.

The two-page *Vaughn* Index fares no better. First, it divides the documents into two batches, but nowhere does it indicate which specific documents fall into which specific batch. The Index includes a column for pages, but it fails to correlate the page numbers with any specifically produced or withheld document. Instead it provides a vague description of the documents by category as either: (1) “Communications between GSA, the White House Office of Management and Budget (OMB) and the Federal Bureau of Investigation (FBI) related to the decision to cancel the FBI Headquarters Consolidation Plan,” or (2) “GSA’s interagency communications related to the decision to cancel the FBI Headquarters Consolidation Plan.” *Vaughn* Index at 1, 2. Although GSA made its second production to CREW in two batches, one can only guess whether those batches correspond to the batches listed in the *Vaughn* Index. This is a far cry from the itemized and indexed system the law requires that “correlate[s] statements made in the [agency’s] refusal justification with the actual portions of the document[.]” *Vaughn v. Rosen*, 484 at 827.

GSA’s *Vaughn* Index also purports to describe specific withheld document portions, but that description also is at such a level of generality as to provide little useful information.

Portions of some unidentified group are described as

Draft documents of communications and talking points for
GSA, OMB and FBI prior to the final determination and

talking points being decided upon as the rationale for the decision to cancel the FBI Headquarters Consolidation Plan

Vaughn Index at 1. Similarly, the Index describes the content of the second batch of documents withheld under Exemption 5 as

Information compiled for purposes of the agency's deliberative process prior to the final determination to cancel the FBI Headquarters Consolidation Plan.

Vaughn Index at 2. The agency letter accompanying the July 6, 2018 production provides no further detail, as it merely recites the fact that "GSA is withholding documents reflecting the agency's deliberative process[.]" Exhibit C to Lewis Decl. As with the Lewis Declaration, merely reciting the elements of the deliberative process privilege fails to provide the Court with a sufficient factual record from which to conclude GSA properly invoked Exemption 5.

GSA also has redacted information without fulfilling its corresponding statutory obligation to mark the document in question with the asserted exemption. *See* 5 U.S.C. § 552(b).⁸⁷ GSA made multiple redactions in the 13-page Findings and Determination document⁸⁸ but failed to insert any notation as to which exemption it was claiming.

Beyond the marking omissions, GSA's *Vaughn* Index appears to suggest these redactions contain material protected by the deliberative process privilege. The content of the document, however, belies this claim. On page one, GSA made three redactions, all of which appear to be

⁸⁷ Department of Justice guidance implementing this requirement provides that "[f]or most records the marking requirements will be readily met by 'blacking out' or otherwise physically marking through the protected information in the record *and then inserting a notation regarding the exemption being asserted for that particular deletion.*" *OIP Guidance: Segregating and Marking Documents for Release in Accordance With the OPEN Government Act*, Oct. 23, 2008, available at <https://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-segregating-and-marking-documents-release-accordance-open> (emphasis added).

⁸⁸ For the Court's convenience this document is separately attached as Exhibit E.

factual in nature as they consist of (1) the number of responses to the RFI GSA received; (2) the number of short-listed offerors GSA identified; and (3) the number of qualified Phase I Offerors. Exhibit E at 1.

Similarly, the redactions on page three appear to be (1) the amount of money for which the JEH was appraised in 2010, and (2) OMB's assumption of how much money "could potentially be expected as a JEH credit" in ascertaining "full funding" for the FBI Headquarters project. *Id.* at 3. Redactions on page five are of the same character – they consist of the amount of money for which the JEH was appraised in 2010 and 2016. *Id.* at 5. Likewise, redactions on page six include values offered for JEH in 2017 and initial proposal offers together with the amount of "an alternate credit figure" one offeror submitted to GSA. *Id.* at 6. The purely factual nature of these redactions defeats any claim they fall within the deliberative process privilege.

Other redactions, while marked, also consist of factual material not subject to withholding under Exemption 5. The one-page sheet entitled "FBI Headquarters Consolidation Procurement: Executive Questions & Responses," contains three redactions. The first appears to be the amount of reduction in the scope and cost of the new facility that would increase competition. *See* Exhibit D. The second is the number of development teams GSA employed, while the third is the number of teams GSA short-listed. *Id.* This numerical information is purely factual and therefore not subject to withholding under Exemption 5.

In sum, GSA has failed both procedurally and substantively to justify its Exemption 5 claims. Its *Vaughn* Index and agency declaration lack sufficient information that would permit the Court to determine that the withheld information is both predecisional and deliberative.

Accordingly, having failed to sustain its burden of proof, GSA should be directed to produce all information withheld under Exemption 5.⁸⁹

CONCLUSION

The background to this case strongly suggests that the FBI and GSA cancelled the FBI Relocation plan to accommodate the financial and business interests of President Trump, whose hotel is situated just down the street from the JEH and likely would experience a loss of business if it had to face competition from another hotel on the JEH site. The FOIA request at issue represents an effort by CREW to expose to the public the true rationale for this decision. GSA's woefully inadequate response not only fails to meet its obligations under the FOIA but also raises a question about the agency's good faith in meeting those obligations. For all the foregoing reasons, GSA's motion for summary judgement should be denied.

Respectfully submitted,

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⁸⁹ GSA also has asserted FOIA Exemption 6 to withhold what it describes as employee signatures and cell phone numbers. While the *Vaughn* Index for these withholdings suffers from the same flaws as it does for the Exemption 5 withholdings, CREW does not contest the application of Exemption 6 to this material.