

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

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

GENERAL SERVICES ADMINISTRATION,

Defendant.

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Civil Action No. 18-2071 (CKK)

**DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS,
TO DISMISS AND FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 12(c), 12(h)(3) and 56, Defendant, the General Services Administration (“Defendant” or “Agency”), hereby moves to dismiss as moot Plaintiff’s claims with respect to documents that, although not yet released when the Complaint was filed, have since been produced, such that those claims are moot. As to the documents or portions of documents that have been withheld by the Agency, Defendant seeks summary judgment, as there are no genuine issues of material fact in dispute, and Defendant is entitled to judgment at this time. In support of its motion, Defendant respectfully refers the Court to accompanying memorandum, declaration and *Vaughn*¹ Index.

Respectfully submitted,

JESSIE K. LIU, DC Bar #472845
United States Attorney

DANIEL F. VAN HORN, DC Bar #924092
Chief, Civil Division

By: _____/s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

¹ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

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

CITIZENS FOR RESPONSIBILITY AND)	
ETHICS IN WASHINGTON,)	
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Plaintiff,)	
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v.)	Civil Action No. 18-2071 (CKK)
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GENERAL SERVICES ADMINISTRATION,)	
)	
Defendant.)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS,
TO DISMISS AND FOR SUMMARY JUDGMENT**

The General Services Administration (“Defendant” or “Agency”) has made releases of materials after the filing of the complaint in this action which renders the request for those materials moot. With respect to the records withheld in full or in part, Defendant provides herewith a declaration and index of the withholdings demonstrating that, where information was withheld, appropriate redactions have been applied where possible, such that the Agency has fulfilled its obligations under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Where information has been withheld, the Agency has relied on the exemptions found in 5 U.S.C. § 552(b)(5), (6), (7)(C), and 7(E).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On or about July 30, 2018, Plaintiff submitted a FOIA request to Defendant in which Plaintiff sought “copies of all communications from January 20, 2017 to the present between GSA and the White House concerning the renovation of the FBI headquarters.” *See* Complaint, ¶ 13; Exhibit 1 (July 30, 2018 FOIA Request); Declaration of Travis Lewis (“Lewis Decl.”), ¶ 4. The Agency conducted searches for electronic and hard copy documents, locating 52 pages of

records responsive to the request. Declaration of Travis Lewis (“Lewis Decl.”), ¶¶ 4-7, 10, 14. Before completing those searches, the parties had engaged in communications to identify acceptable search terms, which were then employed by the Agency in its search. Exhibit 2 (October 22-25, 2018 Email exchange); Lewis Decl., ¶ 5.

The Agency subsequently processed those 52 pages and ultimately produced 25 pages to Plaintiff with certain redactions (reflected on the accompanying *Vaughn* Index). Lewis Decl., ¶¶ 8-13. The remaining 27 pages were withheld in their entirety. As reflected herein, where information was withheld, it was pursuant to one or more Exemptions allowed under the FOIA, specifically, 5 U.S.C. § 552(b)(5), (6), (7)(C) (in conjunction with the deliberative process privilege/attorney work-product doctrine/the Presidential Communications privilege), and 7(E).

II. LEGAL STANDARD

Courts generally and appropriately resolve FOIA cases on motions for summary judgment. *Customs & Int’l Trade Newsletter v. U.S. Customs & Border Prot.*, 588 F. Supp. 2d 51, 54 (D.D.C. 2008); *Light v. U.S. Dep’t of Justice*, 968 F. Supp. 2d 11, 22 (D.D.C. 2013); *see also Wheeler v. U.S. Dep’t of Justice*, 403 F. Supp. 2d 1, 5 (D.D.C. 2005) (“Summary judgment is the routine vehicle by which most FOIA actions are resolved.”). Motions for summary judgment or partial summary judgment should be granted when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is any fact that “might affect the outcome of the suit.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

“Most FOIA cases are appropriately resolved on motions for summary judgment.” *Gilliam v. DOJ*, 128 F. Supp. 3d 134, 138 (D.D.C. 2015) (citing *Brayton v. Office of U.S. Trade*

Representative, 641 F.3d 521, 527 (D.C. Cir. 2011)). Summary judgment is warranted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “The defendant in a FOIA case must show that its search for responsive records was adequate, that any exemptions claimed actually apply, and that any reasonably segregable non-exempt parts of records have been disclosed after redaction of exempt information.” *Light v. DOJ*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013).

A defendant agency is entitled to summary judgment in a FOIA case when it demonstrates that no material facts are in dispute, that it has conducted an adequate search for responsive records, and that each responsive record that it has located either has been produced to the plaintiffs or is exempt from disclosure. *See, e.g., Weisberg v. Dep’t of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980); *see also Landmark Legal Found. v. U.S. Envtl. Prot. Agency*, 272 F. Supp. 2d 59 (D.D.C. 2003) (“[A] lack of timeliness does not preclude summary judgment for an agency in a FOIA case. The only question for summary judgment is whether the agency finally conducted a reasonable search, and whether its withholdings are justified.”). A defendant may rely on affidavits or declarations to meet its burden. *Hayden v. Nat’l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979). As long as the declarations contain reasonably detailed and non-conclusory information, a court may grant summary judgment. *See Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (“Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible’”). *See also Judicial Watch, Inc. v. U.S. Dep’t of Def.*, 715 F.3d 937, 940-41 (D.C. Cir. 2013) (“[s]o long as [the declaration] ‘describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency’s bad faith, . . .

summary judgment is warranted on the basis of the affidavit alone.”) (*quoting ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)).

An agency has the burden of showing that it properly invoked any FOIA exemptions when it decides to withhold information. *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352 (1979). And, an agency can prove that it had an adequate factual basis for invoking FOIA exemptions through one or more means, including affidavits, declarations, a *Vaughn* index, or a combination of those methods. *Nat’l Sec. Counselors v. CIA*, 206 F. Supp. 3d 241, 249 (D.D.C. 2016); *see also Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973).

In support of this motion, Defendant submits Declaration of Travis Lewis and its accompanying *Vaughn* Index. These materials establish Defendant’s justification for redacting or withholding information pursuant to 5 U.S.C. § 552(b).

III. ARGUMENT

A. Adequacy of the Search for Responsive Records

An agency is entitled to summary judgment in a FOIA case with respect to the adequacy of its search if the agency shows “that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (citations omitted), *superseded by statute on other grounds by* Electronic FOIA Amendments 1996, Pub. L. No. 104-231, 110 Stat. 3048. “[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.” *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (citation omitted). And “[a]n agency may establish the adequacy of its search by submitting reasonably detailed, nonconclusory affidavits describing its efforts.” *Baker & Hostetler LLP v. Dep’t of*

Commerce, 473 F.3d 312, 318 (D.C. Cir. 2006). “Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by ‘purely speculative claims about the existence and discoverability of other documents.’” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citation omitted).

Here, Defendant conferred with counsel for Plaintiff regarding appropriate search terms, employed electronic search methods as well as methods designed to ascertain whether paper copies of responsive materials existed, and the search resulted in the identification and review of 52 pages of responsive materials. *See* Exhibit 1 at 2; Exhibit 2 at 1-2; Lewis Decl., ¶¶ 4-7, 10.

Applying the above principles, the Agency is entitled to summary judgment with respect to the adequacy of the searches.

B. The Agency Properly Withheld Records Under Exemption 5.

Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption ensures that members of the public cannot obtain through FOIA records that would be “normally privileged in the civil discovery context.” *Martin v. Office of Special Counsel, Merit Systems Protection Bd.*, 819 F.2d 1181, 1185 (D.C. Cir. 1987); *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Specifically, Exemption 5 incorporates three executive privileges that are relevant here, the deliberative process privilege, the attorney work-product doctrine, and the presidential communications privilege. *Vaughn* Index at 4-7.

For a document to qualify for Exemption 5: “its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that

would govern litigation against the agency that holds it.” *U.S. Dep’t of Interior v. Klamath Water Users Protective Ass’n* (“*Klamath Water*”), 532 U.S. 1, 8, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001); *see also Nat’l Inst. of Military Justice v. Dep’t of Defense*, 512 F.3d 677, 680, 680 n. 4 (D.C.Cir.2008) (noting records withheld under Exemption 5 must be inter- or intra-agency records “ ‘unavailable by law’ under one of the established civil discovery privileges.”).

Each document for which the Agency has claimed Exemption 5 easily meets the definition of source must be a government agency, given that the documents consist of:

1. A draft copy of GSA’s responses to Questions for the Record from the U.S. Senate’s Committee on Environment and Public Works regarding the FBI Headquarters Project sent between White House Counsel and GSA’s Office of General Counsel (in conjunction with the Deliberative Process Privilege);
2. A draft copy of GSA’s Office of the Inspector General’s (IG) Draft Review of GSA’s Revised Plan for the FBI Headquarters Consolidation Project sent between White House Counsel and GSA’s Office of General Counsel (in conjunction with the Deliberative Process Privilege);
3. A draft copy of correspondence from GSA’s General Counsel to GSA IG’s Counsel to the Inspector General concerning a records request for the FBI Headquarters Project (in conjunction with the Deliberative Process Privilege and Attorney Work-Product Doctrine); and
4. A White House Briefing Itinerary regarding a discussion of the future of the FBI headquarters on January 24, 2018 (in conjunction with the Presidential Communications Privilege).

Vaughn Index at 4-7.

The Deliberative Process Privilege

The deliberative process privilege protects “materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citation omitted). “The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a

potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.” *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001) (citations omitted). The privilege also “protects the public from the confusion that would result from premature exposure to discussions occurring before” a final decision has been made and ensures “the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds.” *Russell v. Dep’t of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (alterations and citation omitted).

To come within the scope of the deliberative process privilege, a document must be both predecisional and deliberative. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional if “it was generated before the adoption of an agency policy,” and it is deliberative if “it reflects the give-and-take of the consultative process.” *Id.* “To establish that a document is predecisional, the agency need not point to an agency final decision, but merely establish what deliberative process is involved, and the role that the documents at issue played in that process.” *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1223 (D.C. Cir. 1989)). Accordingly, “even if an internal discussion does not lead to the adoption of a specific government policy, its protection under Exemption 5 is not foreclosed as long as the document was generated as part of a definable decision-making process.” *Gold Anti-Tr. Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 135–36 (D.D.C. 2011) (citation omitted). When evaluating deliberative process claims, courts “must give considerable deference to the agency’s explanation of its decisional process, due to the agency’s expertise in

determining what confidentiality is needed to prevent injury to the quality of agency decisions, while the decisionmaking process is in progress.” *Pfeiffer v. CIA*, 721 F. Supp. 337, 340 (D.D.C. 1989) (citation omitted).

Here, the Agency has applied the Deliberative Process Privilege to protect three draft documents (Document Numbers 1-3, above) which were all prepared to aid in the decision-making process by the Agency in assessing how to proceed regarding the FBI Headquarters project and related inquiries and requests for records. *Vaughn* Index at 4-6. In each instance, the Agency has concluded that disclosure would harm the free flow of information within the Agency as it assesses how to respond. *Id.* Thus, Exemption 5 in conjunction with the deliberative process privilege was properly invoked to withhold the three documents (Document Nos. 1-3, above) on pages 4 through 6 of the *Vaughn* Index.

The Work-Product Doctrine

[For purposes of Exemption 5] privileges include the privilege for attorney work-product and what is sometimes called the “deliberative process” privilege. Work product protects “mental processes of the attorney,” *United States v. Nobles*, 422 U.S. 225, 238 (1975), while deliberative process covers “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,” *Sears, Roebuck & Co.*, 421 U.S., at 150 (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves *9 if each remark is a potential item of discovery and front page news, and its object is to enhance “the quality of agency decisions,” *id.*, at 151, by protecting open and frank discussion among those who make them within the Government, *see EPA v. Mink*, 410 U.S. 73, 86-87 (1973); see also [*United States v.*] *Weber Aircraft Corp.*, [465 U.S. 792, 802 (1984).]

Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8-9 (2001).

Here, the Agency has properly relied on the Attorney work-product doctrine to withhold a single document (A draft copy of correspondence from GSA’s General Counsel to

GSA IG's Counsel to the Inspector General concerning a records request for the FBI Headquarters Project, Document – Document No. 3, above). *Vaughn* Index at 6.

The Presidential Communications Privilege

The presidential communications privilege “preserves the President’s ability to obtain candid and informed opinions from his advisors and to make decisions confidentially.” *Loving v. Dep’t of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008). *See Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112-13 (D.C. Cir. 2004) (describing the privilege as “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution” (citation omitted)). The privilege protects “‘communications directly involving and documents actually viewed by the President,’ as well as documents ‘solicited and received’ by the President or his ‘immediate White House advisers [with] . . . broad and significant responsibility for investigating and formulating the advice to be given the President.’” *Loving*, 550 F.3d at 37 (alterations in original) (quoting *Judicial Watch*, 365 F.3d at 1114). The privilege thus protects in its entirety “the President’s personal decision-making process,” including the gathering of information by White House staff that is relevant to that process. *See Judicial Watch*, 365 F.3d at 1118; *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 320 F. Supp. 3d 110, 116-18 (D.D.C. 2018). Moreover, unlike the deliberative process privilege, which protects the deliberative portions of predecisional documents, “the presidential communications privilege ‘applies to documents in their entirety, and covers final and postdecisional materials as well as pre-deliberative ones.’” *Ctr. for Effective Gov’t v. Dep’t of State*, 7 F. Supp. 3d 16, 22 (D.D.C. 2013) (citing *In re Sealed Case*, 121 F.3d at 745).

Here the Agency properly applied the Presidential Communications Privilege to a single page. Lewis Decl., ¶ 11, *Vaughn* Index at 7 (Document No. 4, above). This document

was a White House Briefing Intinerary regarding a discussion of the future of the FBI headquarters. *Id.* The document constituted a communication prepared by presidential advisors in the course of preparing advice for the President regarding the future of the FBI Headquarters project. *Id.*

Thus, this page was properly withheld pursuant to Exemption 5 of the FOIA and the Presidential Communications privilege. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 320 F. Supp. 3d 116-18; Lewis Decl., ¶ 11, *Vaughn* Index at 7.

C. The Agency Properly Redacted Information Under Exemption 6.

FOIA Exemption 6 exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). There are two steps to determining whether Exemption 6 was properly applied. First, as a threshold matter, the records must be determined to be personnel, medical, or similar files. *Reed v. NLRB*, 927 F.2d 1249, 1250-51 (D.C. Cir. 1991). The Supreme Court has directed lower courts to construe “similar files” broadly to apply to any “Government records on an individual which can be identified as applying to that individual.” *Id.* at 1251 (*citing United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 601-02 (1982)). Second, a court must weigh the relevant privacy interests in nondisclosure and the public interests in disclosure and determine “whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy.” *Reed*, 927 F.2d at 1252 (*citing National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)). Based on guidance from the Supreme Court, the D.C. Circuit has recognized that only “official information that sheds light on an agency’s performance of its statutory duties” merits disclosure under FOIA, while “disclosure of information about private citizens that is accumulated in various

governmental files” would “reveal[] little or nothing about an agency’s own conduct.” *Reed*, 927 F.2d at 1251 (*quoting United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

As explained below and in the *Vaughn* Index, the information withheld under Exemption 6 is contained in “personnel, medical, or similar files,” and the disclosure of the withheld information would constitute a clearly unwarranted invasion of privacy. Specifically, within pages 1-10, 12, 14-23 of the responsive emails and a 2-page attachment to one email, the Agency has redacted White House employee addresses, the name and contact information for law enforcement personnel within the Agency’s Office of the Inspector General and federal employees’ cellular telephone numbers. *Vaughn* Index at 1. These were government emails maintained by the agency for purposes of official communications. Moreover, the Agency reasonably determined that the information would not shed light on agency activities (given the release of the other information) and that disclosure was not warranted of the information, as the privacy interests of those involved outweighed any interest to the public in the contact information and law enforcement officer names. *See Vaughn* Index at 1. Thus, the Agency properly applied Exemption 6.

D. The Agency Properly Redacted Information Under Exemption 7(C).

Exemption 7(C) allows the government to withhold “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).

The Exemption 7(C) analysis is similar to the Exemption 6 analysis discussed above. *Reed*, 927 F.2d at 1251. The first step is to determine whether the information was compiled for

law enforcement purposes. *Barouch v. United States DOJ*, 962 F. Supp. 2d 30, 59 (D.D.C. 2013) (citing *Rural Hous. Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 80 (D.C. Cir. 1974)). Then, the Court must determine whether a privacy interest exists and then balance the privacy interest against the public interest in disclosure. *Barouch*, 962 F. Supp. 2d at 59. “As a general rule, third-party identifying information contained in [law enforcement] records is ‘categorically exempt’ from disclosure.” *Id.* (quoting *Lazaridis v. U.S. Dep't of State*, 934 F. Supp. 2d 21, 38 (D.D.C. 2013)). If a privacy interest is determined to exist, the FOIA requester must “(1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.” *Boyd v. Crim. Div. of the United States DOJ*, 475 F.3d 381, 387 (D.C. Cir. 2007), (internal quotations omitted) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 156, 172 (2004)); *Barouch*, 962 F. Supp. 2d at 60.

The information withheld under Exemption 7(C) was law enforcement related. *See Vaughn* Index at 3. Moreover, the name and identifying information of the Law Enforcement personnel at issue was properly deemed to provide no insight to the public such that any public interest could not outweigh the privacy interest in not being associated with the investigation at hand. *Vaughn* Index at 2. Thus, the government properly withheld the redacted information pursuant to Exemption 7(C).¹

E. The Agency Properly Redacted Information Under Exemption 7(E).

Exemption 7(E) of the FOIA protects all information compiled for law enforcement purposes when its release “would disclose techniques and procedures for law enforcement

¹ Defendant asks that, if the Court does not conclude that Exemption 7(C) applies to these materials, that the Court assess whether Exemption 6 would, nevertheless apply to the document. Each of the exemptions involve similar balancing, and the protection of the third-party's information would be appropriate.

investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). This Court “sets a relatively low bar for the agency to justify withholding” information under Exemption 7(E).” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). The exemption allows for withholding information in the face of “not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.” *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009); see *Public Employees for Environmental Responsibility v. U.S. Section, Int’l Boundary & Water Comm’n*, 740 F.3d 195, 204-05 (D.C. Cir. 2014).

The Agency has employed Exemption 7(E) to a single page of responsive material constituting portions of the communications between an Assistant Special Agent within GSA’s Office of the Inspector General (“IG”) and the Special Assistant to the GSA Administrator regarding the basis of the IG’s request to interview the Administrator. Vaughn Index at 3. The redacted material reflects a specific GSA IG investigative goal as part of its technique in conducting a law enforcement investigation regarding an ongoing investigation within the GSA IG’s office. Defendant submits that the information is properly withheld under 5 U.S.C. § 552(b)(7)(E). Lewis Decl., ¶ 11, *Vaughn* Index.

F. The Agency Processed and Released All Reasonably Segregable Information

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b)(9). But an agency need not disclose records in which the nonexempt information remaining is meaningless. *See Nat’l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005). “Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). And a court “may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated.” *Juarez v. DOJ*, 518 F.3d 54, 61 (D.C. Cir. 2008). Here, the agency has properly conducted a careful, line-by-line review of each document and withheld information only after it concluded that there was no reasonably segregable non exempt information. *See* Lewis Decl., ¶¶ 11-13. There are thus no facts rebutting the presumption that the agency complied with its segregability obligations, and the agency is entitled to summary judgment on this issue.

IV. CONCLUSION

For all the foregoing reasons, Defendant respectfully requests that this Court grant this motion.

Respectfully submitted,

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

CITIZENS FOR RESPONSIBILITY AND)	
ETHICS IN WASHINGTON,)	
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Plaintiff,)	
)	
v.)	Civil Action No. 18-2071 (CKK)
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GENERAL SERVICES ADMINISTRATION,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Civil Rule 7(h), Defendant submits this statement of material facts as to which there is no genuine issue.

1. On or about July 30, 2018, Plaintiff submitted a FOIA request (reproduced as Exhibit 1) to Defendant in which Plaintiff sought “copies of all communications from January 20, 2017 to the present between GSA [the General Services Administration] and the White House concerning the renovation of the FBI headquarters.” *See* Complaint, ¶ 13; Exhibit 1 (July 30, 2018 FOIA Request); Declaration of Travis Lewis (“Lewis Decl.”), ¶ 4.

GSA’S SEARCH AND RESPONSE TO PLAINTIFF’S FOIA REQUEST

2. The Agency conducted searches for electronic and hard copy documents, locating 52 pages of records responsive to the request. Declaration of Travis Lewis (“Lewis Decl.”), ¶¶ 4-7, 10-11, 14, and accompanying index (“*Vaughn* Index”).

3. Before completing those searches, the parties had engaged in communications to identify acceptable search terms, which were then employed by the Agency in its search. Exhibit 2 (October 22-25, 2018 Email exchange); Lewis Decl., ¶ 5.

4. GSA searched electronically for responsive records using the following search parameters:

Date range: January 20, 2017 to July 30, 2018

Custodians: emails between any GSA email address and any White House/EOP email address

Search terms:

headquarters

HQ

demoli!

renov!

rebuild

demo! W/3 rebuild [**explanation:** looking for all variations of demo! within three words of rebuild]

“demolish rebuild”

remodel!

“construction project”

“new construction”

President W/10 order! OR direct! OR instruct! OR decide! OR want! [**explanation:** looking for all variations of these words within 10 words of President]

POTUS W/10 order! OR direct! OR instruct! OR decide! OR want! [**explanation:** looking for all variations of these words within 10 words of POTUS]

operating lease

leaseback

PA Ave!

Pennsylvania Avenue.

Lewis Decl., ¶¶ 5-6.

5. Thus, upon becoming aware of Plaintiff’s proposed search terms, Travis Lewis tasked GSA’s Office of the Chief Information Officer (“OCIO”) to conduct a search for responsive records using terms recommended by Plaintiff. Exhibit 2; Lewis Decl., ¶¶ 5-6.

6. The 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 any potentially responsive documents. Lewis Decl., ¶ 6.

7. The OCIO searched all agency employees' emails, calendar logs and shared drive files for responsive electronic records via the search parameters requested by the FOIA requester. *Id.*

8. Beyond the search for electronic records, GSA also ensured that there were no paper records in the agency's possession that were responsive to Plaintiff's FOIA request. Lewis Decl., ¶ 10.

9. Specifically, each GSA employee that had responsive records per the OCIO search query using the terms provided by Plaintiff has confirmed that they do not have any paper records that pertain to or are responsive to Plaintiff's FOIA request. Lewis Decl., ¶ 10.

10. GSA initially withheld all of the responsive documents, but later produced 25 pages from the emails and an attachment; most of these documents contained redactions, which are described in greater detail, but two pages (pages 11 and 13) were produced without redactions. Lewis Decl., ¶¶ 8-9 and *Vaughn* Index at 1.

THE FOIA EXEMPTIONS

11. The documents for which the Agency has claimed Exemption 5 and withheld in full consist of:

- (1) A draft copy of GSA's responses to Questions for the Record from the U.S. Senate's Committee on Environment and Public Works regarding the FBI Headquarters Project sent between White House Counsel and GSA's Office of General Counsel (in conjunction with the Deliberative Process Privilege);
- (2) A draft copy of GSA's Office of the Inspector General's (IG) Draft Review of GSA's Revised Plan for the FBI Headquarters Consolidation Project sent between White House Counsel and GSA's Office of General Counsel (in conjunction with the Deliberative Process Privilege);
- (3) A draft copy of correspondence from GSA's General Counsel to GSA IG's Counsel to the Inspector General concerning a records request for the FBI

Headquarters Project (in conjunction with the Deliberative Process Privilege and Attorney Work-Product Doctrine); and

- (4) A White House Briefing Itinerary regarding a discussion of the future of the FBI headquarters on January 24, 2018 (in conjunction with the Presidential Communications Privilege).

Vaughn Index at 4-7.

12. The first three documents which the agency withheld in full (described above in paragraph 11 (1) to 11(3)) were drafts of documents, were predecisional (in that they each preceded a decision being contemplated by the government); they were all prepared to aid in the decision-making process by the Agency in assessing how to proceed regarding the FBI Headquarters project and related inquiries and requests for records. *Vaughn* Index at 4-6.

13. In each instance where the Agency was assessing whether to disclose the three documents (described above in paragraph 11(1) to 11(3)), the Agency has concluded that disclosure would harm the free flow of information within the Agency as it assesses how to respond. *Vaughn* Index at 4-6.

14. The Agency has also relied on the Attorney work-product doctrine to withhold a single document (described above in paragraph 11(3)), a draft copy of correspondence from GSA's General Counsel to GSA IG's Counsel to the Inspector General concerning a records request for the FBI Headquarters Project. *Vaughn* Index at 6.

15. The document described above in paragraph 11(3) was withheld because it is a draft copy of the correspondence that GSA's General Counsel wrote on behalf of the GSA Administrator to the IG's office in anticipation of potential litigation; it represents the GSA Attorney-work product and is thus exempt from release accordingly, and the content of this draft document was used by GSA to engage in both interagency and intragency discussions about matters of policy and agency action.

16. Release of the document described above in paragraph 11(3) would have a chilling effect on GSA's ability to protect attorney-work product and its ability to have agency employees engage in discussions about matters of policy and agency action without concern over disclosure of any proposed agency actions prior to its occurrence. *Vaughn* Index at 6.

17. With respect to the Document described in paragraph 11(4), the Agency withheld the document because is a White House Briefing Itinerary regarding a discussion of the future of the FBI headquarters; and it constitutes a communication prepared by presidential advisers in the course of preparing advice for the President regarding the future of the FBI Headquarters project. *Vaughn* Index at 7.

18. Where the Agency withheld information under 5 U.S.C. § 552(b)(6) from the email communications described on page 1 of the *Vaughn* Index, those materials consisted of White House employee email addresses, the name & contact information for law enforcement personnel within GSA's Office of the Inspector General and federal employees' cellular telephone numbers. *Vaughn* Index at 1.

19. In making the determination to withhold the information based on 5 U.S.C. § 552(b)(6) from the email communications described on page 1 of the *Vaughn* Index, GSA determined that any public interest in the release of the White House employee's email address was not outweighed by the privacy interest in nondisclosure of the actual email address. *Vaughn* Index at 1.

20. In making the determination to withhold the information based on 5 U.S.C. § 552(b)(6) from the email communications described on page 1 of the *Vaughn* Index, GSA considered that it has released the name of the White House employee, so the public is aware of the employee's identity, yet releasing his actual White House email address does not

provide the public with any further insight into the nature of his communications with GSA; thus any public interest in the release of this email address is not outweighed by the privacy interest in the non-release of the email address of the associate counsel to the President of the United States. *Vaughn* Index at 1.

21. In making the determination to withhold the information based on 5 U.S.C. § 552(b)(6) from the email communications described on page 1 of the *Vaughn* Index, GSA redacted the federal employees' cellular phone number because it determined that there is no public interest in the dissemination of that information, given that the employees' names and email addresses have been provided. *Vaughn* Index at 1.

22. In making the determination to withhold the information based on 5 U.S.C. § 552(b)(6) from the email communications described on page 1 of the *Vaughn* Index, GSA redacted the name & contact information for law enforcement personnel within GSA's Office of the Inspector General, as the mention of the individual's name in the law enforcement file it is a part of carries a stigmatizing connotation given the subject matter of the investigation. *Vaughn* Index at 1.

23. In making the determination to withhold the information based on 5 U.S.C. § 552(b)(7)(C) from the email communication described on page 2 of the *Vaughn* Index, GSA removed only the name and contact information of an Assistant Special Agent within GSA's IG office that is part of a law enforcement record; GSA did so because it determined that any public interest in the release of the identifying information for the law enforcement personnel was not outweighed by the privacy interest in its nondisclosure of his information, as this information is from a law enforcement file in an ongoing investigation in the GSA IG's office. *Vaughn* Index at 2.

24. In making the determination to withhold the information based on 5 U.S.C. § 552(b)(7)(E) from the email communication described on page 3 of the *Vaughn* Index, GSA removed only the portions of the communications between an Assistant Special Agent within GSA's IG office and the Special Assistant to the GSA Administrator regarding the basis of the IG's request to interview the Administrator; GSA did so because the information reflects a specific GSA IG investigative goal as part of its technique in conducting a law enforcement investigation regarding an ongoing investigation within the GSA IG's office, and if this information was made publicly available, this would likely cause a current or future subject of an IG investigation to undertake certain actions in order to circumvent the law. *Vaughn* Index at 3.

SEGREGABILITY

25. In assessing whether portions of documents should be released, GSA was cognizant that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of portions which are exempt." Lewis Decl., ¶ 12.

26. GSA reviewed each record, line-by-line, to identify information exempt from disclosure, resulting in the production of several pages of partially-released materials from which only non-exempt information was withheld from disclosure. Lewis Decl., ¶ 13.

27. As a result of the searches and production using the line-by-line analysis, GSA has produced to Plaintiff all responsive nonexempt records and portions of records that were located by the Agency. Lewis Decl., ¶¶ 13-14.

Respectfully submitted,

JESSIE K. LIU, DC Bar #472845
United States Attorney

DANIEL F. VAN HORN, DC Bar #924092
Chief, Civil Division

By: _____/s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney
555 4th Street, N.W.
Washington, DC 20530
(202) 252-2536
mark.nebeker@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendant's Motion For Judgment On The Pleadings, To Dismiss And For Summary Judgment, supporting memorandum, statement of material facts, exhibits, declaration and a proposed order has been made through the Court's electronic transmission facilities on this 28th day of March, 2019.

_____/s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney
555 4th Street, N.W.
Washington, DC 20530
(202) 252-2536
mark.nebeker@usdoj.gov

CREW | citizens for responsibility and ethics in washington

455 Massachusetts Ave. NW
Washington, D.C. 20001
Phone: 202-408-5565
Fax: 202-588-5020

FACSIMILE TRANSMITTAL SHEET

TO:

FOIA Officer

COMPANY:

General Services Administration

RECIPIENT'S FAX NUMBER:

202-501-2727

RECIPIENT'S PHONE NUMBER:

FROM:

Anne L. Weismann

DATE:

JULY 30, 2018

PAGE 1 OF 4

RE:

Please see enclosed FOIA request

NOTES/COMMENTS:

Pages transmitted are privileged and confidential.



CREW

**citizens for responsibility
and ethics in washington**

July 30, 2018

BY FACSIMILE: (202) 501-2727

U.S. General Services Administration
FOIA Requester Service Center (H1F)
1800 F Street, N.W., Room 7308
Washington, D.C. 20405-0001

Re: Freedom of Information Act Request

Dear FOIA Officer:

Citizens for Responsibility and Ethics in Washington ("CREW") makes this request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and General Services Administration ("GSA") regulations.

Specifically, CREW requests copies of all communications from January 20, 2017 to the present between GSA and the White House concerning the renovation of the FBI headquarters. This request includes, but is not limited to, records from GSA Public Buildings Service, GSA Office of the Administrator, and the National Capital Region.

CREW makes this request in light of recent reporting that President Donald Trump is "obsessed" with renovating the FBI headquarters, wants to be personally involved with the details of any renovation, and has met with FBI officials and GSA to discuss the renovation.¹

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly

¹ Alex Lockie, Trump Is Reportedly 'Obsessed' With Redoing FBI HQ and Treating it Like a Trump Tower Project, *Business Insider*, July 2018, available at <https://www.businessinsider.com/trump-obsessed-with-remodeling-fbi-hq-like-trump-tower-2018-7>; Jonathan Swan, Scoop: Trump's Obsession With the 'Terrible' FBI Building, *Axios*, July 29, 2018, available at <https://www.axios.com/donald-trump-obsession-fbi-building-headquarters-65d36fb9-b1a2-42ca-8cbd-3dbbe59de907.html>; Margaret Hartmann, Why Trump Is 'Obsessed' With Revamping the FBI Building: 5 Theories, *New York Magazine*, July 30, 2018, available at <http://nymag.com/daily/intelligencer/2018/07/trumps-fbi-building-revamp-obsession-5-theories.html>.

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July 30, 2018
Page 2

exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. See *Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A) and GSA regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. See 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. See, e.g., *McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

The sudden and unexpected decision of GSA to cancel what it termed the "new FBI headquarters consolidation project,"² announced on July 11, 2017, generated criticism and controversy. Members of Congress described the cancellation as "putt[ing] America's national security at risk," while local officials commented on the significant amount of "time and energy wasted."³ The latest revelations about President Trump's personal involvement and desire to oversee the details of any renovation⁴ raise questions about what is behind the intensity of his interest, especially given the concerns of GSA "that the building can't be rehabilitated particularly given the security requirements[.]"⁵ The requested records will help answer these questions and assist the public in evaluating the merits of the any renovation, which is expected to cost significantly more than the costs of relocating the FBI to a more secure location where virtually the entire FBI staff could be housed.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request

² GSA Statement on FBI Headquarters, July 11, 2017

³ 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.

⁴ See n. 1, *supra*.

⁵ Lockie, *Business Insider*, July 2018.

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July 30, 2018
Page 3

to the public through its website, www.citizensforethics.org. The release of information obtained through this request is not in CREW's financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. See *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a "representative of the news media" and broadly interpreting the term to include "any person or organization which regularly publishes or disseminates information to the public").

CREW routinely and systematically disseminates information to the public in several ways. CREW's website receives tens of thousands of page views every month. The website includes a blog that reports on and analyzes newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts documents it receives under the FOIA at its website.

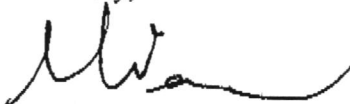
Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

Conclusion

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 408-5565 or aweismann@citizensforethics.org. Also, if CREW's request for a fee waiver is not granted in full, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the requested records to me either at aweismann@citizensforethics.org or at Anne L. Weismann, Citizens for Responsibility and Ethics in Washington, 455 Massachusetts Ave., N.W., Washington, D.C. 20001. Thank you for your assistance in this matter.

Sincerely,



Anne L. Weismann
Chief FOIA Counsel

Nebeker, Mark (USADC)

From: Duane Smith <duane.smith@gsa.gov>
Sent: Thursday, October 25, 2018 10:24 AM
To: Nikhel Sus
Cc: Nebeker, Mark (USADC)
Subject: Re: Activity in Case 1:18-cv-02071-CKK CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON v. GENERAL SERVICES ADMINISTRATION Order

Hey Nik-

Yes, we are running a subsequent search with your proposed search terms. I'll get back to you as soon as practicable on the results of the search.

On Thu, Oct 25, 2018 at 10:15 AM, Nikhel Sus <nsus@citizensforethics.org> wrote:
Duane and Mark,

Any update on whether GSA can implement our search terms? Happy to discuss.

Thanks,
Nik

On Mon, Oct 22, 2018 at 11:33 AM, Nikhel Sus <nsus@citizensforethics.org> wrote:
Duane and Mark,

Thanks for speaking with me earlier. We propose the following search terms/parameters for this FOIA request:

- **Date range:** January 20, 2017 to July 30, 2018
- **Custodians:** emails between any GSA email address and any White House/EOP email address
- **Search terms:**
 - headquarters
 - HQ
 - demoli!
 - renov!
 - rebuild
 - demo! W/3 rebuild [**explanation:** looking for all variations of demo! within three words of rebuild]
 - "demolish rebuild"
 - remodel!
 - "construction project"
 - "new construction"
 - President W/10 order! OR direct! OR instruct! OR decide! OR want! [**explanation:** looking for all variations of these words within 10 words of President]
 - POTUS W/10 order! OR direct! OR instruct! OR decide! OR want! [**explanation:** looking for all variations of these words within 10 words of POTUS]
 - operating lease
 - leaseback
 - PA Ave!



o Pennsylvania Avenue

We developed these terms based on the publicly-released docs I mentioned below concerning the FBI HQ project. Please let me know if you would like to discuss.

Thanks,
Nik

On Thu, Oct 18, 2018 at 3:27 PM, Nikhel Sus <nsus@citizensforethics.org> wrote:
Hi Mark,

Thanks for speaking with me earlier. To recap, our July 30, 2018 FOIA request seeks "all communications from January 20, 2017 to the present between GSA and the White House concerning the renovation of the FBI headquarters." On our call this afternoon, the GSA rep said that the agency's search uncovered no responsive records. Today, however, HOCR released the following documents: <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Emails%20on%20FBI%20HQ%20Decision.pdf>. This release includes emails between GSA and White House officials that are responsive to our request (e.g. 002281, a Jan. 25, 2018 email between Joseph Lai and Brennan Hart discussing "a path forward for the new FBI Headquarters announcement"). This indicates GSA does in fact have responsive records.

As discussed, our plan was for GSA to review these docs and for us to discuss next steps on Monday at 10:00am. Look forward to discussing more then.

Best,
Nik

On Thu, Oct 18, 2018 at 2:38 PM, Nebeker, Mark (USADC) <Mark.Nebeker@usdoj.gov> wrote:

I cannot get through to you. Could you call me back, please?

W. Mark Nebeker

Assistant United States Attorney

Civil Division

555 4th Street, N.W.

Washington, DC 20530

(202) 252-2536