UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

Defendant General Services Administration, by and through undersigned counsel, hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. Attached in support of Defendant's motion are a memorandum of points and authorities, declaration of Travis Lewis, statement of material facts not in dispute, exhibits, *Vaughn* Index,[1] and proposed order.

Dated: March 16, 2020

Respectfully submitted,

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

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

Defendant General Services Administration, by and through undersigned counsel, hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. Attached in support of Defendant's renewed motion are a memorandum of points and authorities, declaration of Travis Lewis, statement of material facts not in dispute, *Vaughn* Index,[1] exhibits, and proposed order.

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

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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On or about July 30, 2018, Plaintiff submitted a Freedom of Information Act ("FOIA") request to Defendant General Services Administration ("GSA") seeking "copies of all communications from January 20, 2017 to the present between GSA and the White House concerning the renovation of the FBI headquarters." Compl. ¶ 13; Ex. 1 (July 30, 2018, FOIA Request); Decl. Travis Lewis ("Lewis Decl.") ¶ 4. Defendant conducted searches for electronic and hard copy documents, locating fifty-two pages of records responsive to the request. Lewis Decl. ¶¶ 5-10. Before completing those searches, the parties engaged in communications to identify acceptable terms, which Defendant then employed in its search. Ex. 2 (Oct. 22-25, 2018, email exchange); Lewis Decl. ¶ 5.

Defendant subsequently processed those fifty-two pages and ultimately produced to Plaintiff twenty-five pages with certain redactions (as reflected in the accompanying *Vaughn* Index). Lewis Decl. ¶¶ 8-10, 16. The remaining twenty-seven pages were withheld in their entirety. *Id.* ¶ 10. As reflected herein, Defendant withheld information pursuant to one or more FOIA Exemptions, namely Exemptions 5 (in conjunction with the attorney work product doctrine and deliberative process and presidential communications privileges), 6, 7(C), and 7(E).

The parties briefed cross-motions for summary for summary judgment. In a July 29, 2019, memorandum opinion, the Court granted in part and denied in part Plaintiff's cross-motion for summary judgment, determining that Defendant's search in response to the FOIA request was inadequate. *See generally* ECF No. 26. The Court also denied without prejudice Defendant's motion for summary judgment. *See id.* at 2, 12. The Court declined to address Defendant's withholdings and redactions, and instead advised the parties that, after Defendant completed a

new search, they could file renewed motions for summary judgment addressing all disputed withholdings and redactions. *Id.* at 12-13.

Following the Court's ruling, Duane Smith from the GSA Office of General Counsel requested that GSA's Office of the Chief Information Officer ("OCIO") conduct a second email search utilizing the following parameters:

Email addresses: gsa.gov
Dates: January 20, 2017 to July 30, 2018
Terms: Joseph G. Lai
Tim A. Pataki
Joyce Y. Meyer
Amy H. Swonger
Daniel Q.Greenwood
Andrew D. Abrams
Kathleen L. Kraninger
Daniel Z. Epstein

Lewis Decl. ¶ 13. After the email search returned tens of thousands of documents, the search was further reviewed using the key termd "EPW" and "FBI". *Id.* ¶ 14. Defendant communicated these search parameters to Plaintiff, which did not object. *Id.*

A total of thirteen pages were deemed responsive. *Id.* ¶ 15. Of those thirteen pages, one page was released in full and twelve pages were partially redacted. *Id.* Of those twelve pages, some were repetitive. *Id.* As reflected herein, Defendant withheld information pursuant to one or more FOIA exemptions, namely Exemptions 5 (in conjunction with the deliberative process and presidential communications privileges) and 6.

II. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate when the pleadings and evidence show 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); *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 247 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248.

The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. Once the moving party has met its burden, the non-moving party may not rest upon the mere allegations or denials of his pleadings, but must instead establish more than "the mere existence of a scintilla of evidence" in support of its position. *Anderson*, 477 U.S. at 252. Thus, summary judgment is due if the non-moving party fails to offer "evidence on which the jury could reasonably find for the [nonmovant]." *Id.* In determining whether a genuine issue of material fact exists, the trier of fact must view all facts, and reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

B. Summary Judgment Standard As Applied to FOIA Cases

Summary judgment is "the routine vehicle by which most FOIA actions are resolved." *Wheeler v. U.S. Dep't of Justice*, 403 F. Supp. 2d 1, 5 (D.D.C. 2005). To obtain summary judgment in a FOIA action, an agency must show, viewing the facts in a light most favorable to the requester, that there is no genuine issue of material fact as to the agency's compliance with FOIA. *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). An agency is entitled to summary judgment in a FOIA case when it demonstrates that no material facts are in dispute, it conducted an adequate search for responsive records, and each responsive record that it located either has been produced to the plaintiff 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. EPA*, 272 F. Supp. 2d 59,

62 (D.D.C. 2003) ("The only question for summary judgment is whether the agency finally conducted a reasonable search, and whether its withholdings are justified.").

The Court may enter summary judgment based solely upon information provided in affidavits or declarations when those affidavits or declarations describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exception, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). A plaintiff "cannot rebut the good faith presumption" afforded to an agency's supporting affidavits "through purely speculative claims about the existence and discoverability of other documents." *Brown v. Dep't of Justice*, 742 F. Supp. 2d 126, 129 (D.D.C. 2010).

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). An agency can prove it had an adequate factual basis for invoking FOIA exemptions through one or more means, including affidavits, declarations, a *Vaughn* Index, or a combination thereof. *See Nat'l Sec. Counselors v. CIA*, 206 F. Supp. 3d 241 (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 a Declaration of Travis Lewis and an 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. Defendant Conducted Reasonable and Adequate Searches Calculated to Uncover All Relevant Documents.

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* FOIA Amendments 1996, Pub. L. No. 104-233, 110 Stat. 3048. As the D.C. Circuit explained, the "issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). An 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).

In its prior ruling, the Court deemed Defendant's search inadequate because Plaintiff presented Defendant with at least two emails that were responsive to Plaintiff's FOIA request but Defendant's search did not locate the responsive records. ECF No. 26 at 11-12. After the Court's ruling, GSA's Office of the Chief Information Officer ("OCIO") conducted a second email search. Lewis Decl. ¶ 13. The email search performed by GSA's OCIO returned tens of thousands of pages, which GSA OCIO reviewed using the key term "EPW FBI." *Id.* ¶ 14. Defendant communicated these search parameters to Plaintiff and received no objections. *Id.* ¶¶ 14, 20. After applying these search parameters, GSA's OCIO determined that thirteen pages were responsive to Plaintiff's FOIA request. *Id.* ¶ 15. One page was released in full, and twelve pages were partially redacted. *Id.* Some of the twelve pages deemed responsive were repetitive. *Id.*

For the foregoing reasons, Defendant submits that it conducted reasonable searches and is entitled to summary judgment with respect to the adequacy of its searches. *Id.* ¶ 20; *see Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) ("[H]owever fitful or delayed the release of information

under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform.").

B. Defendant Properly Withheld Records Pursuant to Exemption 5.

Exemption 5 protects disclosure of "inter-agency or intra-agency memorandums or letters which 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). Courts have "construed this exemption to encompass the protections traditionally afforded certain documents pursuant to evidentiary privileges in the civil discovery context," *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 676 (D.C. Cir. 1981), including three executive privileges relevant here: the attorney work product doctrine, the deliberative process privilege, and the presidential communications privilege. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-50, 155 (1975) (discussing the work product doctrine and deliberative process privilege); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) ("Exemption 5 also has been construed to incorporate the presidential communications privilege.").

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*, 532 U.S. 1, 8 (2001); *see also Nat'l Inst. of Military Justice v. Dep't of Def.*, 512 F.3d 677, 60 & n.4 (D.C. Cir. 2008) (noting that 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 Defendant withheld under Exemption 5 satisfies the government agency source requirement:

a. Email communications between January 20, 2017, to July 30, 2018, between GSA and the White House concerning the renovation of FBI Headquarters (in conjunction with the presidential communications and deliberative process privileges) ("Category No. 1");[2]

b. A draft copy of GSA's response to Questions for the Record from the U.S. Senate's Committee on Environmental 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) ("Category No. 2");

c. A draft copy of GSA's Office of the Inspector General ("OIG") Draft Review of GSA's Revised Plan for the Federal Bureau of Investigation ("FBI") Headquarters Consolidation Project sent between White House Counsel and GSA's Office of General Counsel (in conjunction with the deliberative process privilege) ("Category No. 3");

d. A draft copy of correspondence from GSA's General Counsel to GSA's OIG 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) ("Category No. 4"); and

e. 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) ("Category No. 5").

[2] Defendant also withheld certain information contained in Category No. 1 pursuant to Exemption 6, *see infra* Part III.C, Exemption 7(C), *see infra* Part III.D, and Exemption 7(E), *see infra* Part III.E.

Vaughn Index at 2, 5-8.

Additionally, an agency may only withhold information if it "reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption." 5 U.S.C. § 552(a)(8)(A). As discussed below, Defendant has satisfied this additional requirement.

1. Defendant Properly Relied Upon the Attorney Work Product Doctrine to Withhold One Document

The work product doctrine is incorporated into Exemption 5 and shields materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). It provides a "'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). The doctrine "should be interpreted broadly and held largely inviolate." *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (discussing *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)); *see also FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983) (holding that attorney work product is exempt from mandatory disclosure under Exemption 5 without regard to the status of any litigation for which it was prepared). Moreover, "factual material is itself privileged when it appears within documents that are attorney work product." *Judicial Watch, Inc.*, 432 F.3d at 371.

Here, Defendant properly withheld material within Category No. 4 as attorney work product. The document in Category No. 4 consists of correspondence from GSA's General Counsel to GSA Inspector General's Counsel to the Inspector General concerning a records request. *See Vaughn* Index at 7. The document in Category No. 4 contains the opinions of counsel regarding the records request, *see id.*, and, accordingly, is not subject to disclosure.

2. Defendant Properly Relied Upon the Deliberative Process Privilege to Withhold Email Communications and Three Draft Documents

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). This privilege rests "on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, 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." *Klamath Water Users Protective Ass'n*, 532 U.S. at 8-9. There are three policy bases for the privilege, which protects: (1) creative debate and candid consideration of alternatives within an agency, thereby improving the quality of agency policy decisions; (1048) (2) the public from misconstruing the views of an individual as the views of the agency; (1949); and (3) the integrity of the decision-making process. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048-49 (D.C. Cir. 1982).

Exemption 5 "is intended to protect the deliberative process of government and not just deliberative material." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977). For the deliberative process privilege to apply under Exemption 5, courts must deem the material both pre-decisional and deliberative. *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). A document is pre-decisional if it was "prepared in order to assist an agency decision maker in arriving at his decision, rather than to support a decision already made." *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (internal quotations omitted). A document is deliberative in nature if it "reflects the give-and-take of the consultative process." *Coastal States Gas Corp.*, 617 F.2d at 866.

The "ultimate aim" of the deliberative process privilege set forth in Exemption 5 is to "prevent injury to the quality of agency decisions." *Petroleum Info. Corp.*, 976 F.2d at 1433-34 (internal quotations omitted). When evaluating deliberate process claims, courts "must give considerable deference to the agency's explanation of its decisional process." *Pfeiffer v. CIA*, 721 F. Supp. 337, 340 (D.D.C. 1989) (citation omitted).

Here, Defendant has met its burden of demonstrating that the deliberative process privilege applies to certain email communications and three draft documents it withheld from release. With regard to the former, the documents in Category No. 1 consist of email communications between GSA and the White House regarding the future of the FBI Headquarters project. These communications were made as part of a consultative process and consist of recommendations so that decisions about the future of the project could be made. *Vaughn* Index at 2. They also reflect deliberations through which policy about the project was being formulated. *Id.* The documents in Category No. 1 are therefore both pre-decisional and part of the deliberative process.

With regard to the latter, drafts are typically pre-decisional and deliberative. *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014). "Draft documents, by their very nature, are typically predecisional and deliberative." *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983). This is so because drafts are prepared "prior in time to the final decision on agency policy," *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 132 (D.D.C. 2008), and reflect the give-and-take process rather than adopted policy itself, *see Coastal States Gas Corp.*, 617 F.2d at 866. Although drafts are not automatically protected by the deliberative process

privilege,[3] *see Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982), the drafts Defendant withheld meet the criteria of the privilege and are exempt from disclosure under FOIA.

The document in Category No. 2 is a draft copy of GSA's responses to Questions for the Record from the U.S. Senate's Committee on Environmental and Public Works regarding the FBI Headquarters Project. The draft, which was exchanged between White House counsel and GSA's Office of General Counsel, included GSA's proposed responses and interagency deliberations. *Vaughn* Index at 5. Those deliberations occurred prior to any determination being reached about how GSA would move forward with responding to questions for the record. *Id.* The document in Category No. 2 is therefore both pre-decisional and part of the deliberative process. *Id.*

The document in Category No. 3 is a draft copy of GSA's OIG draft review of GSA's revised plan for the FBI project that was sent between White House Counsel and GSA's Office of General counsel. Document No. 3 was marked "Draft" by the OIG and was provided to GSA in order to review and respond to the questions presented therein. *Vaughn* Index at 6. The information contained in this draft document was part of OIG's deliberative process, which involved analyzing and determining what, if any, GSA action with respect to the project required further inquiry or investigation. *Id.* The document in Category No. 3 is therefore both pre-decisional and part of the deliberative process. *Id.*

The document in Category No. 4 is a draft copy of correspondence from GSA's General Counsel to GSA's OIG Counsel to the Inspector General concerning a records request for the FBI Headquarters project. As discussed above, this document is attorney work product. *See supra*

[3] The D.C. Circuit explained that the relevant decision for purposes of analyzing the deliberative process privilege is the decision to publish, not the decision to draft. *See Formaldehyde Inst. v. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1120 (D.C. Cir. 1989); *see also Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1049 (D.C. Cir. 1982) (recognizing that Exemption 5 applies to an agency's editorial review process).

Part III.B.1. The content of this draft was also used by GSA to engage in both interagency and intra-agency discussions about policy matters and agency action. *Vaughn* Index at 7. The document in Category No. 4 is therefore both pre-decisional and part of the deliberative process.

Release of non-final documents such as those in Category Nos. 2-4 would reveal the editorial judgments of government staff. It would also disclose collaborative dialogue about the matters under consideration, including information about agency personnel's decisions about which portions to retain and revise. Disclosure of the government's internal deliberations risks chilling government personnel from engaging in candid discussion within the agency about policy matters and proposed agency actions, thereby undermining the agency's ability to perform its functions. The deliberative process privilege prevents these types of intrusions into the government's internal deliberations. *See Dudman Commc'ns Corp. v. Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987); *Russell v. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982).

For these reasons, Defendant properly applied Exemption 5 to withhold release of documents in Category Nos. 1-4.

3. Defendant Properly Relied Upon the Presidential Communications Privilege to Withhold Two Documents

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). This privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Judicial Watch, Inc.*, 365 F.3d at 1113 (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, Inc.*, 365 F.3d at 1114). Thus, the privilege protects in its entirety "the President's personal decision-making process," including the gathering of information by White House staff that is relevant to the process. *See Judicial Watch, Inc.*, 365 F.3d at 1118. Unlike the deliberative process privilege, 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, Defendant properly applied the presidential communication privilege to documents in Category No. 1,[4] *see Vaughn* Index at 2, and one page of a document within Category No. 5, *see id.* at 8. In both instances, presidential advisors made the communications during the course of preparing advice for the President about the future of the FBI Headquarters project. *Vaughn* Index at 2, 8. The privilege extends to the President's immediate advisers "because of the need to protect 'candid, objective, and even blunt or harsh opinions,'" *Judicial Watch, Inc.*, 365 F.3d at 1115, particularly where the President "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Thus, Defendant properly invoked the presidential communications privilege to withhold under Exemption 5 two documents prepared by the President's advisers as part of preparing advice for the President.

In short, Defendant properly withheld materials pursuant to FOIA Exemption 5 that included attorney work product; preliminary, pre-decisional opinions and deliberations of agency employees underlying decisions or policies, and privileged presidential communications.

[4] These communications are also protected by the deliberative process privilege. *See supra* Part III.B.2.

C. Defendant Properly Redacted Information Under Exemption 6

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). When evaluating a withholding under Exemption 6, courts must determine whether (1) the records at issue are personnel files, medical files, or similar files; (2) the material at issue implicates a privacy interest that is more than de minimis; and (3) the privacy interest outweighs any public interest in disclosure. *Nat'l Ass'n of Home Buyers v. Norton*, 309 F.3d 26, 33 (D.C. Cir. 2002). With regard to the first inquiry, 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." *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (citing *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). The term "similar files" protection also covers "bits of personal information, such as names and addresses." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006).

With regard to the second inquiry, Exemption 6 is designed to protect personal information in public records, even if it is not embarrassing or of an intimate nature. *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989). While disclosure of names and addresses is "not inherently and always a significant threat to the privacy of those listed," whether disclosure is a significant or de minimis threat depends upon the circumstances. *Id.* at 877. As for the third inquiry, courts must balance 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. "[O]nly official information that sheds light on an agency's performance of its statutory duties" merits disclosure under FOIA,

whereas "disclosure of information about private citizens that is accumulated in various government files" would "reveal[] little or nothing about an agency's own conduct." *Id.* at 1251.

Here, Defendant withheld information under Exemption 6 that is contained in personnel, medical, or similar files; the material implicates significant privacy interests; and disclosure of the information would constitute a clear, unwarranted invasion of privacy. At issue are government emails contained in Category No. 1 that were maintained by the agency for purposes of official communications. *Vaughn* Index at 1. Contained within pages 1-10, 12, 14-23 of responsive emails and a two-page attachment are various White House employee addresses, names and contact information for law enforcement personnel within GSA's OIG, and federal employees' cellular telephone numbers. *Vaughn* Index at 1. Defendant concluded that releasing this information "does not provide the public with any further insight into the nature of his communications with GSA," and the privacy interests of those involved outweighed any interest to the public in the contact information and law enforcement officer names. *Vaughn* Index at 1. Accordingly, Defendant properly applied Exemption 6 to protect privacy interests contained in Category No. 1.

D. Defendant Properly Redacted Information Under Exemption 7(C).

Exemption 7(C) authorizes 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 analysis under Exemption 7(C) is similar to the Exemption 6 analysis. *See supra* Part III.C. The first step is to determine whether the information was compiled for law enforcement purposes. *Barouch v. U.S. Dep't of Justice*, 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

balance that interest against the public interest in disclosure. *Id.* 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 exists, then the FOIA requester must show that (1) the public interest sought to be advanced is significant and one more specific than having the information for its own sake; and (2) the information is likely to advance that interest. *Boyd v. Crim. Div. of the U.S. Dep't of Justice*, 475 F.3d 381, 387 (D.C. Cir. 2007).

Here, the information Defendant withheld under Exemption 7(C) pertains to law enforcement information contained in Category No. 1. *Vaughn* Index at 3. Defendant determined that the name and identifying information of the law enforcement personnel at issue provided no insight to the public, and any public interest was not outweighed by the privacy interest in nondisclosure of information contained in the law enforcement file of an ongoing investigation in the GSA OIG's office. *Vaughn* Index at 3. Accordingly, Defendant properly redacted this information pursuant to Exemption 7(C).[5]

E. Defendant Properly Redacted Information Under Exemption 7(E).

Exemption 7(E) protects all information compiled for law enforcement purposes when its release "would disclose techniques and procedures for law enforcement 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). Courts "set[] a relatively low bar for the agency to justify withholding" under

[5] If the Court concludes that Exemption 7(C) does not apply to these materials, then Defendant asks the Court to assess whether Exemption 6 would apply to the document. Each of the exemptions involves similar balancing such that protecting third parties' information would be appropriate.

Exemption 7(E), *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011), which only requires that the agency "demonstrate[] logically how the release of that information might create a risk of circumvention of the law," *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993). Exemption 7(E) looks 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).

Here, Defendant invoked Exemption 7(E) to a single page of responsive material in Category No. 1 containing portions of a communication between an Assistant Special Agent within GSA's OIG and the Special Assistant to the GSA Administrator regarding the basis of the Inspector General's request to interview the Administrator. *Vaughn* Index at 4. The redacted information reflects a specific GSA OIG investigative goal as part of its technique in conducting a law enforcement investigation regarding an ongoing investigation within the GSA's OIG. *Id.* GSA's OIG "is a 'mixed function agency'" that investigates compliance with the law and has capacity to generate records for law enforcement purposes. *Gould Inc. v. Gen. Servs. Admin.*, 688 F. Supp. 689, 695 (D.D.C. 1988); *see also United States v. Safavian*, 528 F.3d 957, 967-69 (D.C. Cir. 2008) (vacating the defendant's conviction on, among other charges, one count of obstruction of a GSA OIG investigation). Accordingly, Defendant properly withheld the information pursuant to Exemption 7(E).

F. Defendant Processed and Released All Reasonably Segregable Information.

While an agency may properly withhold records or parts of records under one or more FOIA exemptions, it "must release 'any reasonably segregable portions' of responsive records that do not contain exempt information.'" *Agrama v. IRS*, 282 F. Supp. 3d 264, 275 (D.D.C. 2017); *see* 5 U.S.C. § 552(b) (requiring "any reasonably segregable portion of a record shall be provided to [the requester] after deletion of the portions which are exempt"). Non-exempt portions of a document "must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc.*, 566 F.2d at 260. Before approving the application of a FOIA exemption, district courts must make specific findings of segregability regarding the documents to be withheld. *Summers v. Dep't of Justice*, 140 F.3d 1077, 1081 (D.C. Cir. 1998). Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material. *Boyd*, 475 F.3d at 391. Courts "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008).

Here, Defendant conducted a detailed, line-by-line review of the responsive records to determine whether it could release any reasonably segregable material.[6] Lewis Decl. ¶ 18. It determined that, for records that were released in part, "all information not exempted from disclosure pursuant to the FOIA . . . was correctly segregated and non-exempt portions were released." *Id.* Defendant has explained its redactions and withholdings, and produced segregable material when possible. *See generally Vaughn* Index. Accordingly, Defendant has properly withheld information pursuant to Exemptions 5, 6, 7(C), and 7(E).

[6] If a document is fully protected as work product, then segregability is not required. *Judicial Watch, Inc.*, 432 F.3d at 371.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court grant its Renewed Motion for Summary Judgment.

Dated: March 16, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Pursuant to Local Civil Rule 7(h), Defendant General Services Administration ("GSA"), submits this statement of material facts as to which there is no genuine dispute.

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 and the White House concerning the renovations of the FBI headquarters." Compl. ¶ 13; Ex. 1 (July 30, 2018, FOIA Request); Decl. Travis Lewis ("Lewis Decl.") ¶ 4.

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

2. GSA conducted searches for electronic and hard copy documents, locating 52 pages of records responsive to the request. Lewis Decl. ¶¶ 4-11.

3. Before completing those searches, the parties engaged in communications to identify acceptable search terms, which GSA then employed in its search. Ex. 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.

5. Upon becoming aware of Plaintiff's proposed search terms, Travis Lewis, GSA's Director of the Freedom of Information Act & Records Management Division of the Office of Administrative Services, tasked GSA's Office of the Chief Information Officer ("OCIO") to conduct a search for responsive records using terms recommended by Plaintiff. Lewis Decl. ¶¶ 5-6; Ex. 2.

6. 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. OCIO searched all agency employees' emails for responsive electronic records via the search parameters requested by the FOIA requester. Lewis Decl. ¶ 6.

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. ¶ 11.

9. Each GSA employee who had responsive records per the OCIO search query using the terms provided by Plaintiff confirmed that they do not have any paper records that pertain to or are responsive to Plaintiff's FOIA request. Lewis Decl. ¶ 11.

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; *Vaughn* Index at 1.

11. Plaintiff later commented that it viewed a communication in materials publicized by Congress which were not included in the documents released by GSA. To address this, on September 4, 2019, Duane Smith from the GSA Office of General Counsel requested OCIO conduct a second e-mail search using the following parameters:

Email addresses: gsa.gov
Dates: January 20, 2017 to July 30, 2018
Terms:

- Joseph G. Lai
- Tim A. Pataki
- Joyce Y. Meyer
- Amy H. Swonger
- Daniel Q. Greenwood
- Andrew D. Abrams
- Kathleen L. Kraninger
- Daniel Z. Epstein

The e-mail search returned tens of thousands of pages. Those were further reviewed using the key terms "EPW" and "FBI". The search parameters were communicated to Plaintiff and no objection was received. Lewis Decl. ¶¶ 13-14.

12. A total of 13 pages were subsequently found to be responsive. One page was fully releasable and 12 pages were partially redacted. Of those 12 pages, some were repetitive. The withholdings and the reasons for those withholdings are provided in the accompanying *Vaughn* Index. Lewis Decl. ¶ 15.

THE FOIA EXEMPTIONS

13. The documents for which GSA has claimed Exemption 5 and withheld in full consist of:

a. Category No. 1: Email communications between January 20, 2017, to July 30, 2018, between GSA and the White House concerning the renovation of FBI Headquarters (in conjunction with the presidential communications and deliberative process privileges);

b. Category No. 2: 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);

c. Category No. 3: a draft copy of GSA's Office of Inspector General's 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);

d. Category No. 4: a draft copy of correspondence from GSA's General Counsel to GSA Office of Inspector General's Counsel to the Inspector General concerning a records request for the FBI Headquarters project (in conjunction with the attorney work product doctrine and deliberative process privilege); and

e. Category No. 5: 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 2, 5-8.

14. The first three documents GSA withheld in full (described in paragraphs 11(b), (c), and (d)) were drafts of documents; were predecisional in that they each preceded a decision being contemplated by the government; and were all prepared to aid in the decision-making process by GSA in assessing how to proceed regarding the FBI Headquarters project and related inquiries and records requests. *Vaughn* Index at 5-7.

15. In each instance where GSA assessed whether to disclose the three documents (described in paragraphs 11(b), (c), and (d)), GSA concluded that disclosure would harm the free flow of information within GSA as it assessed how to respond. *Vaughn* Index at 5-7.

16. GSA also relied on the attorney work product doctrine to withhold a single document (described in paragraph 11(d)), a draft copy of correspondence from GSA's General Counsel to GSA Inspector General's Counsel to the Inspector General concerning a records request for the FBI Headquarters project. *Vaughn* Index at 7.

17. GSA withheld the document described in paragraph 11(d) because it is a draft copy of correspondence that GSA's General Counsel wrote on behalf of the GSA Administrator to the Inspector General's office in anticipation of potential litigation; it represents GSA attorney work

product and is exempt from release accordingly. GSA used the content of this draft document to engage in both interagency and intra-agency discussions about matters of policy and agency action. *Vaughn* Index at 7.

18. Release of the document described in paragraph 11(d) would have a chilling effect on the ability of GSA to engage in either interagency and intra-agency discussions candidly about matters of policy and agency action without concern that the information could be disclosed prior to its occurrence. *Vaughn* Index at 7.

19. GSA withheld the document described in paragraph 11(e) because it is a White House Briefing Itinerary regarding a discussion of the future of the FBI Headquarters; 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 8.

20. Where GSA withheld information under Exemption 6 from the email communications described on page 1 of the *Vaughn* Index, those materials consisted of White House employee email addresses, the name and contact information for law enforcement personnel within GSA's Office of the Inspector General and federal employees' cellular telephone numbers. *See Vaughn* Index at 1.

21. In making the determination to withhold the information based on Exemption 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. *See Vaughn* Index at 1.

22. In making the determination to withhold the information based on Exemption 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; 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. *See Vaughn* Index at 1.

23. In making the determination to withhold the information based on Exemption 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. *See Vaughn* Index at 1.

24. In making the determination to withhold the information based on Exemption 6 from the email communications described on page 1 of the *Vaughn* Index, GSA redacted the name and contact information for law enforcement personnel within GSA's Office of Inspector General because reference to an individual's name in a law enforcement file carries a stigmatizing connotation given the subject matter of the investigation. *See Vaughn* Index at 1.

25. In making the determination to withhold information based on Exemption 7(C) from the email communication described on page 3 of the *Vaughn* Index, GSA removed only the name and contact information of an Assistant Special Agent within GSA's Office of Inspector General 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 since this information is from a law enforcement file in an ongoing investigation within the GSA Office of Inspector General. *Vaughn* Index at 3.

26. In making the determination to withhold information based on Exemption 7(E) from the email communication described on page 4 of the *Vaughn* Index, GSA removed only the portions of the communications between an Assistant Special Agent within GSA's Office of Inspector General and the Special Assistant to the GSA Administrator regarding the basis of the Inspector General's request to interview the Administrator; GSA did so because the information reflects a specific GSA Inspector General investigative goal as part of its technique in conducting a law enforcement investigation regarding an ongoing investigation within the GSA's Office of Inspector General. If this information was made publicly available, it would likely cause a current or future subject of an Office of Inspector General investigation to undertake certain actions in order to circumvent the law. *Vaughn* Index at 4.

SEGREGABILITY

27. When 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. ¶ 18.

28. 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. ¶ 19.

29. 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 GSA located. Lewis Decl. ¶¶ 19-20.

Dated: March 16, 2020

Respectfully submitted,

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