

**IN THE 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-cv-2071-CKK

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE, AND
STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFF’S
RENEWED CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7(h), Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) submits this response to Defendant General Services Administration’s (“GSA”) Statement of Material Facts as to Which There Is No Genuine Issue, ECF No. 36-2, and Statement of Undisputed Material Facts in Support of Plaintiff’s Renewed Cross-Motion for Summary Judgment.

I. CREW’s Response to GSA’s 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 [GSA] 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; [GSA] Ex. 1 (July 30, 2018, FOIA Request); Decl. Travis Lewis (“Lewis Decl.”) ¶ 4.

Plaintiff’s Response: This paragraph is not disputed.

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

Plaintiff’s Response: This paragraph is not disputed to the extent it refers to GSA’s initial search. Following the Court’s order granting summary judgment in part to CREW, ECF No. 26, GSA conducted a supplemental search and produced an additional 13 pages of records, *see* CREW Exs. 8–10, for a total of 65 responsive documents located.

3. Before completing those searches, the parties engaged in communications to identify acceptable search terms, which GSA then employed in its search. [GSA] Ex. 2 (October 22–25, 2018, email exchange); Lewis Decl. ¶ 5.

Plaintiff’s Response: This paragraph is not disputed to the extent it refers to GSA’s initial search. Plaintiff disputes that GSA used the parties’ agreed-upon search terms with respect to GSA’s supplemental search. *Compare* ECF No. 27 at 2 (joint status report listing agreed-upon search terms), *with* Lewis Decl. ¶ 14 (describing search conducted based on different and more narrow terms).

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.

Plaintiff's Response: This paragraph is not disputed.

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.

Plaintiff's Response: This paragraph is not disputed.

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.

Plaintiff's Response: This paragraph is not disputed.

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

Plaintiff's Response: This paragraph is not disputed to the extent it refers to GSA's initial search. Plaintiff disputes that GSA used the "search parameters requested by the FOIA requester" with respect to GSA's supplemental search. *Compare* ECF No. 27 at 2 (joint status report listing agreed-upon search terms), *with* Lewis Decl. ¶ 14 (describing search conducted based on different and more narrow terms).

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.

Plaintiff's Response: This paragraph is disputed to the extent that it implies a legal conclusion that GSA located all paper documents "responsive" to Plaintiff's FOIA request, which is not a material fact to which Plaintiff must respond. Plaintiff does not dispute that GSA conducted a search for paper records.

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.

Plaintiff's Response: This paragraph is not disputed to the extent it refers to GSA's initial search. Plaintiff disputes that GSA used the "terms provided by Plaintiff" with respect to GSA's supplemental search. *Compare* ECF No. 27 at 2 (joint status report listing agreed-upon search terms), *with* Lewis Decl. ¶ 14 (describing search conducted based on different and more narrow terms).

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.

Plaintiff's Response: This paragraph is not disputed.

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.

Plaintiff’s Response: This paragraph is disputed to the extent that it suggests Plaintiff raised to GSA’s attention the “materials publicized by Congress” only after GSA’s initial production of 25 pages. The record makes clear that CREW identified to GSA emails released by the U.S. House Committee on Oversight and Government Reform (“House Oversight”) *before* GSA conducted the search that became the subject of the parties’ first cross-motions for summary judgment. *See* GSA Ex. 2 at 2 [ECF No. 36-5] (October 18, 2018 email exchange between CREW and GSA counsel discussing House Oversight emails); ECF No. 22 at PDF 18, ¶¶ 9–11 (Defendant’s Response to Plaintiff’s Statement of Undisputed Material Facts, First Summary Judgment Briefing); ECF No. 26 (Memorandum Opinion) at 11 (noting “this is not a case where Defendant uncovered additional documents *after* its initial search” but rather “Plaintiff presented Defendant with documents responsive to its FOIA request *prior* to Defendant’s supplemental search” (emphases in original) (quotation marks omitted)).

This paragraph is also disputed to the extent it indicates that GSA conducted the September 4, 2019 search for email communications because CREW raised the House Oversight emails to GSA's attention. To the contrary, on July 29, 2019 the Court ordered GSA to "conduct an adequate search," ECF No. 26 at 12, and GSA conducted its September 4, 2019 search in response to the Court's order, *see* ECF No. 27 at 1 (joint status report in which GSA indicated it "completed a new search for responsive records by September 5, 2019" in response to "the Court's July 29, 2019 Order").

Finally, this paragraph is disputed because the final sentence is incorrect: neither Mr. Lewis nor Defendant's counsel ever communicated to CREW any proposal to use only "EPW" and "FBI" as search terms. *See* Declaration of Nikhel S. Sus ¶¶ 3-4. The parties instead agreed upon a broader set of terms, and memorialized that agreement in a joint status report filed with the Court. *See* ECF No. 27 at 2.

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.

Plaintiff's Response: CREW does not dispute that GSA found 13 pages to be responsive to its supplemental search. This paragraph is disputed to the extent it implies a legal conclusion about the validity of GSA's withholdings, which is not a material fact to which Plaintiff must respond.

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.

Plaintiff's Response: This paragraph is disputed to the extent it implies a legal conclusion that the documents at issue are covered by Exemption 5, which is not a material fact to which Plaintiff must respond.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: Plaintiff does not dispute that GSA has invoked the attorney work product doctrine to withhold one document. To the extent this paragraph is implied to support the validity of GSA's invocation of the attorney work product doctrine, the paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph is not disputed.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

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.

Plaintiff's Response: This paragraph sets forth conclusions of law, not a statement of material fact to which Plaintiff must respond. To the extent a response is deemed required, the paragraph is denied.

II. CREW's Statement of Undisputed Material Facts.

1. CREW submitted a FOIA request to GSA on July 30, 2018. GSA Ex. 1 [ECF No. 36-4]; Declaration of Travis Lewis [ECF No. 36-3] ¶ 4.

2. CREW's FOIA request sought "all communications from January 20, 2017 to [July 30, 2018] between GSA and the White House concerning the renovation of the FBI headquarters." GSA Ex. 1.

3. On August 27, 2018, the GSA's Office of Inspector General released a report entitled "Review of GSA's Revised Plan for the Federal Bureau of Investigation Headquarters Consolidation Project" ("GSA OIG Report"). CREW Ex. 2.

4. The GSA OIG Report describes three in-person meetings between GSA and White House officials concerning the FBI headquarters project, which were held on December 20, 2017; January 24, 2018; and June 15, 2018. CREW Ex. 2 at 5–6, 7–9, 11.

5. The GSA OIG Report also includes GSA's response to the report, in which:

- a. GSA disputed OIG's suggestion that "the GSA/FBI project team was directed to shift planning efforts from other preferred site options at the behest of senior White House officials," claiming that "[t]his simply is not true." CREW Ex. 2 at A-2.

b. GSA insisted that “[t]he GSA and FBI representatives attending the January 24 White House meetings had already agreed and decided to locate the new headquarters at 935 Pennsylvania Avenue NW in Washington, DC,” and the “claim that GSA and FBI ‘received direction from the President’ at the January 24 meeting is unsubstantiated and conclusory.” CREW Ex. 2 at A-3 (citation omitted).

c. GSA further denied that the White House meetings resulted in any “decision” that could be “attribute[d] . . . to the President.” CREW Ex. 2 at A-3.

6. After GSA’s statutory response deadlines elapsed, CREW filed this FOIA suit on September 4, 2018. *See* ECF No. 1 (Complaint).

7. On October 18, 2018, the U.S. House Committee on Oversight and Government Reform (“House Oversight”) publicly released several GSA emails concerning the FBI headquarters project, including emails between GSA and White House officials. *See* CREW Exs. 3, 7.

8. The emails released by House Oversight included the following:

a. A January 25, 2018 email exchange between Joseph Lai of the White House and Brennan Hart of GSA concerning the “path forward for the new FBI Headquarters announcement,” which the “President” had “signed off on.” CREW Ex. 3 at 2281.

b. A January 28, 2018 email exchange in which GSA officials forwarded an email from an official with the Office of Management and Budget (“OMB”), and explained that the FBI headquarters project is now “a demolition/new construction [project] per the President’s instructions.” *Id.* at 2290–91.

9. Later on October 18, 2018, the parties in this case held a phone call during which GSA stated that its search uncovered no records responsive to CREW's FOIA request. GSA Ex. 2 at 2 [ECF No. 36-5].

10. CREW responded that House Oversight had earlier that day released the emails described above, which are plainly responsive to CREW's FOIA request and thus casted doubt on GSA's position that it had no responsive records. GSA Ex. 2 at 2.

11. By email dated October 25, 2018, GSA agreed to conduct another search using specific terms and parameters provided by CREW, which were formulated based partly on language from the emails released by House Oversight. GSA Ex. 2 at 1.

12. By letter dated December 7, 2018, GSA informed CREW that it had completed its search and determined that all "responsive documents are exempt from release pursuant to exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5)." CREW Ex. 4.

13. CREW responded to GSA's letter by email dated December 10, 2018, asking GSA to specify how many responsive pages it was withholding, and the grounds for its Exemption 5 claim. CREW Ex. 5.

14. GSA responded to CREW's email by letter dated December 14, 2018, stating that the agency had located 52 pages of responsive records, was withholding 25 of these pages pursuant to Exemption 5, based on the presidential communications privilege and deliberative process privilege, as well as Exemption 6 and Exemption 7(C), based on GSA's finding that disclosure of the withheld material could reasonably be expected to constitute an unwarranted invasion of personal privacy. CREW Ex. 6.

15. GSA's December 14, 2018 letter added that GSA was withholding the remaining 27 responsive pages pursuant to Exemption 5 and the deliberative process privilege. CREW Ex. 6.

16. By letter dated March 15, 2019, GSA stated that "[a]fter a subsequent analysis" of the 25 pages it had originally withheld based on the presidential communications privilege, GSA had decided to release those documents to CREW with certain redactions. CREW Ex. 1 at 2.

17. On July 29, 2019, the Court granted summary judgment in part to CREW and ordered GSA to "conduct an adequate search." ECF No. 26 at 12.

18. Following the Court's order granting in part summary judgment to CREW, the parties agreed that GSA would conduct a supplemental search of "all agency communications" with Tim A. Pataki, Joyce Y. Meyer, Amy H. Swonger, Daniel Q. Greenwood, Andrew D. Abrams, Kathleen L. Kraninger, Dan Epstein, and Joseph Lai. ECF No. 27 at 1; ECF No. 30 at 1.

19. The parties also agreed "that the search terms to be used to locate responsive materials in the approximate 30,000 pages of potentially responsive documents will be any of the following terms: 'FBI', 'Federal Bureau of Investigation', 'Hoover', 'JEH', 'Wray', 'Rosenstein', or 'Deputy AG.'" ECF No. 27 at 2.

20. The parties informed the Court of their agreement with respect to the search parameters and search terms in joint status reports. ECF Nos. 27, 30.

21. GSA never communicated to CREW that it intended to use only "EPW" and "FBI" as search terms, nor would CREW have agreed to any such proposal. Declaration of Nikhel S. Sus ¶¶ 3-5.

22. By email dated October 9, 2019, GSA stated that it had completed review of 1,000 pages of documents and, after removing duplicates, was releasing 4 pages of responsive documents to CREW. CREW Ex. 8 at 2.

23. By email dated December 13, 2019, GSA stated that was releasing 1 responsive document to CREW. CREW Ex. 9 at 2.

24. By email dated January 10, 2020, GSA indicated that it was releasing 8 pages of responsive records to CREW. CREW Ex. 10 at 2.

25. In total, 12 of the 13 pages produced by GSA as a result of its supplemental search were redacted pursuant to Exemption 5 and/or Exemption 6. *See* CREW Exs. 8–10.

26. GSA has provided no indication—in the Declaration of Travis Lewis, its *Vaughn* index, or elsewhere—that its supplemental search for responsive records uncovered the January 28, 2018 email publicly released by House Oversight on October 12, 2018.

Date: April 16, 2020

Respectfully Submitted,

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