IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF COMMERCE, Defendant.	Civil Action No. 18-cv-3022-CJN

REPLY IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Commerce's opposition confirms that the agency waived the deliberative process privilege as to the Census Testimony Email, based both on Eric Branstad's voluntary disclosure of the Email to non-privileged private parties and the agency's undisputed failure to do anything to rectify that disclosure. It likewise confirms that Commerce's Exemption 4 claim fails because the agency admittedly provided no express assurance of confidentiality to Circinus as to the withheld material, nor has Commerce demonstrated that any such assurance should be inferred. CREW is entitled to summary judgment on both issues.

ARGUMENT

I. Commerce Has Waived the Deliberative Process Privilege as to the Census Testimony Email

It striking what Commerce does *not* dispute—namely, that it has failed to take any steps to rectify Branstad's voluntary disclosure of the Census Testimony Email, including "any steps to recover the purportedly privileged material from [Rick] Gates, Tom Barrack, or any other

third party who may be in possession of it." CREW Stmt. of Facts ¶ 8, ECF No. 15-4; *see* Commerce Response to CREW Stmt. of Facts ¶ 8, ECF No. 18 ("Undisputed . . .").[1] Absent such efforts, there is every reason to believe that the Email remains in Gates's private email account, freely available to him and anyone with whom he chooses to share it. If Rick Gates has access to the Email, so should the public.

Commerce provides a terse declaration from Branstad, which speculates that, "to the best of [his] knowledge, Messrs. Gates and Thomas Barrack . . . never looked at the content of the forwarded email or attachment, nor disseminated it to anyone else." Branstad Decl. ¶ 5, ECF No. 17-3. But Branstad does not describe the basis for his "knowledge," does not claim that he confirmed these facts with Gates or Barrack, and does not state that he made any effort to claw back the Email from them. Branstad's rank speculation does nothing to undercut CREW's waiver claim. And setting aside Branstad's conduct, what matters now is *Commerce's* inaction. Its indifference toward the continued retention of the Census Testimony Email by private parties runs headlong into the principle that "the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived." *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); *see In re Fannie Mae Sec. Litig.*, 2009 WL 10708594, at *1 (D.D.C. June 9, 2009) (confirming that principle applies to deliberative process privilege). If Commerce cares about keeping the Email confidential, its actions surely do not show it. *See*

[1] Per CREW's opening brief, the term "Census Testimony Email" refers to a portion of a May 1, 2017 email in which Commerce official Earl Comstock discusses draft congressional testimony of the Director of the Census Bureau, John Thompson, and the draft testimony itself, which was attached to Comstock's email. CREW Mot. at 3, ECF No. 15-1.

In re Sealed Case, 877 F.2d at 980 ("[T]he amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege.").

Commerce largely ignores these points, and instead advances several arguments that mischaracterize both the record and the governing law. First, it disputes that there has been any disclosure at all, "since there is no evidence that Mr. Gates looked at anything in the email." Commerce Opp. at 9, ECF No. 18. But such evidence is not required to establish waiver, which focuses on the actions of the *privilege holder*, not the third-party recipient of allegedly privileged material. *See In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) ("The courts will grant no greater protection to those who assert the privilege than their own precautions warrant."); *In re Sealed Case*, 877 F.2d at 980 (if party "wishes to preserve the privilege, it must treat the confidentiality of . . . communications like jewels—if not crown jewels"). CREW need not prove that Gates actually read the Census Testimony Email to establish waiver.

Second, Commerce claims Gates was a "necessary" third party, as Branstad required his assistance to print the materials for the Secretary of Commerce to review. Commerce Opp. at 9. In other words, we are to believe that Branstad, a Chief Aide to the Secretary of Commerce, had no options for printing the Email other than sending it to the private email address of a non-governmental third party who was, at the time, actively lobbying Commerce to obtain lucrative foreign defense work. Even accepting that dubious proposition as true, it only explains why Branstad initially disclosed the Email to Gates; it does not explain why neither he nor Commerce have lifted a finger to rectify that disclosure. Indeed, even if there were some temporary need for Gates to possess the Email, that need expired as soon as he printed the Email and gave it to Branstad. At that point, Branstad and Commerce, upon learning of the disclosure, should have

taken appropriate steps to ensure return of the purportedly privileged material. The undisputed facts show they have not. *See* Commerce Response to CREW Stmt. of Facts ¶ 8.

Third, Commerce makes the perplexing argument that even if there were a disclosure to an unnecessary third party, "it was not an inadvertent one; it was purposefully done." Commerce Opp. at 10. CREW agrees, and that is precisely why waiver is established. *See* CREW Mot. at 6 (asserting that "it is undisputed that Branstad voluntarily and intentionally disclosed the purportedly privileged material to a third party," and "'[t]his voluntary disclosure waived the deliberative process privilege'"). Commerce asserts that the voluntariness of Branstad's disclosure somehow distinguishes this case from those cited by CREW applying the concept of "inadvertent waiver." *See* Commerce Opp. at 10; CREW Mot. at 6-7 (citing cases). But Commerce misses the point. CREW cited those cases to refute Commerce's arguments regarding "unauthorized" disclosure, since courts often apply the framework for inadvertent waiver in analyzing purportedly unauthorized disclosures. *See, e.g.*, *Bayliss v. New Jersey State Police*, 622 F. App'x 182, 186 (3d Cir. 2015) (invoking Fed. R. Evid. 502(b) standard for inadvertent waiver where state claimed that disclosure of material protected by deliberative process privilege "was unauthorized," and finding no waiver because "the State took reasonable steps in preventing and rectifying the disclosure"); *NRDC v. DOD*, 442 F. Supp. 2d 857, 866 (C.D. Cal. 2006) (deliberative process privilege waived based partly on government's failure to "take any affirmative steps to inhibit . . . further dissemination of the letters" after learning of their purported "unauthorized" disclosure). Courts similarly hold that an entity may be deemed to "ratify" a purportedly unauthorized disclosure through inaction. *See Bus. Integration Servs., Inc. v. AT & T Corp.*, 251 F.R.D. 121, 127-28 (S.D.N.Y. 2008) (finding that party "acquiesced in

the [unauthorized] disclosure of . . . privileged information," reasoning that "this is a case where a reasonable holder of a privilege, confronted with an unauthorized disclosure of privileged information, would have expressed dissent to that disclosure (and would have taken steps to limit its consequences). Failure to do so within a reasonable time frame may be construed as ratification."); *Escue v. Sequent, Inc.*, 2012 WL 12925810, at *2 (S.D. Ohio Apr. 13, 2012) (same). However the issue is framed, the core question is the same: did the privilege-holder take reasonable steps to rectify the allegedly unauthorized disclosure upon learning of it? With respect to Commerce, the answer is clear: it did not. Because Commerce's inaction is incompatible with the confidentiality required of the deliberative process privilege, its privilege claim should be deemed waived.[2]

II. Commerce's Exemption 4 Claims Fail Because It Has Not Demonstrated Any Assurance of Confidentiality With Respect to the Withheld Material

Commerce concedes that it gave Circinus no express assurance of confidentiality with respect to the information it seeks to withhold under Exemption 4. *See* CREW Stmt. of Facts ¶ 10; Commerce Response to CREW Stmt. of Facts ¶ 10 ("Undisputed that [Commerce] made no express assurance of confidentiality. . . ."). But it insists that the circumstances here warrant finding an *implied* assurance of confidentiality. Commerce Opp. at 2-7. Commerce is wrong.

[2] *Medina-Hincapie v. Dep't of State*, 700 F.2d 737 (D.C. Cir. 1983), on which Commerce relies, is inapposite. That case concerned FOIA Exemption 3, which allows for withholding of information prohibited from disclosure by another statute, *see* 5 U.S.C. § 552(b)(3). The Circuit rejected the plaintiff's waiver argument, reasoning that even if the withheld material had been previously disclosed to the plaintiff, such disclosure could not waive a separate statutory *prohibition* on disclosure. *See Medina-Hincapie*, 700 F.2d at 742 n.20. That ruling is inapplicable here, where the applicable FOIA exemption is Exemption 5, and the underlying privilege at issue, deliberative process, is plainly waivable. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997).

For starters, it bears emphasizing that no D.C. Circuit authority indicates that Exemption 4 may be satisfied by an implied assurance of confidentiality by the government. The only pre-*National Parks* Circuit case law on this issue involved *express* assurances. *See* CREW Mot. at 9-10 (citing *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971), and *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580, 582 (D.C. Cir. 1970)). In *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019), the Supreme Court noted these two cases were "consistent with" its understanding of the term "confidential," though, as both parties agree, it did not definitively resolve the question.

Nonetheless, even assuming Exemption 4 could be satisfied by an implied assurance of confidentiality, Commerce has not demonstrated any such assurance here. Recent guidance from the Department of Justice's Office of Information Policy ("DOJ OIP") explains that, "in the context of Exemption 4, agencies can look to the context in which the information was provided to the government to determine if there was an implied assurance of confidentiality." OIP Guidance, Exemption 4 after the Supreme Court's Ruling in *Food Marketing Institute v. Argus Leader Media*, Oct. 4, 2019, *available at* https://bit.ly/2PbfPVG ("OIP Guidance"). "Factors to consider include the government's treatment of similar information and its broader treatment of information related to the program or initiative to which the information relates. For example, an agency's long history of protecting certain commercial or financial information can serve as an implied assurance to submitters that the agency will continue treating their records in the same manner." *Id.* By contrast, "such factors may in some contexts result in the opposite conclusion that the submitter could not have had a reasonable expectation of confidentiality"—for example, where records at issue are ones the "agency has historically disclosed." *Id.*; *see also* Commerce

Opp. at 5-6 (acknowledging that implied confidentiality analysis requires a "particularized approach, in which the government would be obligated to demonstrate the specific circumstances" warrant an inference of confidentiality).

Here, Commerce has failed to demonstrate that the "specific circumstances" here warrant finding an implied assurance of confidentiality. It generically asserts that the withheld information relates to Circinus's international business plans and strategy for expanding operations abroad, and that there was an "implied understanding" it would remain confidential because public disclosure would give Circinus's competitors insight into its strategies and capabilities. *See* Commerce Opp. at 6-7; Suppl. Lieberman Decl. ¶¶ 5-7, ECF No. 17-2. But the agency offers no details concerning Commerce's historical "treatment of similar information." OIP Guidance. So, there is no indication of whether Commerce has a "long history" of *protecting* the type of information it is seeking to withhold here or, conversely, a history of *disclosing* such information. For all we know, Commerce is selectively keeping information about Circinus secret even though it has disclosed similar information about other companies in the past. Nor has Commerce provided any detail on "its broader treatment of information related to the program or initiative to which the information relates." *Id.* Indeed, it fails even to identify the relevant "program or initiative," relying instead on general assertions about Commerce's overall "mission to facilitate the growth of American commerce domestically and abroad." Suppl. Lieberman Decl. ¶ 7. Because Commerce has failed to provide facts necessary to support a claim of implied confidentiality, its Exemption 4 claims should be rejected.

Commerce also appears to be improperly withholding under Exemption 4 information that it elsewhere disclosed to CREW or is otherwise in the public domain. Specifically,

Commerce says that it is withholding "the identity of the foreign government" whose business Circinus was seeking. Suppl. Lieberman Decl. ¶ 5. But Commerce's releases to CREW indicate that it was the Romanian government, *see* CREW Ex. 2, ECF No. 15-3 (repeatedly referencing Romanian government), and news articles reinforce that understanding, *see* Kenneth P. Vogel, et al., Two Trump Allies, Seeing Unlimited Opportunity, Instead Draw Scrutiny, *New York Times*, July 24, 2018, *available at* https://nyti.ms/2uO97dj (describing Circinus's efforts to "secur[e] an endorsement from the Commerce Department for Circinus's efforts to win lucrative defense work from the Romanian government," and noting that Branstad "relayed Circinus's request to the agency staff overseeing Romania"). Insofar as the identity of the foreign government, as well as Commerce's endorsement of Circinus to provide defense work for that government, are already in the public domain, the identity cannot be deemed confidential under Exemption 4. Relatedly, the public nature of Commerce's endorsement defeats any claim of implied confidentiality as to foreign government's identity.

CONCLUSION

The Court should grant CREW's cross-motion for summary judgment and deny Commerce's motion for summary judgment.

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Respectfully Submitted,

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