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

MEMORANDUM
IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

ARGUMENT 4

I. Commerce Has Waived the Deliberative Process Privilege as to the Census Testimony Email 4

II. Commerce's Exemption 4 Claims Fail Because It Gave Circinus No Assurance of Confidentiality With Respect to the Allegedly Exempt Material 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Bayliss v. New Jersey State Police, 622 F. App'x 182 (3d Cir. 2015) 6

CIA v. Sims, 471 U.S. 159 (1985) 10

DOJ v. Julian, 486 U.S. 1 (1988) 10

Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356 (2019) 8, 9

Grumman Aircraft Eng. Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970) 9, 10

In re Fannie Mae Sec. Litig., 2009 WL 10708594 (D.D.C. June 9, 2009) 4, 6

In re Grand Jury, 475 F.3d 1299 (D.C. Cir. 2007) 4, 5

In re McKesson Gov't Entities Average Wholesale Price Litig., 264 F.R.D. 595 (N.D. Cal. 2009) 6

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) 4

Mannina v. Dist. of Columbia, 2019 WL 1993780 (D.D.C. May 6, 2019) 4, 6, 7

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) 9

NRDC v. DOD, 442 F. Supp. 2d 857 (C.D. Cal. 2006) 6

Sikorsky Aircraft Corp. v. United States, 106 Fed. Cl. 571 (2012) 6, 7

Sterling Drug Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971) 9, 10

Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997) 4

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir.1973) 10

Washington Post Co. v. HHS, 865 F.2d 320 (D.C. Cir. 1989) 10

Statutes

5 U.S.C. § 552(b)(5) 4

5 U.S.C. § 552(b)(4) 8

Rules

Fed. R. Evid. 502(b) 7

Legislative Materials

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1964) 10

INTRODUCTION

In this suit under the Freedom of Information Act ("FOIA"), Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") seeks communications between Eric Branstad, a former high-level official at Defendant U.S. Department of Commerce ("Commerce"), and Rick Gates, a political consultant and lobbyist. CREW also seeks communications with Branstad mentioning the company Circinus, on whose behalf Gates lobbied Commerce. The parties have now cross moved for summary judgment.

CREW is entitled to summary judgment on two issues. First, Commerce invokes the deliberative process privilege in withholding an email concerning an agency official's proposed congressional testimony. But the undisputed facts show that Branstad voluntarily disclosed that email to Gates, a non-governmental third party, and that Commerce failed to exercise reasonable diligence in either preventing or rectifying Branstad's disclosure. As a result, Commerce waived privilege as to that email. Second, Commerce is withholding material under FOIA Exemption 4 that it claims includes Circinus's confidential business information. Yet there is no indication, either in the unredacted material released by Commerce or in the agency's *Vaughn* submissions, that Commerce provided Circinus any assurance of confidentiality with respect to the withheld material. Absent proof of such assurances, Commerce's Exemption 4 claims fail. Thus, on both these issues, the Court should grant CREW's motion and deny Commerce's motion.

BACKGROUND

Eric Branstad is a political consultant who served as the Iowa State Director for Donald J. Trump's 2016 presidential campaign. Compl. ¶ 6. After the election, Branstad joined

Commerce as Senior White House Advisor and Chief Aide to Secretary of Commerce Wilbur Ross. *Id.* Branstad left Commerce in January 2018. *Id.*

Rick Gates is a political consultant and lobbyist who worked for Trump's 2016 presidential campaign as a deputy campaign manager. *Id.* ¶ 7. Branstad and Gates worked together on the campaign. *Id.* In February 2018, Gates pleaded guilty to charges of conspiracy and false statements relating to his consulting work with pro-Russian political figures in the Ukraine. *Id.*

While Branstad worked at Commerce, Gates repeatedly contacted him on behalf of Circinus, a defense contractor. *Id.* ¶ 8. Gates reportedly considered Branstad a "contact" at Commerce who could help secure the agency's endorsement of lucrative defense work by Circinus for the Romanian government. *Id.* Gates relayed talking points to Branstad explaining why Circinus deserved the endorsement, which Branstad, in turn, relayed to the agency staff overseeing Romania. *Id.* Commerce ultimately provided the endorsement. *Id.*

To help answer questions about these contacts, CREW submitted a FOIA request to Commerce on August 2, 2018, seeking:

> 1. All communications between former White House advisor to the Commerce Department Eric Branstad and former Trump campaign official Rick Gates from January 20, 2017 to March 1, 2018.
>
> 2. All communication[s] sent or received by Branstad that mention the defense firm Circinus.

Declaration of Brian D. Lieberman [ECF No. 14-1] ("Liberman Decl.") ¶ 4; Commerce Ex. 2 [ECF No. 14-3].

After Commerce's statutory deadline elapsed, CREW filed this suit on December 20, 2018. Commerce produced responsive records to CREW over the next few months, culminating in a final production on June 14, 2019. Liberman Decl. ¶ 10; Commerce Ex. 8 [ECF No. 14-9].

Pursuant to FOIA Exemption 5 and the deliberative process privilege, Commerce is withholding several copies of (1) 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 (2) the draft testimony itself, which was attached to Comstock's email (collectively, the "Census Testimony Email"). CREW Ex. 1; Liberman Decl. ¶¶ 22-27; *Vaughn* Index, Lines 42-43, 46 [ECF No. 14-2]. It is undisputed that Branstad intentionally forwarded the Census Testimony Email to Gates, a private individual who was, at the time, working as a political consultant and lobbyist. CREW Ex. 1; Liberman Decl. ¶ 24; *Vaughn* Index, Lines 42-43, 46; Compl. ¶ 7. In forwarding the email, Branstad asked Gates," Can we print this at Tom [Barrack's] house for Sec. [of Commerce Wilbur] Ross," CREW Ex. 1 at 00073, 00090, 00137, to which Gates responded, "Yes. Will do now," and later added, "Got them all for you," CREW Ex. 1 at 00137.

Commerce is also withholding, pursuant to Exemption 4, material that it asserts includes confidential business information about the company Circinus. CREW Ex. 2; Liberman Decl. ¶¶ 17-21; *Vaughn* Index, Lines 49-67. Commerce does not claim it provided any assurance of confidentiality to Circinus with respect to the withheld information. Nor do the unredacted portions of the agency's Exemption 4 withholdings reveal any such assurances by Commerce or even a request for confidentiality by Circinus. CREW Ex. 2; Liberman Decl. ¶¶ 17-21; *Vaughn* Index, Lines 49-67.

The parties have now cross moved for summary judgment.

ARGUMENT

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

In this Circuit, "voluntary disclosure . . . to unnecessary third parties . . . waives" the "deliberative process privilege" as to "the document or information specifically released." *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997).[1] Applying this principle in *In re Sealed Case*, the Circuit held that the White House waived the deliberative process privilege as to certain "documents that it voluntarily revealed to third parties outside the White House." *Id.* at 741-42; *see also Mannina v. Dist. of Columbia*, 2019 WL 1993780, at *8 (D.D.C. May 6, 2019) (holding that defendant's prior voluntary disclosure of document to plaintiff waived deliberative process privilege) (citing *In re Sealed Case*, 121 F.3d at 741-42). The Circuit's ruling reflects the general principle that the confidentiality of privileged material "must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant." *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007); *see In re Fannie Mae Sec. Litig.*, 2009 WL 10708594, at *1 (D.D.C. June 9, 2009) (applying principle to deliberative process privilege).

[1] Commerce invokes the deliberative process privilege pursuant to FOIA Exemption 5, which protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "Exemption 5 permits an agency to withhold materials normally privileged from discovery in civil litigation against the agency," including material protected by the deliberative process privilege. *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997).

Here, there is no dispute that Branstad, a Chief Aide to the Secretary of Commerce, voluntarily disclosed the Census Testimony Email to Gates, a non-governmental and "unnecessary third part[y]." The unredacted portions of the May 1, 2017 email show that Branstad forwarded the email to Gates, asked him to "print this" at the house of Tom Barrack (another non-governmental third party), and that Gates complied. *See* CREW Ex. 1 at 00073, 00090, 00137. Moreover, there is no indication that Commerce, upon learning of Branstad's disclosure, took any steps to recover the purportedly privileged material from Gates, Barrack, or any other third party who may be in possession of it. The material may well remain in Gates's private email account. Copies may remain at Barrack's house. The agency's submissions simply shed no light on these issues. Far from reflecting any "jealous[] guard[ing]" of the privilege, *In re Grand Jury*, 475 F.3d at 1305, Commerce's actions show casual indifference at best.[2]

Commerce insists there was no waiver because "the information was not knowingly put out into the public domain by the agency" and was "unauthorized by [Commerce] and contrary to [its] policy and practice." Commerce Mem. at 9 (citing *Mannina*, 2019 WL 1993780, at *8 and Liberman Decl. ¶ 24). This argument fails for several reasons.

For starters, *Mannina* does not help Commerce. There, it was undisputed that the defendant *inadvertently* produced privileged material to the plaintiff in discovery. *See* 2019 WL

[2] The Liberman Declaration makes a conclusory statement that, "[t]o [his] knowledge, the email and attachment were not distributed to any private individuals other than Mr. Gates." Liberman Decl. ¶ 24. Yet the declaration does not describe any steps Commerce took to investigate this issue, nor does it state that the agency contacted Gates, Barrack, or any other private individuals who plausibly may be in possession of the Census Testimony Email.

1993780, at *7 ("The District asserts that its disclosure of Document 2 was inadvertent, and Ms. Mannina does not contend otherwise."). The court found no waiver, reasoning that "only intentional disclosures of information subject to the deliberative process privilege operate to waive that privilege." *Id.* at *8. Here, by contrast, it is undisputed that Branstad voluntarily and intentionally disclosed the purportedly privileged material to a third party. Thus, as the *Mannina* court held with respect to a different document, "[t]his voluntary disclosure waived the deliberative process privilege." *Id.*

Insofar as Commerce is claiming that Branstad's disclosure qualifies as "inadvertent" because the agency itself did not authorize disclosure, that argument fails as well. Even where a disclosure is unauthorized or inadvertent, courts have frequently held that an agency can waive the deliberative process privilege by failing to take reasonable steps to prevent or rectify the disclosure. *See, e.g.*, *In re Fannie Mae Sec. Litig.*, 2009 WL 10708594, at *1 (privilege waived where government "did not take 'reasonable steps' to prevent the documents' inadvertent disclosure or to promptly rectify such disclosure"); *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 584-86 (2012) (privilege waived where government "did not act with sufficient alacrity to claw back the records" inadvertently produced in discovery); *In re McKesson Gov't Entities Average Wholesale Price Litig.*, 264 F.R.D. 595, 600 (N.D. Cal. 2009) (privilege waived where government "voluntarily disclosed the documents" and did not take "reasonable precautions to avoid disclosure of privileged information"); *NRDC v. DOD*, 442 F. Supp. 2d 857, 866 (C.D. Cal. 2006) (privilege waived based partly on government's failure to "take any affirmative steps to inhibit the [third party's] further dissemination of the" privileged material); *cf. Bayliss v. New Jersey State Police*, 622 F. App'x 182, 186 (3d Cir. 2015) (no waiver where

"the State took reasonable steps in preventing and rectifying the disclosure," including "immediately request[ing] return of the" privileged material upon learning of its unauthorized disclosure, and later filing a "Clawback Motion" to obtain the material). Many of these cases apply the standard for inadvertent waiver set forth in Federal Rule of Evidence 502, under which inadvertent disclosure will result in waiver if the privilege holder failed to take "reasonable steps to prevent disclosure" and "promptly t[ake] reasonable steps to rectify the error." Fed. R. Evid. 502(b).[3]

Here, Commerce has failed to take *any* steps, let alone prompt and reasonable ones, to rectify Branstad's purportedly unauthorized disclosure. It follows that even if Branstad's initial disclosure did not waive the privilege, Commerce's utter failure to do anything about it did. Nor is there sufficient evidence that Commerce took reasonable precautions to prevent such disclosure in the first instance. The Liberman Declaration includes a conclusory statement that Branstad's disclosure was "contrary to [agency] policy and practice," Liberman Decl. ¶ 24, yet it is devoid of any detail on this so-called policy. Commerce does not provide a copy of the policy, describe its scope, or discuss any steps the agency took to implement it. Its bare assertion about

[3] Insofar as *Mannina* held that inadvertent disclosure can *never* result in waiver of the deliberative process privilege, and declined to apply Rule 502(b)'s standard for inadvertent waiver, *see* 2019 WL 1993780, at *8, that ruling is contrary to the weight of authority cited above. It is also bad policy, as it would allow the government to withhold material under the deliberative process privilege even where it has carelessly failed to take basic steps to preserve confidentiality and limit disclosure to non-privileged parties. There is no basis for granting the government such leeway, particularly where private parties enjoy no such protections for comparable privileges. Moreover, while the text of Rule 502(b) does not expressly apply to the deliberative process privilege, courts are free to (and often do) consult that rule in formulating federal common law governing the privilege. *See Sikorsky Aircraft*, 106 Fed. Cl. at 576 ("The deliberative process privilege . . . is a creation of federal common law.").

the mere existence of a policy fails to demonstrate that the agency took reasonable steps to prevent disclosure.

To summarize: the undisputed facts show that Branstad, a high-level Commerce official, voluntarily disclosed the Census Testimony Email to a non-governmental third party, and that Commerce failed to exercise reasonable diligence in either preventing or rectifying that disclosure. Under these circumstances, Commerce waived the deliberative process privilege.

II. Commerce's Exemption 4 Claims Fail Because It Gave Circinus No Assurance of Confidentiality With Respect to the Allegedly Exempt Material

Exemption 4 protects "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Commerce invokes this exemption in withholding information concerning the company Circinus, claiming that the information is "confidential" because it "pertains to the company's plans and strategy for providing defense/military contracting and related services to foreign nations, which was intended for [Commerce] review and to potentially use in support of Circinus." Liberman Decl. ¶ 21. Yet Commerce makes no claim that it provided any assurance of confidentiality to Circinus with respect to the withheld information, nor do the unredacted portions of the agency's Exemption 4 withholdings reveal any such assurances by Commerce or even a request for confidentiality by Circinus. CREW Ex. 2; Liberman Decl. ¶¶ 17-21; *Vaughn* Index, Lines 49-67. As explained below, this is fatal to the agency's Exemption 4 claims.

The Supreme Court recently addressed Exemption 4's "confidentiality" standard in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). There, the Court noted that "FOIA nowhere defines the term 'confidential,'" so it examined "what that term's 'ordinary,

contemporary, common meaning' was when Congress enacted FOIA in 1966." *Id.* at 2362-63. It then pointed to "[c]ontemporary dictionaries," which "suggest two conditions that might be required for information communicated to another to be considered confidential": (1) "information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it," and (2) "information might be considered confidential *only if the party receiving it provides some assurance that it will remain secret*." *Id.* at 2363 (emphasis added). The Court went on to hold that Exemption 4 makes the first condition mandatory, but it had no occasion to rule on the second condition, as it was "clearly satisf[ied]" in that case given that "the government ha[d] long promised" the companies "to keep their information private." *Id.* The Court thus concluded that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner *and provided to the government under an assurance of privacy*, the information is 'confidential' within the meaning of Exemption 4." *Id.* at 2366 (emphasis added).[4]

While *Food Marketing* did not definitively resolve whether Exemption 4 requires a governmental assurance of confidentiality, the Court favorably cited several pre-*National Parks* cases that do support such a requirement, including two from this Circuit. *See id.* at 2363 (citing *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971); *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580, 582 (D.C. Cir. 1970)). In *Sterling Drug*, the D.C. Circuit

[4] *Food Marketing* also held that Exemption 4's confidentiality standard does not require any showing of "substantial competitive harm," overturning the D.C. Circuit's seminal decision in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and over 40 years of precedent applying that case. *See* 139 S. Ct. at 2363-66. Consequently, the Circuit's post-*National Parks* cases on Exemption 4 are of minimal precedential value here.

held that Exemption 4 protected documents a company submitted to the Federal Trade Commission, where the company requested three times in writing that the documents "be considered confidential," and the "Commission notified [the company] that they would be classified confidential." 450 F.2d at 701. Citing legislative history stating that Exemption 4 was intended to apply to information "given to an agency in confidence," the Circuit noted that the company "sought to prevent public disclosure of these documents, and the Commission has agreed to treat them as confidential." *Id.* at 709 (quoting H.R. Rep. No. 1497, at 31, 89th Cong., 2d Sess. 10 (1964)). Similarly, in *Grumman*, the Circuit recognized that Exemption 4 applied to "data submitted 'in confidence' to the [government] by defense contractors." 425 F.2d at 580.

Requiring a governmental assurance of confidentiality conforms with FOIA's overarching polices. "The mandate of the FOIA calls for broad disclosure of Government records," *CIA v. Sims*, 471 U.S. 159, 166 (1985), and "for this reason . . . FOIA exemptions are to be narrowly construed," *DOJ v. Julian*, 486 U.S. 1, 8 (1988); *see Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir.1973) ("[E]xemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act."). "Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute." *Washington Post Co. v. HHS*, 865 F.2d 320, 324 (D.C. Cir. 1989). The requirement is also readily administrable: whether the government provided the submitter an assurance of confidentiality entails an objective inquiry that does not depend on fuzzy or ill-defined concepts.

Thus, the conclusion that Exemption 4 requires a governmental assurance of confidentiality is supported by contemporaneous dictionary definitions of the term

"confidential," the Supreme Court's decision in *Food Marketing*, the pre-*National Parks* case law, the legislative history, and FOIA's overarching policies. Because there is no proof of such governmental assurances here, Commerce's Exemption 4 claims fail.

CONCLUSION

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

Date: September 4, 2019

Respectfully Submitted,

/s/ Nikhel Sus
NIKHEL S. SUS
(D.C. Bar No. 1017937)
ANNE L. WEISMANN
(D.C. Bar. No. 298190)
Citizens for Responsibility and Ethics in Washington
1101 K St. NW, Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org
aweismann@citizensforethics.org

Counsel for Plaintiff