IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF STATE, Defendant.	Civil Action No. 19-1344 (RBW)
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Plaintiff, v. U.S. DEPARTMENT OF STATE, Defendant.	Civil Action No. 19-2125 (RBW)

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

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INTRODUCTION

On March 18, 2019, Secretary of State Mike Pompeo held a briefing call with a select group of "faith-based" media outlets in advance of a planned trip to the Middle East. The briefing focused on "international religious freedom," so-called "radical Islamic terrorism," and Israeli-Palestinian relations. Although the U.S. Department of State ("State") initially invited both religious and non-religious media outlets to join the briefing, it later rescinded invitations to the non-religion-focused outlets, explaining that the briefing was "for faith-based media only." State also rescinded its invitation to the only Muslim-focused organization included in the initial list of call participants.

In these consolidated cases under the Freedom of Information Act ("FOIA" or the "Act"), Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Reporters Committee for Freedom of the Press (the "Reporters Committee") seek records concerning the March 18, 2019 briefing call. State has completed its productions but has withheld several records or portions thereof as purportedly exempt. The parties now cross-move for summary judgment.

Plaintiffs are entitled to summary judgment as to State's Exemption 5 and 6 withholdings. As to Exemption 5, State has invoked the deliberative process privilege to improperly withhold communications that are both post-decisional and non-deliberative, as well as communications about State's interactions with the press that are unrelated to any policy-oriented judgments. State has also failed to provide basic details needed to evaluate its deliberative process claims. As to Exemption 6, State is improperly withholding the domain name portions of email addresses—the portion of the email address following the "@" sign, e.g.

".gov"—for Secretary Pompeo and two others. State has not and cannot carry its burden of showing that the addressees have any—let alone more than a *de minimis* privacy interest—in their email domains, which cannot be used to determine their full email addresses. Finally, with respect to all Exemption 5 and 6 withholdings, State has failed to meet its burden under the FOIA Improvement Act of 2016 to show that disclosure would foreseeably harm an exemption-protected interest. Indeed, State appears to be withholding many records not to safeguard any legitimate interest, but rather to shield damaging or embarrassing information concerning its improper exclusion of non-"faith-based" media organizations from an official press briefing with the Secretary of State.

For all these reasons, the Court should enter summary judgment for Plaintiffs.

BACKGROUND

Following news reports about Secretary Pompeo's March 18, 2019 briefing call, Plaintiffs CREW and the Reporters Committee submitted separate FOIA requests seeking all records relating to the briefing. *See* Declaration of Eric F. Stein, ECF No. 18-2 ("Stein Decl.") ¶¶ 5, 12 & Exs. 1, 8. After State failed to produce records within statutory deadlines, Plaintiffs separately sued. Between September 2019 and March 2020, State released a total of 34 records in full and 45 records in part in response to Plaintiffs' FOIA requests. *Id.* ¶ 54. By order dated February 27, 2020, the Court consolidated the CREW and Reporters Committee cases. ECF No. 16.

State's productions have revealed key details about the briefing call that the agency previously refused to disclose, including the following:

- According to the briefing transcript, Secretary Pompeo held the briefing to discuss his upcoming trip to the Middle East, which he described as focusing on "challenges we face from radical Islamic terrorism in the region," State's "work[] to promote religious tolerance" in the countries visited, and Israeli-Palestinian relations. Declaration of Lin Weeks Ex. A.[1] He recognized that "persons of all faiths will have something to say" about the Trump Administration's Israel-Palestine peace plan. *Id.* He also described "a very robust effort to work with other countries" to "cease allowing radicalism to take place in their mosques or elsewhere in madrasas." *Id.* Secretary Pompeo responded to several questions on these subjects from participants in the call. *Id.*
- Emails show that State initially invited both religious and non-religious media outlets to join the briefing call, but later rescinded invitations to non-religion-focused outlets, over reporters' objections, because the briefing was "for faith-based media only." Ex. B. Reporters from outlets such as *The Washington Post*, *The Wall Street Journal*, Reuters, and CNN were excluded from the call, or received no response to their attempts to RSVP. Exs. B, C, D, E. State has withheld, under Exemption 5 and the deliberative process privilege, various emails concerning this issue.
- Both the briefing transcript and final list of briefing attendees reveal that no organizations dedicated exclusively or primarily to Muslim-focused issues attended the briefing. Exs. A, F.

[1] Unless otherwise noted, all exhibits cited in this memorandum are attached to the Weeks Declaration.

- Emails further show that an earlier list of call participants included a representative from the Council on American-Islamic Relations ("CAIR"), and that State initially invited CAIR to join the briefing, but later rescinded that invitation. Exs. G, H. State has withheld, under Exemption 5 and the deliberative process privilege, emails concerning State's exclusion of CAIR from the briefing call.
- The day after the briefing, a State official sent an email summarizing what transpired and the resulting backlash from the press, stating that "Jessica Donati of [*The Wall Street Journal*] was extended an invitation and then someone in Kansas asked that the invitation be rescinded. It is unclear to me who made the decision and why it was made. . . . Someone affiliated with CAIR was also rescinded an invite." Ex. I.
- Finally, emails show that senior agency officials were dismayed by the briefing and how it was handled. In response to press coverage critical of the briefing, one official wrote: "This is NOT a good look for the U.S." Ex. J. Another official emailed a colleague to say, "I'm reading about [the briefing] on Twitter and it seems somewhat strange. Would appreciate any context you have." Ex. K. The colleague responded: "I have no insight to offer why they decided to conduct this engagement in this highly unusual manner." *Id.*

State has withheld various records under FOIA Exemptions 1, 5, and 6. The parties have now cross-moved for summary judgment. Plaintiffs only challenge State's Exemption 5 and 6 withholdings.[2]

LEGAL STANDARDS

FOIA was enacted to create an enforceable, statutory right of "access to official information long shielded unnecessarily from public view." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). As the Supreme Court has explained, the "core purpose" of FOIA is to increase "public understanding *of the operations or activities of the government*." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989) (internal quotation marks omitted).

Under FOIA, the responding agency's actions are reviewed by the district court de novo. 5 U.S.C. § 552(a)(4)(B). The agency bears the burden of establishing that it conducted a search "reasonably calculated to uncover all relevant documents," *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983), and that its withholding of records is proper under one of FOIA's nine enumerated exceptions, *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998), *as amended* (Mar. 3, 1999); *see also* 5 U.S.C. § 552 (a)(4)(B). "Consistent with the Act's goal of broad disclosure," these exceptions must be narrowly construed, *DOJ v. Tax Analysts*, 492 U.S. 136,

[2] Although Plaintiffs do not challenge the adequacy of State's search or its Exemption 1 claims, that does not relieve State of its burden to demonstrate its entitlement to summary judgment on those issues. *See* Fed. R. Civ. P. 56(a); *Tokar v. DOJ*, 304 F. Supp. 3d 81, 94 n.3 (D.D.C. 2018) ("the Court still has an independent duty to 'determine for itself whether the record and any undisputed material facts justify granting summary judgment,' because a Court may not grant summary judgment simply because the withholding was not challenged") (citation omitted); *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 505 (D.C. Cir. 2016) ("The burden is always on the movant to demonstrate why summary judgment is warranted. The nonmoving party's failure to oppose summary judgment does not shift that burden.") (citation and internal quotation marks omitted).

151 (1989), and the underlying facts "viewed in the light most favorable to the requester," *Weisberg*, 705 F.2d at 1350.

In addition, for any document withheld as exempt, the agency must separately satisfy the "foreseeable harm" requirement of the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538. As amended, FOIA now provides: "An agency shall . . . withhold information under this section only if . . . (I) the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption; or (II) disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). "Stated differently, 'pursuant to the FOIA Improvement Act, an agency must release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest' and if the law does not prohibit the disclosure." *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 98 (D.D.C. 2019) (quoting *Rosenberg v. DOD*, 342 F. Supp. 3d 62, 72 (D.D.C. 2018)).

FOIA cases are frequently decided on summary judgment. *See, e.g.*, *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (collecting cases). Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An agency is entitled to summary judgment in a FOIA action only if it establishes that it has "fully discharged" its statutory obligations. *Weisberg*, 705 F.2d at 1350. To do so, "the agency must provide a detailed description of the information withheld through the submission of a so-called '*Vaughn* index,' sufficiently detailed affidavits or declarations, or both." *Hussain v. DHS*, 674 F. Supp. 2d 260, 267 (D.D.C. 2009). Summary judgment may be granted only if the agency's submissions "describe the justifications for nondisclosure with reasonably specific

detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009).

ARGUMENT

I. State is improperly withholding records under FOIA Exemption 5 and the deliberative process privilege.

State is withholding portions of 15 records under Exemption 5. *See* Stein Decl. ¶¶ 38, 39, 41–43, 46–53. "Exemption 5 permits an agency to withhold materials normally privileged from discovery in civil litigation against the agency." *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). State has invoked the deliberative process privilege, which "protects 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Loving v. DOD*, 550 F.3d 32, 38 (D.C. Cir. 2008). To fall within this privilege, a document must be both "predecisional" and "deliberative." *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A document is predecisional if "it was generated before the adoption of an agency policy" and deliberative if it "reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980).

To successfully invoke the privilege, the "government must explain, *for each withheld record*, at least, (1) what deliberative process is involved, (2) the role played by the documents in issue in the course of that process, and (3) the nature of the decisionmaking authority vested in the office or person issuing the disputed document[s], and the positions in the chain of command of the parties to the documents." *Ctr. for Investigative Reporting v. CBP*, 2019 WL 7372663, at

*4 (D.D.C. Dec. 31, 2019) (internal citations omitted, emphasis added); *see also Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982). And when an agency identifies any withholding as a "draft," it "must indicate whether the draft was (1) adopted formally or informally, as the agency position on an issue, or (2) used by the agency in its dealings with the public." *Heffernan v. Azar*, 317 F. Supp. 3d 94, 125-26 (D.D.C. 2018) (Walton, J.). Finally, an agency invoking any FOIA exemption, including Exemption 5, must satisfy the statute's foreseeable harm requirement.

Here, State has fallen short of its burden in several respects.

A. State has failed to provide any details on the decisionmaking authority of the employees involved in the withheld communications.

"Explaining decisionmaking authority is an essential ingredient to justifying withholdings under the deliberative process" privilege. *Ctr. for Investigative Reporting*, 2019 WL 7372663, at *6. As the D.C. Circuit has explained, "[a] key feature under both the 'predecisional' and 'deliberative' criteria is the relation between the author and recipients of the document. A document from a junior to a senior is likely to reflect his or her own subjective opinions and will clearly have no binding effect on the recipient. By contrast, one moving from senior to junior is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking rather than part of its give-and-take." *Access Reports v. DOJ*, 926 F.2d 1192, 1195 (D.C. Cir. 1991).

Disregarding these principles, State made no effort to identify "the relation between the author and recipients of the document," *id.*, but rather "wholly omitted information about the positions and responsibilities of the authors and recipients . . . of the records," *Ctr. for*

Investigative Reporting, 2019 WL 7372663, at *6. That is the case for every one of the agency's deliberative process withholdings. *See* Stein Decl. ¶¶ 38, 39, 41–43, 46–53. This failure to "provide the minimal information necessary to make a determination concerning applicability of the deliberative process privilege" by itself precludes summary judgment for State. *Heffernan*, 317 F. Supp. 3d at 118-19.

B. Challenges to specific withholdings.

Documents C06827382, C06827384, C06827393, C06827424, C06827426, C06828153, and C06827478. These are several copies of a March 18, 2019 email exchange in which State withheld "the name of an individual in the context of an inquiry about whether that individual should be included on any of the scheduled conference calls." Stein Decl. ¶ 38. State asserts the withheld name is "predecisional and deliberative with regard to the final list of invitees to the call with the Secretary." *Id.*

State's claim does not withstand scrutiny. The unredacted portions of the email exchange show Kuros Ghaffari—the State official who took the lead on coordinating the briefing call—communicating with the agency's "Operations Center" about logistical matters for various calls, including "faith-based" media briefing. Ex. F. The operations officer asked "whether [redacted] should be included on any of the calls," and Ghaffari responded "[redacted] does not/not need to be included on any of the calls." *Id.* The communication was therefore purely administrative; it does not reflect any substantive deliberations regarding the briefing attendees. It instead occurred *after* the agency's final decision regarding briefing attendees, and merely conveyed that previously made decision to the agency's Operations Center for logistical purposes only. Such non-deliberative, post-decisional communications are not privileged. *See Abtew v. DHS*, 808

F.3d 895, 898 (D.C. Cir. 2015) (document is predecisional only "if it precedes, in temporal sequence, the decision to which it relates."); *Coastal States*, 617 F.2d at 868 (document is deliberative only if it reflects "agency give-and-take of the deliberative process by which the decision itself is made"). Indeed, State does not even attempt to meet its "burden of establishing . . . the role played by the [withheld] documents" in the agency's purported deliberative process. *Coastal States*, 617 F.2d at 868. That is because they played no such role.

Nor do these post-decisional communications reveal any protected pre-decisional deliberations. As discussed above, State's releases make clear that the agency excluded representatives from CAIR and non-religion-focused media outlets from the call. To the extent the withheld name is one of those excluded individuals, it is merely a subset of information State has already disclosed. Since disclosure of the name itself would shed no further light on State's deliberations beyond what the agency has elsewhere revealed, State has no confidentiality interest in withholding it.

Documents C06827453 and C06827455. These are emails from State's "Operations Center that list the confirmed and pending calls on Secretary Pompeo's schedule." Stein Decl. ¶ 39. State is withholding "the calls under the 'Pending' and 'Ops is tracking the following calls' headings," asserting that the information is "predecisional and deliberative with regard to the Secretary of State's actual schedule and calls he actually took." *Id.* But there is nothing "deliberative" about a mere list of pending calls. Nor does State demonstrate that the withheld material includes any substantive discussions about which calls the Secretary should take, or that it otherwise reflects the "agency give-and-take of the deliberative process by which the decision itself is made." *Coastal States*, 617 F.2d at 868. It instead appears to consist solely of non-

deliberative factual information. Moreover, State overlooks that "even if [a] document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position." *Id.* at 866. State thus cannot withhold any of the listed "non-confirmed" calls that were ultimately confirmed, and it is likely at least some of them were. The Stein Declaration provides no details on this point.

Documents C06827968 and C06827969. These are March 18, 2019 emails concerning State's "response to media inquiries" about the briefing call, including discussion of how generally "to respond to individuals or organizations who ask to participate in the call but were not on the invitation list," Stein Decl. ¶ 42, and how specifically to respond to a reporter from *The Washington Post* who had asked to participate in the briefing, *id.* ¶ 43.

These communications are not privileged. As this Court has recognized, records "must have some bearing on the deliberative, give and take process of formulating policy or recommendations for policy changes, in order to be covered by the privilege." *Heffernan*, 317 F. Supp. 3d at 126 n.18; *see also Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435-37 (D.C. Cir. 1992) (holding that "materials must bear on the formulation or exercise of agency policy-oriented *judgment*" to be privileged, and rejecting privilege claim where information "lack[ed] . . . association with a significant *policy* decision"); *Coastal States*, 617 F.2d at 869 (rejecting privilege claim where records did not "discuss the wisdom or merits of a particular agency policy, or recommend new agency policy"). Thus, communications solely concerning an agency's proposed response to inquiries from the press and other external entities, with no link to matters of substantive agency policy or other policy-oriented judgments, are not protected. *See, e.g.*, *Heffernan*, 317 F. Supp. 3d at 126-27 (agency failed to carry burden where

it gave "no indication as to what deliberative process the withheld pre-final draft press release concerned or its role in the formulation of policies or recommendations for policy change"); *Mayer, Brown, Rowe & Maw LLP v. IRS*, 537 F. Supp. 2d 128, 139 (D.D.C. 2008) (ordering draft press releases to be "produced in their entirety because they [did] not 'bear on . . . policy formulation'"), *aff'd*, 562 F.3d 1190 (D.C. Cir. 2009); *Sun-Sentinel Co. v. DHS*, 431 F. Supp. 2d 1258, 1278 (S.D. Fla. 2006) (emails not privileged where they merely offered "suggestions and comments regarding suitable responses to inquiries from the press," but had no "advice that relate[d] to the mission of FEMA," nor any "relationship to a policy matter or a decision regarding the formulation of FEMA policy"), *aff'd sub nom. News-Press v. DHS*, 489 F.3d 1173 (11th Cir. 2007); *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 739 F. Supp. 2d 515, 545 (S.D.N.Y. 2010) ("Communications regarding how to present agency policies to Congress, the press, or the public . . . are properly withheld [only] if their release would reveal the status of internal deliberations on substantive policy matters."). Here, the withheld communications do not involve messaging about any substantive policy issue relevant to State's mission; they instead concern how State officials responded to media requests to participate in the briefing call and the fallout from outlets being excluded from the briefing. The communications therefore fall outside the deliberative process privilege.

Even if the privilege were available, State has "not indicated whether" the withheld "public relations materials . . . have been formally or informally adopted or used in the agency's interactions with the public." *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004) (Walton, J.). "Since either will defeat the deliberative process privilege," State has "failed to meet [its] burden of establishing that the documents were properly withheld." *Id.*;

accord Heffernan, 317 F. Supp. 3d at 127; *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 261 (D.D.C. 2004).

Document C06828154. This is a March 18, 2019 email with the subject line "WSJ – Donati," Ex. L, likely in reference to a reporter from *The Wall Street Journal* who attempted to join the briefing call, objected to being excluded, and was told she could not join because the briefing was "for faith-based media only," Ex. B. State has fully redacted the body of the email. Ex. L. Yet it has failed altogether to provide any justification for that withholding—in the Stein Declaration or elsewhere. *See* Stein Decl. ¶¶ 35-53. Absent any justification, the withholding is improper. And insofar as State's justification for this withholding mirrors its justification for the other records discussed above, it fails for the same reasons.

C. State has failed to satisfy FOIA's foreseeable harm requirement.

Even if State's withholdings fell within the scope of Exemption 5 and the deliberative process privilege, which they do not, they are still improper because State has failed to satisfy FOIA's foreseeable harm requirement. As noted, "pursuant to the FOIA Improvement Act, an agency must release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest.'" *Judicial Watch*, 375 F. Supp. 3d at 98. The foreseeable harm requirement "'impose[s] an independent and meaningful burden on agencies,'" which is "'intended to restrict agencies' discretion in withholding documents under FOIA.'" *Ctr. for Investigative Reporting*, 2019 WL 7372663, at *9. To meet that "independent and meaningful burden, an agency must 'identify specific harms to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the withheld materials' and 'connect[ ] the harms in [a] meaningful way to the information withheld.'" *Id.*

(quoting *Judicial Watch, Inc. v. DOJ*, 2019 WL 4644029, at *5 (D.D.C. Sept. 24, 2019)). An agency thus cannot merely "perfunctorily state that disclosure of all the withheld information—regardless of category or substance—would jeopardize the free exchange of information." *Judicial Watch*, 375 F. Supp. 3d at 100 (quoting *Rosenberg*, 342 F. Supp. 3d at 72).

As to whether disclosure would harm an "exemption-protected" interest, under FOIA's foreseeable harm requirement "information may not be withheld 'merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.'" S. Rep. No. 114-4, at 7 (quoting White House Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009)). That is so "even if . . . the technical requirements of the exemption" are met. *Id.* at 3. This ensures that agencies "comply" not only "with the letter of" FOIA, but also "the spirit of the law." *Ctr. for Investigative Reporting*, 2019 WL 7372663, at *7 (quoting 162 Cong. Rec. H3717 (2016)). It also reflects Congress's judgment that "[n]ondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve." S. Rep. No. 114-4, at 7.

Finally, the foreseeable harm standard warrants strict adherence in the present context because Congress, in adopting it, "was especially concerned about agencies' . . . over-withholding" of records under "Exemption 5 and the deliberative process privilege." *Ctr. for Investigative Reporting*, 2019 WL 7372663, at *8-9; *see* H.R. Rep. No. 114-391, at 10 (noting that "Exemption five has been singled out as a particularly problematic exemption," and that the "deliberative process privilege is the most used privilege and the source of the most concern regarding overuse"); S. Rep. No. 114-4, at 3 (noting that in 2012 "agencies used Exemption 5 . . .

more than 79,000 times in 2012—a 41% increase from the previous year," and that this was part of "a growing and troubling trend towards relying on . . . discretionary exemptions to withhold large swaths of Government information").

1. Disclosing information relating to State's improper exclusion of non-"faith-based" media outlets from the briefing call would not harm any "exemption-protected interest."

As a threshold matter, State's claims of foreseeable harm are legally flawed insofar as the agency is merely trying to shield from disclosure information that would shed light on its improper exclusion of news media outlets from an official briefing with the Secretary of State solely on the basis of those outlets' religious viewpoint (or lack thereof). State has no "exemption-protected interest" in covering up such conduct, which, at a minimum, offends First Amendment principles.

The following facts are undisputed: Secretary Pompeo held a briefing call to discuss official government business exclusively with "faith-based" media. Exs. A, B. State intentionally excluded non-religion-focused media outlets from the briefing, over their objection, on the ground that the briefing was "for faith-based media only." Ex. B. State also rescinded its invitation to the only Muslim-focused organization, CAIR, initially slated to participate in the call. Exs. A, F, G, H. Finally, State's own employees criticized the briefing, stating it was handled in a "highly unusual manner," Ex. K, and was "NOT a good look for the U.S," Ex. J.

Against this undisputed factual backdrop, State attempts to withhold the following records under the deliberative process privilege:

- Portions of a March 18, 2019 email exchange containing agency "employees' discussion about whether a particular individual should be invited to participate in

[the] call with the Secretary." Stein Decl. ¶ 41. Although the Stein Declaration does not identify the referenced "individual," there are strong indications it was the representative from CAIR. Specifically, the first email in the chain has an unredacted list of eight potential participants, which included the CAIR representative, Ex H, yet CAIR is the only one of the eight listed groups whose invitation State ultimately rescinded, Exs. F, I. Thus, the withheld material is virtually certain to shed light on why State ultimately excluded CAIR from the briefing.

- Portions of a March 18, 2019 email exchange where an agency official asks whether a particular individual "should be included" in scheduled conference calls (including the "faith-based media" briefing call), and another official responds that the individual "does not/not need to be included on any of the calls." Stein Decl. ¶ 38; Ex. F. Only the individual's name is redacted. Again, the referenced individual is likely the CAIR representative discussed above.
- The March 18, 2019 email discussed above, with the subject line "WSJ – Donati," Ex. L—likely in reference to the reporter from *The Wall Street Journal* who objected to being excluded from the briefing. The body of the email is fully redacted, and the Stein Declaration includes no explanation for this withholding.
- Portions of a March 18, 2019 email exchange including agency officials' discussion of "the invitation list for the call and how to respond to individuals or organizations who ask to participate in the call but were not on the invitation list." Stein Decl. ¶ 42; Ex. M.

- A March 18, 2019 email where a State official "comments on" a *Washington Post* reporter's request to participate in the briefing call, and "proposes a response to provide the" reporter. Stein Decl. ¶ 43; Ex. N.
- Portions of a March 17, 2019 email containing a "draft of the invitation to participate in the call," as well as another employee's response to that email. Stein Decl. ¶ 50; Ex. O.
- Portions of a March 12-13, 2019 email exchange where one employee asks another to "recommend religious media outlets to consider inviting to the" March 18, 2019 briefing call. Stein Decl. ¶ 52; Ex. P. State withheld "the names of those recommended invitees," questions "about local outlets, including a specific question about one publication, to gather more information to decide which outlets to invite to participate on the call," and responses to those questions. Stein Decl. ¶ 53.

As noted, the foreseeable harm standard forbids an agency from withholding information "merely because public officials might be embarrassed by disclosure," or "because errors and failures might be revealed," S. Rep. No. 114-4, at 7, since such concerns are not "exemption-protected" interests. *See Ctr. for Investigative Reporting*, 2019 WL 7372663, at *8. Yet that is precisely what State appears to be doing here: withholding information relating to its use of a viewpoint-based criterion (namely, whether it considers a media outlet to be "faith-based") to deny members of the press access to an official briefing with the Secretary of State—a move State's own employees described as "highly unusual," Ex. K, and "NOT a good look for the U.S," Ex. J. In addition to departing from basic tenets of transparency and neutral governance, State's exclusion of non-"faith-based" media from the briefing raises, at a minimum, serious

First Amendment concerns.[3] Shielding such improper conduct from public scrutiny does not serve any legitimate exemption-protected interest in promoting "candid discussion within the agency" or protecting "the agency's ability to perform its functions." *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987); *cf. Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 163 (D.D.C. 2003) (holding that deliberative process privilege did not apply to personnel matter where racial discrimination was alleged, as "it is inconceivable that Congress intended federal agencies to shield . . . information otherwise subject to the deliberative process privilege when that information bears on" impermissible agency discrimination). State thus cannot satisfy the foreseeable harm test with respect to these withholdings.[4]

2. State has otherwise failed to meet its burden to demonstrate foreseeable harm.

In addition to the substantive flaws with its foreseeable harm claims, State has also failed to meet its "independent and meaningful burden" to explain the "'specific harms to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the withheld materials' and 'connect[ ] the harms in [a] meaningful way to the information

[3] *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (content-based and viewpoint-based restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests"); *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (noting that "arbitrary or content-based criteria for press pass issuance are prohibited under the first amendment" where the government "voluntarily decided" to "open" up a journalistic forum to the press); *Getty Images News Servs. v. DOD*, 193 F. Supp. 2d 112, 122 (D.D.C. 2002) (citing cases recognizing that "when press access is granted to some, others have a constitutional right to equal access"); *see also Freedom from Religion Found., Inc. v. City of Marshfield, Wis.*, 203 F.3d 487, 496 (7th Cir. 2000) ("'[G]iving sectarian religious speech preferential access to a forum' . . . would violate both the Establishment Clause and the Free Exercise Clause, because by so doing, the government exercises favoritism of one sect or religion over another based on the content of the expression.") (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality)).

[4] At a minimum, Plaintiffs request that the Court review State's withholdings *in camera* before deciding whether the foreseeable harm requirement is satisfied. *See Rosenberg*, 342 F. Supp. 3d at 79 (proceeding as such).

withheld.'" *Ctr. for Investigative Reporting*, 2019 WL 7372663, at *9. It instead repeatedly asserts, with only slight variation, that disclosure would "have a chilling effect on the open and frank expression of ideas and recommendations." *See* Stein Decl. ¶¶ 29, 38, 39, 41-43, 46-53. Judges of this court have consistently rejected such "perfunctory" and "boilerplate" claims that disclosure would "jeopardize the free exchange of information" without any meaningful record-specific analysis of how disclosure would cause concrete harm. *Judicial Watch*, 375 F. Supp. 3d at 100; *see Ctr. for Investigative Reporting*, 2019 WL 7372663, at *9 (rejecting foreseeable harm claims where defendants repeated same "general explanations" of harm and "boiler plate language . . . with only slight variation"); *Judicial Watch v. DOJ*, 2019 WL 4644029, at *4-5 (same).

These decisions recognize agencies cannot simply parrot the general rationale for the deliberative process privilege to show that disclosure of specific records would harm those interests. Agencies must instead "provide 'context or insight into the specific decision-making processes or deliberations at issue, and how they *in particular* would be harmed by disclosure.'" *Ctr. for Investigative Reporting*, 2019 WL 7372663, at *10 (emphasis added). State has fallen far short of this burden.

II. State has failed to meet its burden to justify its withholding of portions of records under FOIA Exemption 6.

Plaintiffs challenge State's assertion of Exemption 6 as justification for withholding email domains—the portion of any email address following the @ sign[5]—for the private email

[5] This includes host and-second level domains, as well as top-level domains. For example, in the email address DRL-press@state.gov, "state.gov" is the email domain; the ".gov" part of this domain is known as the top-level domain.

address of Andy Schacter and the email addresses of Secretary Pompeo and then-Deputy Secretary (now Ambassador) John J. Sullivan.

Exemption 6 applies to "personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). For this type of information, there is a "presumption in favor of disclosure [that] is as strong as can be found anywhere in the Act." *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (internal quotation marks omitted). Exemption 6 permits the withholding of personal information only if "disclosure would comprise a substantial, as opposed to a *de minimis*, privacy interest." *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). In order to find that a privacy interest is substantial, courts must "balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (internal quotation marks omitted). As a second step, and only *if* disclosure is found to implicate a substantial privacy interest, courts then "weigh that privacy interest in non-disclosure against the public interest in the release of records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy." *Horner*, 879 F.2d at 874; *see also ACLU v. DOJ*, 655 F.3d 1, 6–7 (D.C. Cir. 2011). The focus of this balancing inquiry is "the citizens' right to be informed about 'what their government is up to.'" *Davis v. DOJ*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (quoting *Reporters Comm. For Freedom of Press*, 489 U.S. at 776).

A. Disclosure of Secretary Pompeo's and Ambassador Sullivan's email domains would not constitute a substantial invasion of privacy.

State has not met its burden of showing that disclosure of the email domains of Secretary Pompeo and Ambassador Sullivan would cause a substantial invasion of personal privacy. State argues that it withheld these email addresses in full to "allow[] these high level officials to keep working efficiently without having their email usage potentially compromised by directly receiving email from the public." State Br. at 11; *see* Stein Decl. at ¶¶ 39, 40; Exs. Q (email with Ambassador Sullivan listed on bcc line), R (same), S (emails to and from Secretary Pompeo). Plaintiffs do not here challenge this withholding as to the *username* of these email addresses—the portion of the email address before the "@" sign—but only the email domains. There is no significant privacy interest to Secretary Pompeo or Ambassador Sullivan implicated by these domains. State represents that the withheld email address are the "official government email addresses" for both Secretary Pompeo and Ambassador Sullivan (*see* Stein Decl. ¶¶ 39, 40); if this is so, disclosing the "state.gov" domains poses no risk that either person would have their email usage compromised "by directly receiving email from the public," because untold other State Department employees also use that email domain. FOIA mandates that any "reasonably segregable portion of a record" be released even if other parts are exempt from disclosure. 5 U.S.C. 552(b); *see, e.g.*, *CREW v. DOJ*, 846 F. Supp. 2d 63, 76 (D.D.C. 2012) (ordering government to "disclose any non-exempt portions of the requested documents that are not 'inextricably intertwined with exempt portions'"). Even if the domain were not of an "official government email address," disclosing the domain poses no threat to the privacy of either individual without a corresponding disclosure of the username.

The single case State cites in support of this withholding, *Shurlteff v. EPA*, 991 F. Supp. 2d 1 (D.D.C. 2013), does not speak to this issue. Unlike here, where Plaintiffs challenge the withholding of only email domains, in that case, the plaintiff sought the full email addresses for then-EPA Administrator Lisa P. Jackson and "the official email addresses of staff members within the Executive Office of the President." *Id*. at 17. The agency's justification for withholding the addresses in *Shurlteff* was similar to that of State in this case; however, "the burden of unsolicited emails and harassment," (*id*. at 18) is not implicated by the disclosure of only email domains. As such, *Shurlteff* is inapposite.

Rather, disclosure of email domains does not constitute a substantial invasion of privacy—and State has made no showing to the contrary. In *Bloche v. DOD*, as here, plaintiffs challenged defendants' "invocation of FOIA Exemption 6 to redact the domain portions of agency email addresses—like @defense.gov." 370 F. Supp. 3d 40, 58 (D.D.C. 2019). The court accepted the plaintiffs' argument that "email domains do not 'refer to a particular individual.'" *Id.* at 59. Because the defendants showed no substantial privacy interest that weighed in favor of withholding, the court held that they had not met their burden. *Id.* This Court should do the same. *See also Judicial Watch, Inc. v. U.S. Dep't of State*, 2017 WL 456417, at *1 (D.D.C. Feb. 2, 2017) ("[T]here is no privacy interest in the mere domain extensions of email addresses, when release of the domain extension would not reveal the owner's full email address and the agency does not make any showing suggesting that the third party has such an interest.").

B. Disclosure of the email domain of a State Department employee's private email address would not constitute a substantial invasion of that employee's personal privacy.

Similarly, State has not met its burden of showing that the disclosure of the domain portion of the private, non-governmental email address of Andy Schachter would cause a substantial invasion into Mr. Schachter's privacy. State justifies this withholding as grouping it within a larger category[6] for which "the release of such information—tied directly to a particular employee—could subject them to harassment and unwanted publicity." State Br. at 10; Stein Decl. ¶ 45; *see* Ex. T. As with the email domains for Secretary Pompeo and Ambassador Sullivan, there is no privacy interest implicated by the disclosure of this domain extension.

Indeed, State has made no meaningful effort to demonstrate such a privacy interest. State cites no cases related to Mr. Schachter's privacy interest in his private email's domain, *see* State Br. at 10, and makes no factual showing in the Stein Declaration as to Mr. Schachter's privacy, stating only that "[r]elease of this information would shed no light on the conduct of government business and would constitute an unwarranted invasion of personal privacy," Stein Decl. ¶ 45. This type of conclusory assertion is insufficient to establish that Mr. Schachter has more than a *de minimis* privacy interest in the email domain that State improperly withheld. *See, e.g.*, *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 60–61 (D.D.C. 2012) ("By merely asserting in conclusory terms that '[d]isclosure of [this] information would constitute an invasion of privacy of [person in question],' defendants have failed to articulate a substantial privacy interest.") (citation omitted).

[6] This category, per State's brief, also includes "information about a family member of another employee," and "the names and contact information for lower level employees and four employees who were detailed to the State Department." State Br. at 10. Plaintiffs' argument here is limited to the domain of Mr. Schachter's email address.

In *Judicial Watch v. U.S. Dep't of State*, plaintiffs sought, *inter alia*, disclosure of the domain extensions of a number of email addresses related to potential conflicts of interest then-Secretary Hillary Clinton may have had with the Clinton Foundation. 2017 WL 456417, at *1, *11. The court wrote that while disclosure of full email addresses may constitute a more than *de minimis* invasion of privacy,

> [m]ere domain extensions . . . do not trigger a substantial third-party privacy interest. . . . State does not show . . . that the email domain extensions contained within the document where the email prefixes are still redacted are the types of "bits of information" that "can be identified as applying to that individual," any more than the redactions themselves can be attributed to the unredacted identities of the authors. . . . In light of the strong presumption in favor of disclosure, the Court will order the release of email domain extensions that, based on previous releases, could not be used to infer the full email addresses.

Id. at *12. As in that case, State has made no showing here that withholding Mr. Schachter's private email domain is necessary to prevent an unwarranted invasion of his privacy, given that his username has not been disclosed.

C. There is significant public interest in the withheld email domains.

Though the Court need not reach this question because State has not shown the requisite privacy interest, there is significant public interest in the disclosure of these materials. Specifically, the public has a strong interest in ensuring that agency officials and employees use their government emails to conduct government business, because communications conducted on private email accounts may not be properly preserved, and thus may be far less accessible to the public under FOIA. This interest is reflected in the records management law, which requires officers and employees of executive agencies that use non-official email accounts to copy their official government email accounts on those emails or forward a complete copy of the email to

their official government email account within 20 days. 44 U.S.C. § 2911; *cf. Competitive Enter. Inst. v. OSTP*, 827 F.3d 145, 150 (D.C. Cir. 2016) ("If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served."). It is also reflected in the guidance of the National Archives and Records Administration, which has promulgated specific instructions pertaining to how agencies should handle their officers or employees using personal email accounts. *See, e.g.*, Memorandum from Archivist of the United States to Senior Agency Officials for Records Management, *Criteria for Managing Email Records in Compliance with the Managing Government Records Directive* (April 6, 2016).[7] Moreover, email domains may reveal a previously-unknown conflict of interest for a State Department employee; the public interest in knowing about such conflicts is high.

For these reasons, if the Court were to find more than *de minimis* privacy interests in the withheld domain names, it would be far outweighed by the public interest in that information. But here, because "no significant privacy interest is implicated" under Exemption 6, "FOIA demands disclosure." *Multi Ag Media LLC*, 515 F.3d at 1229 (quoting *Horner*, 879 F.2d at 874).

D. State has failed to satisfy FOIA's foreseeable harm requirement.

As with its failure to meet FOIA's foreseeable harm requirement for its Exemption 5 withholdings, State offers only generic, conclusory claims of harm with respect to the Exemption 6 withholdings Plaintiffs challenge. 5 U.S.C. § 552(a)(8)(A)(i); *see also Judicial Watch*, 375 F. Supp. 3d at 98. State asserts that two of the withheld email addresses in question (Secretary

[7] Available at https://perma.cc/5YWB-MNBU.

Pompeo's and Ambassador Sullivan's) "could subject [the addressee] to unsolicited attention or harassing inquiries." Stein Decl. ¶¶ 39, 40. For a third (Mr. Schachter's), it does not even attempt to make any showing of foreseeable harm, claiming only that it would "result in an unwarranted invasion of privacy," *id.* ¶ 45, which is a separate standard, discussed above.

This is insufficient. First, the harm identified by State with respect to Secretary Pompeo's and Ambassador Sullivan's email addresses does not apply to the *domains* of those email addresses. Disclosing the email domains poses no risk of subjecting Secretary Pompeo and Ambassador Sullivan (or Mr. Schachter) to unsolicited attention or harassing inquiries, because sending an email requires both a username and a domain. Second, as with Exemption 5, State has failed to meet its "independent and meaningful burden" to explain the specific harms it reasonably foresees "would actually ensue from disclosure of the withheld materials.'" *Ctr. for Investigative Reporting*, 2019 WL 7372663, at *9. It instead offers only a boilerplate recitation of supposed harm for Secretary Pompeo and Ambassador Sullivan that fails to "provide context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure." *Id.* at *10 (internal quotation marks omitted).

CONCLUSION

The Court should grant Plaintiffs' cross-motion for partial summary judgment and deny State's motion for summary judgment.

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Respectfully Submitted,

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