UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF STATE, *et al.*, Defendants.	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)

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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By and through its undersigned counsel, Defendant Department of State ("State Department" or "Department") respectfully submits this memorandum of points and authorities in opposition to the cross-motion for summary judgment ("Cross-Motion") filed by Plaintiffs Citizens for Responsibility and Ethics in Washington and Reporters Committee for Freedom of the Press ("Plaintiffs") and in further support of the State Department's initial motion for summary judgment ("Motion"). In sum, there exists no genuine issue of material fact that precludes judgment in the State Department's favor as a matter of law in this Freedom of Information Act ("FOIA") case. Plaintiffs' contentions to the contrary, and those in support of their Cross-Motion, are legally flawed and Plaintiffs fail to identify a genuine issue of material fact. Accordingly, the Court should enter summary judgment in the State Department's favor pursuant to Federal Rule of Civil Procedure ("Rule") 56 and deny Plaintiffs' Cross-Motion. The Second Declaration of Eric Stein ("2d Stein Decl.") is attached hereto, and Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts is attached to Defendant's Opposition to Pls.' Cross-Motion.

PRELIMINARY STATEMENT

The pending cross-motions for summary judgment effectively narrow the issues for the Court to resolve. Plaintiffs challenge all of the withholdings the Department made under Exemption 5 of the FOIA and some of the redactions made under Exemption 6. Plaintiffs have submitted the redacted records and thereby facilitated this Court's review. *See* Declaration of Lin Weeks (ECF No. 19-3, Exhibits B-T). Based on the entire record, the Court should conclude that the Department reasonably segregated exempt from non-exempt material, and withheld only limited material for which there was foreseeable harm associated with release.

Were the Court to examine any of the remaining issues, the record demonstrates that the Department conducted a reasonable search of all places likely to contain responsive records, that the Department's searches were designed to identify all responsive documents, and that the

Department's efforts led to the release of information responsive to the FOIA requests at issue. The Department redacted certain information to protect (1) properly classified information, (2) the substantial privacy interests of third parties whose personal information appears in the government's records, and (3) the deliberative process in which agency employees engaged to execute the Secretary of State's mission and message in this phone call as part of executing or supporting the Department's mission.

Accordingly, the Court should deny Plaintiffs' Cross-Motion, grant Defendant's Motion for Summary Judgment, and enter judgment in the Department's favor on Plaintiffs' claims in this action.

PERTINENT FACTUAL DEVELOPMENT SINCE THE STATE DEPARTMENT MOVED FOR SUMMARY JUDGMENT

The Department previously released in part Document C06828154, and inadvertently neglected to include a description of the document and its withholdings in the first Stein Declaration. *See* 2d Stein Decl. ¶ 11; Weeks Decl., Exhibit L. The Department has now released that record in full. *See* 2d Stein Decl. ¶ 11. Accordingly, no issue remains concerning Document C06828154. *See Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 388 (D.C. Cir. 2007) ("[B]ecause the report was located in the work file and subsequently disclosed, the issue is moot for purposes of this FOIA action.") (citation omitted).

ARGUMENT

I. THE DEPARTMENT'S WITHHOLDINGS UNDER EXEMPTIONS 5 AND 6 ARE PROPER

A. Exemption 5

Among other things, Plaintiffs contend that the agency has failed to explain adequately the nuts and bolts of the deliberative process for each record. *See* Pls.' Mem. at 7. In the days leading up to the March 18, 2019 call with the Secretary, the redacted records Plaintiffs seek reflect four

individuals communicating about the participants and other matters relating to the call. The Second Stein Declaration identifies the agency employees involved in the email chains: Robert Greenan, the Director of the Office of Press Relations, Andrew Laine, the Deputy Director of the Office of Press Relations, as well as Drew Bailey and Kuros Ghaffari, Media Outreach Officers in the Office of Press Relations. *See* 2d Stein Decl. ¶ 6. The Second Stein Declaration explains that, as relevant to this case:

> The Office of Press Operations (R/GPA/MD/PRS) supports the President and Secretary of State by explaining the foreign policy of the United States and the positions of the Department to domestic and foreign journalists, including by providing logistical support and expertise to the Secretary of State and other Department officials for events involving media participation. The Department's public communication of its foreign policy can be integral to the success of that foreign policy, making it critical for the Department to ensure that its public messaging works in lockstep with its policy goals. One important decision for any press strategy is the decision about which journalists to invite to any select interview or targeted event, especially when it is with high-ranking officials like the Secretary of State. When deciding which journalists to invite, R/GPA/MD/PRS must weigh a variety of factors, including each journalist's or outlet's readership, reputation, location, and distribution, all with an eye to whether that journalist's or outlet's participation is likely to advance the foreign policy goals of the United States and the Department. Likewise, when deciding which individuals affiliated with the Department should participate in any select interview or targeted event, the Department considers whether each person's participation would advance the foreign policy goals of the United States and the Department. Officials in R/GPA/MD/PRS often engage in deliberative discussions about whom to invite to any particular targeted event. If such internal deliberations were publicly disclosed, R/GPA/MD/PRS personnel would likely be less candid and more circumspect in expressing their thoughts, which would impede the free-flowing discussion of issues necessary to reach a well-reasoned decision and execute a well-crafted press strategy.

2d Stein Decl. ¶ 4.

Courts have recognized that media and public outreach linked to an agency's execution of its core mission falls within the ambit of Exemption 5. For example, in *Reporters Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, Civ. No. 15-1392 (RJL), 2020 WL 1324397, (D.D.C. Mar. 20, 2020), *appeal pending*, No. 20-5091 (D.C. Cir.), the court examined internal FBI

email chains debating how to respond to media inquiries about an FBI operation that had become subject to public interest as reflected in media inquiries. *See id*. at *7. As here, the emails preceded the final communication by the Director (a letter to a particular news publication) and the court found that what led up to that was "generated as part of a continuous process of decision making" such as "how to respond to on-going inquiries" from the press[.] *Id*. (citing *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208 (D.D.C. 2010); *see also Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 880 F. Supp. 2d 105, 111-12 (D.D.C. 2012)). The type of harm the FBI cited was virtually identical to the harm the State Department has described in this case; employees will be discouraged or chilled from expressing suggestions or views about framing the public message or how to best disseminate it if their internal communications are subject to being revealed through FOIA. *See Machado Amadis v. Dep't of Justice*, 388 F. Supp. 3d 1, 20 (D.D.C. 2019); *Gellman v. Dep't of Homeland Sec.*, No. 16-CV-635 (CRC), 2020 WL 1323896, at *12 (D.D.C. Mar. 20, 2020) (holding that documents containing discussions of how to respond to press inquiries are protected by the deliberative process privilege); *Am. Ctr. for Law & Justice v. Dep't of State*, 330 F. Supp. 3d 293, 304 (D.D.C. 2018).

At least one district court has described an "overwhelming consensus" among courts in this District that internal agency discussions about how to interact with the press are protected by the deliberative process privilege. *Am. Ctr. for Law & Justice v. Dep't of Justice*, 325 F. Supp. 3d 162, 171-72 (D.D.C. 2018) ("While the D.C. Circuit does not appear to have addressed the application of [the deliberative process] privilege to public-relations issues, the overwhelming consensus among judges in this District is that the privilege protects agency deliberations about public statements."); *see also Leopold v. Office of the Dir. Nat'l Intelligence*, No. 16-2517, 2020

WL 805380, at *6 (D.D.C. Feb. 18, 2020) (collecting cases); *Lewis v. U.S. Dep't of the Treasury*, No. 17-CV-0943 (DLF), 2020 WL 1667656, at *8 (D.D.C. Apr. 3, 2020), *appeal pending*, No. 20-5120 (D.C. Cir). In all these cases, unlike the different factual contexts in the cases on which Plaintiffs rely (Pls.' Mem. at 11-12) the foreseeable harm was the same as in this case, and revealing the substance of the deliberations in greater detail than the existing record reflects would risk waiving the State Department's privilege (and mooting the issue). *See* 5 U.S.C. § 552(a)(8)(A)(i).

The deliberative process privilege protects important interests allowing government employees to go about their work without worrying that their suggestions, ideas, or recommendations that do not get incorporated into final agency actions will be made public, potentially exposing the employees to embarrassment or worse. Although the privilege is a qualified one, Plaintiffs advance no argument in these cases for overriding the privilege based on strong public need. *In re Sealed Case*, 121 F.3d 729,737 (D.C. Cir. 1997).[1] Because much of the information redacted as privileged ultimately reflects things that the Secretary did not end up doing, its disclosure would also not serve FOIA's core purpose of significantly informing the public about government "operations or activities." *Reporters Comm. for Freedom of Press*, 489 U.S. at 773.

Although Plaintiffs note that agencies should indicate for any records that are "drafts" whether the agency subsequently adopted the position reflected in the draft or used the draft in dealing with the public (Pls.' Mem. at 8), none of the emails are drafts, nor do they attach any drafts in the sense of the cases on which Plaintiffs rely. Thus, requirements for withholding draft

[1] To the extent Plaintiffs intend or the Court construes Plaintiffs' argument about purported impropriety in the March 18, 2019 call with the Secretary as a basis for overcoming the deliberative process based on privilege, those arguments are addressed *infra* at 9-11.

documents cited by Plaintiffs are not at issue in this case.

The specific redacted records are discussed further below.

1. Documents C06827382, C06827384, C06827393, C06827424, C06827426, C06828153, and C06827478

This group of records (Stein Decl. ¶ 38) involves internal State Department discussions about the composition of the participants on the call with the Secretary. In particular, the material withheld in these emails under Exemption 5 consists of a question ("Please indicate whether [redacted] should be included on any of these calls") and an answer ("[redacted] does not need to be included on any of the calls"). *See* Weeks Decl. Exhibit F. At the outset, Plaintiffs' arguments about the public importance of this document hinge on their assertion that the person whose name is redacted is a representative of the advocacy organization known as CAIR. *See* Pls.' Mem. at 10, 16. Plaintiffs' assertion is incorrect: the person whose name is redacted is not a representative or member of CAIR. 2d Stein Decl. ¶ 5.

In any event, Plaintiffs contend that the communications are not deliberative with respect to anything other than purely administrative details for which the privilege does not apply, and that the communications were post-decisional. *See* Pls.' Mem. at 9-10; Weeks Decl. Exhibit F. Both arguments are incorrect.

The four officials in the Office of Press Operations align the Department's public messaging with its policy goals to support the success of the policies. *See* Stein Decl. ¶¶ 4-6. Discussions about the selection for inclusion of a particular participant lies at the core of the creation, evolution, revision, and execution of the media outreach strategy closely tied to the State Department's mission. As noted in the Second Stein Declaration, the decision about which journalists or individuals to invite to any event requires careful consideration of how the Department views its strategy to advance the foreign policy goals of the United States and the

Department. *See* 2d Stein Decl. ¶ 4. Selecting the media outlets and participants is both pre-decisional (because it necessarily precedes the call) and inherently deliberative until the call takes place; the State Department has released both the actual list of participants and an unofficial transcript of the March 18, 2019 call. *See* Stein Decl. ¶¶ 29, 38-39, 41-42; 2d Stein Decl. ¶¶ 4-5; Weeks Decl. Exhibit A.

Plaintiffs claim that the email exchange in these documents "occurred *after* the agency's final decision regarding briefing attendees." *See* Pls. Mem. at 9-10. But as the timestamp of the emails make clear, the conversation occurred in the early hours of March 18, 2019, many hours before the late-afternoon call. As the Second Stein Declaration explains, "[t]he decision about whether to include that individual on the call … did not become a final decision until the call started. An invitation can be extended or rescinded at any time until the event begins, so a preliminary decision about who to invite does not crystallize into a final agency decision until the event begins." 2d Stein Decl. ¶ 5. Just as a draft document does not become final until actually signed or transmitted, a draft invitation list does not become final until the call begins. Accordingly, all of the information in this group of records is properly within the deliberative process privilege and is exempt from disclosure under FOIA.

2. Documents C06827453 and C06827455

These two documents list the confirmed and pending calls on Secretary Pompeo's schedule for March 17, 2019, March 18, 2019, March 19, 2019, and March 28, 2019, as of the dates of creation of the two records, which precede March 18, 2019. *See* Weeks Decl. Exhibits Q, R. Logically, meetings that are reflected on a tentative schedule but not confirmed are deliberative and pre-decisional. *See* 2d Stein Decl. ¶ 7. Exemption 5 has been held to apply to what amount to draft schedules when they have a sufficient nexus to an event and the changes reflect the deliberative process. *See Seife v. Dep't of State*, 366 F. Supp. 3d 592, 603-04 (S.D.N.Y. 2019)

(holding "draft rollout schedules" are covered by Exemption 5 and the deliberative process privilege). Here, the Department has demonstrated that it released the information about confirmed calls that took place and limited its withholdings to the unconfirmed calls reflecting the deliberative process for reaching the final schedule. *See* 2d Stein Decl. ¶ 7. Even though the records may not explain the reasons for particular changes, they fall within the privilege because the facts contained in them reveal the deliberations and they are part of the continuous process of setting the Secretary's schedule as related, among other things, to the call that is the subject of the FOIA requests at issue. *See id*.; *Gosen v. U.S. Citizenship & Immigration Servs.*, 118 F. Supp. 3d 232, 243 (D.D.C. 2015) (citation omitted).

3. Documents C06827968 and C06827969

These two documents are an email chain dated March 18, 2019 in which Department officials discuss how to respond to inquiries from members of the press who were not invited to participate in the call with the Secretary of State. *See* Weeks Decl. Exhibits M and N. Because these emails are part of the internal communications about the agency's proposed response to inquiries from the press, they are exempt under FOIA because press strategy is an aspect of policy. *See* Stein Decl. ¶ 42; *Am. Ctr. for Law & Justice v. Dep't of Justice*, 325 F. Supp. 3d at 171-72. Plaintiffs argue that these communications are not deliberative because they concern essentially etiquette rather than policy and it is unclear whether silence or a particular response was ever adopted as the Department's final resolution of a response or non-response. *See* Pls.' Mem. at 11-13. Plaintiffs' contention represents an overly narrow conception of the deliberative process privilege, and these communications relate to the same decision-making process for the March 18, 2019 call. *See Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 135-36 (D.D.C. 2011) ("[E]ven if an internal discussion does not lead to the adoption of a specific government policy, its protection under Exemption 5 is not foreclosed as

long as the document was generated as part of a definable decision-making process."). Although the deliberative process privilege does not generally protect factual material, such material may be withheld if its disclosure would expose the deliberative process. *Gosen*, 118 F. Supp. 3d at 243. Because public disclosure of purely internal communications concerning how or whether to respond to inquiries from media or citizens risks chilling employees' asking for guidance and could potentially cause offense and hamper the Department's media strategy, the foreseeability of harm is clear. *See* Stein Decl. ¶ 42; 2d Stein Decl. ¶ 4.

4. The Court Should Deny Plaintiffs' Cross-Motion

In recently denying an agency's assertion of Exemption 5 on the threshold issue of the timing of the decision to which the deliberations related, the D.C. Circuit instructed that finding the agency's explanation insufficient did not automatically trigger granting the FOIA requester's cross-motion for summary judgment. *See Hall & Assocs. v. Envtl. Prot. Agency*, 956 F.3d 621, 633 (D.C. Cir. 2020) (reversing district court's grant of summary judgment to the agency on assertion of Exemption 5 after *in camera* review but rejecting requester's argument that summary judgment in its favor was automatic).

Plaintiffs' argument that not making the Secretary available on the phone to all participants raises First Amendment concerns and alters the analysis of the Department's deliberative process privilege or the foreseeable harm in public release of the deliberations concerning the participants lack merit. *See* Pls.' Mem. at 15-18 & n.3. First, Plaintiffs' contention is grounded upon the notion that controlling or selecting participants for government media events is "improper," but they cite no case supporting that proposition and undersigned counsel is unaware of any. No individual or press organization has an unlimited right to access the Secretary every time he speaks or makes himself available. *See generally Karem v. Trump*, 960 F.3d 656 (D.C. Cir. 2020) (finding a likelihood of success on merits of reporter's due process claim that revocation of hard pass for

access to White House press pool without questioning that a procedurally proper suspension would not violate the First Amendment); *cf. Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) ("enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."). There is a distinction between restrictions on media publication, the specter of which is not present in this case, and any burden to the right to gather the news of the March 18, 2019 is minimal and rational because the government has a right to its own speech. *See Pulphus v. Ayers*, 249 F. Supp. 3d 238, 253-54 (D.D.C. 2017) (removal of artist's painting from display of winners of Congressional art competition did not implicate his First Amendment rights because the government speech doctrine provides that when the government speaks, it "is free to discriminate based on viewpoint."), *appeal dismissed as moot*, 909 F.3d 1148 (D.C. Cir. 2018).

Second, Plaintiffs' claims about the Department's supposed lack of transparency in conducting the call are distinct and irrelevant to the agency's assertions of Exemptions available under the FOIA when responding to the FOIA requests. *See* Pls.' Mem. at 17 (referring to departure from "basic tenets of transparency and neutral governance"). The supposed transparency deficit is sharply undercut by Plaintiffs' detailed description of the underlying events leading up to the call and fact that the Department released an unredacted transcript of the call itself. See Pls.' Mem. at 1, 2-4; Weeks Decl. Exhibit A. But in any event, the Department's assertion of a deliberative process privilege here is proper and raises no Constitutional issue. *See* Pls.' Mem. at 17-18. Regardless of the sincerity or magnitude of Plaintiffs' desire to have all available information about a subject of their interest, it does not increase their right of access under FOIA nor negate the foreseeable harm in having internal agency deliberations about the participants for a call with the Secretary released to the public. *See Protect Democracy Project, Inc. v. Dep't of*

Defense, 320 F. Supp. 3d 162, 177 (D.D.C. 2018) (concluding that talking points "qualify as predecisional and deliberative" because "[r]evealing their contents would expose the process by which agency officials crafted a strategy for responding to the press and to Congress"). *Cf. Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) ("FOIA expressly recognizes that 'important interests [are] served by [its] exemptions,' [], and "[t]hose exemptions are as much a part of [FOIA's] purpose[s and policies] as the [statute's disclosure] requirement.") (citations omitted).

Because there was no "improper conduct" (Pls.' Mem. at 18) in connection with the call itself, Plaintiffs' argument for invalidating the Department's assertion of FOIA exemptions is incorrect as a matter of law. *Judicial Watch, Inc. v. Dep't of State*, 241 F. Supp. 3d 174, 183 (D.D.C. 2017) (finding that "the only applicable Circuit authority militates against recognizing a government misconduct exception in a FOIA case"). Because there is no right under the First Amendment or otherwise to unlimited access to high level government officials when the government is conducting its own business, the agency's deliberative process for designing and executing its outreach strategy should be respected and protected.

B. Exemption 6

Plaintiffs do not challenge the Department's withholding of "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." Pls.' Mem. at 23 n.6. Thus, the Court need not address those withholdings at all. *E.g.*, *Am. Ctr. for Law & Justice v. Dep't of Justice*, 325 F. Supp. 3d 162, 167-68 (D.D.C. 2018) (finding challenge under FOIA to agency's search waived when plaintiff agreed in status report to narrow case to issues with agency's withholdings); *Gilman v. Dep't of Homeland Sec.*, 32 F. Supp. 3d 1, 22 (D.D.C. 2014)

(FOIA requester waived right to receive attachments to emails when it narrowed its request in a status report filed in litigation); *People for Am. Way Found. v. Dep't of Justice*, 451 F. Supp. 2d 6, 12 (D.D.C. 2006) (finding plaintiff had narrowed request as noted in status reports). Even were the Court to address these withholdings, it should uphold them based on the at least modest privacy interests of the individuals mentioned in the records and the lack of any legitimate public interest in their identity. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

Plaintiffs challenge State's withholding of the domain (the part after the "@" in an email address) associated with a private email address for an employee named Andy Schacter and the addresses associated with Secretary Pompeo, then-Deputy Secretary of State (and now Ambassador) John J. Sullivan. These challenges are meritless.

First, with respect to one document including emails to and from Secretary Pompeo (Weeks Decl. Exhibit S), Plaintiffs argue that State improperly redacted the domain name of Secretary Pompeo's email address. Pls. Mem. at 21. However, as the Second Stein Declaration explains, "the email domain does not appear on the unredacted version of the document. The only information under the redaction is the username associated with Secretary Pompeo's '@state.gov' email address." 2d Stein Decl. ¶ 9. Accordingly, even were Plaintiffs correct that redacting the email domain would be improper, no such redactions were made on this document.

Second, with respect to two documents including emails to then-Deputy Secretary of State John J. Sullivan, see Weeks Decl. Exhibits Q and R, Plaintiffs argue that State improperly withheld the domain name of that email address. State already disclosed, however, that the domain name of that email address is "@state.gov." *See* Stein Decl. ¶ 39; 2d Stein Decl. ¶ 10. Removing the redaction of the domain name would not provide any additional information. Because the

Department already disclosed this information, the Court need not decide the existence or magnitude of the public interest in the email domains used by high-level government officials. *See Boyd*, 475 F.3d at 388.

Third, Plaintiffs argue that the Department has not met its burden to withhold the *private* email address of a lower level employee, Andy Schachter, whose official (@state.gov) email address is included in the same document. *See* Pls.' Mem. at 23-24. There is no conceivable legitimate public interest in what domain a government employee is using for his private email because it reflects nothing about what the government is doing. *Judicial Watch, Inc. v. U.S. Dep't of State*, 306 F. Supp. 3d 97, 116-17 (D.D.C. 2018) (noting the clarity of cases recognizing "a substantial privacy interest" in private email addresses and upholding challenge to Department's withholding of email domains); *see U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989).[2]

The government employee has equivalent privacy interests in his personal email address that the nongovernment individuals have in their email addresses (which Plaintiffs do not challenge) when they appear in government records. Courts have recognized the privacy interests of employees in personal information such as email addresses, and allowed agencies to withhold them under FOIA Exemption 6. *E.g.*, *People for the Ethical Treatment of Animals v. Dep't of Health & Human Servs.*, No. 17-1395, 2020 WL 2849906, *5 (D.D.C. June 1, 2020) ("*PETA*");

[2] In any event, even the burden of showing that the information Plaintiffs seek applies to a particular individual is minimal and easily satisfied here. *See N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1006 (D.C. Cir. 1990). The Supreme Court has held that disclosure implicates a cognizable privacy interest if it affects either "the individual's control of information concerning his or her person." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 763. As such, there is at least a "minor privacy interest" in the domain associated with a private email address. *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010), *abrogated on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc).

see also 5 U.S.C. § 552a (Privacy Act protects privacy of individuals through regulation of collection, maintenance, use, and dissemination of information by federal agencies).[3] And as the Court recognized in *PETA*,

> "[a] FOIA requester bears the burden of identifying an overriding public interest and demonstrating that disclosure would further that interest," *Milton* [*v. United States Dep't of Justice*, 783 F. Supp. 2d 55, 58 (D.D.C. 2011)], and a requester must "'adequately support[ ] its 'public interest' claim with respect to the specific information being withheld." *Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 876 F.3d 346, 351 (D.C. Cir. 2017).

Id. at *5. Plaintiffs in this case have not met their burden, particularly because there is no hint or suggestion in this case that Mr. Schachter used his private email address for anything relating to the March 18, 2019 telephone call, in sharp contrast to a case like *Rojas v. Fed. Aviation Admin.*, 941 F.3d 392 (9th Cir. 2019), in which an employee allegedly used a personal email address in a "scheme" to provide correct answers to applicants for positions as air traffic controllers. *See id*. at 399, 401; *see also Bloomgarden v. U.S. Dep't of Justice*, 874 F.3d 757 (D.C. Cir. 20117). Accordingly, the balance tips heavily in favor of protecting the employee from the possibility of harassment through disclosure on the public record of any part of his private email address. *Judicial Watch, Inc.*, 306 F. Supp. 3d at 116-17 (acknowledging risks attendant to disclosure of partial email addresses).

The public interest Plaintiffs proffer to overcome the privacy interest is having government employees use government email systems exclusively such that their records will be preserved and may be located and potentially obtained through FOIA. *See* Pls.' Mem. at 24-25. But Plaintiffs have not demonstrated that Mr. Schacter used a personal email account without simultaneously using his government account, and that takes all of the wind out of their argument in this case.

[3] Plaintiffs' argument in a footnote (Pls.' Mem. at 17-18 & n.3) that supposed "exclusion of

C. The Department Respectfully Submits That *In Camera* Review Is Unnecessary

Although the short nature of the documents and their relatively small universe would pose less of a burden to review *in camera* as Plaintiffs urge (Pls.' Mem. at 18 n.4), the Department does not believe that the Court need undertake the burden. *Mobley v. Cent. Intelligence Agency*, 806 F.3d 568, 588 (D.C. Cir. 2015) (district court did not abuse its discretion in declining to conduct *in camera* review). With the lightly redacted records already in the record (Weeks Decl. Exhibits B-T), and the information provided in the two declarations from Mr. Stein, the record is well developed and adequate to grant the Department's motion for summary judgment.

II. IF THE COURT CONSIDERS PLAINTIFF RCFP'S PASSIVE CHALLENGES TO THE DEPARTMENT'S SEARCH AND ASSERTION OF EXEMPTION 1, THE COURT SHOULD FIND THE AGENCY HAS MET ITS BURDEN

Plaintiffs have not challenged either the adequacy of the Department's search for responsive records or the limited withholdings made of classified information under Exemption 1. *See* Pls.' Mem. at 5 & n.2. Plaintiff CREW affirmatively disclaimed such challenges in a Joint Status Report filed on February 5, 2020. *See* ECF No. 13 in C.A. 19-1344. Plaintiff CREW should be held to that narrowing of the issues. *E.g.*, *Am. Ctr. for Law & Justice v. Dep't of Justice*, 325 F. Supp. 3d 162, 167-68 (D.D.C. 2018) (finding challenge to agency's search waived when plaintiff agreed in status report to narrow case to issues with agency's withholdings).

Plaintiff RCFP may not be bound to Plaintiff CREW's representation, but the Court's *de novo* review of the search and the Exemption 1 withholding need only consider the evidence proffered by the Department because the motion is unopposed. At least one other district court in the District of Columbia has found that plaintiff's lack of opposition to portions of a motion for summary judgment in a FOIA case removed the controversy over the matters such that the district court had no need to consider argument and should not grant the agency's motion for summary

judgment with respect to such issues. *See Shapiro v. U.S. Dep't of Justice*, 239 F. Supp. 3d 100, 105-06 & n.1 (D.D.C. 2017); *but see Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 505 (D.C. Cir. 2016) (holding that district courts may not grant summary judgment as conceded because Rule 56 requires district courts to examine the record for genuine disputes of material facts and evaluate whether defendant is entitled to judgment as a matter of law).

A. The Department's Search Was Adequate

The State Department has shown that it conducted a reasonable search of all locations likely to contain responsive records. *See* Stein Decl. ¶¶ 18-22. In this case, the Department searched the Executive Secretariat, the Bureau of Global Public Affairs, and the Office of International Religious Freedom. *See id.* ¶ 21. Based on the subject of the FOIA request, information regarding a telephone call with the Secretary about international religious freedom, these search locations were reasonable. *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). Within each of those offices, the Department relied on individuals familiar with the files to determine how best to locate responsive records, and responsive records were successfully uncovered. *See* Stein Decl. ¶¶ 22, 35-53. No more should be required.

B. The Department Properly Protected Classified Information

The State Department withheld certain properly classified information under Exemption 1. *See* Stein Decl. ¶¶ 24-27, 35. The information related to intelligence activities, sources or methods. *See id.* ¶ 27. The harm from public release of such information is obvious, and courts appropriately afford agencies some deference with respect to classified information. *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *Taylor v. Dep't of the Army*, 684 F.2d 99, 109 (D.C. Cir. 1982). In this case, the agency's declaration is reasonably specific and there is no evidence of bad faith, so the Court should uphold the Department's assertion of Exemption 1 to withhold limited information on one record. *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 715 F.3d 937, 940-41,

943-44 (D.C. Cir. 2013). Again, no more should be required.

CONCLUSION

For all these reasons and those in Defendant's opening memorandum and the entire record, Defendant respectfully requests that the Court grant its motion for summary judgment and deny Plaintiffs' cross-motion for summary judgment.

Dated: July 15, 2020.

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