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)

REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The Department of State's ("State's") opposition confirms that the agency improperly invoked Exemption 5 and the deliberative process privilege to withhold post-decisional, non-deliberative records, as well as records lacking any policy-related deliberations. State also refuses to provide details on whether withheld "draft" material was adopted by the agency in its dealings with the public, which would defeat any privilege claim.

State's opposition likewise confirms that it improperly invoked Exemption 6 to withhold certain information. In several instances, State has again failed to demonstrate the requisite substantial privacy interest in the email domains of its employees. Elsewhere, the agency's opposition gives rise to a genuine issue of material fact with respect to the type of information it withheld under Exemption 6, precluding summary judgment in its favor.

And, finally, with respect to both its Exemption 5 and 6 claims, State continues to provide insufficient detail to meet its "independent and meaningful" obligation to demonstrate foreseeable harm as required by the FOIA Improvement Act of 2016, and appears to be withholding some material not to further any exemption-protected interest, but rather to avoid potential "embarrass[ment]" or because "errors and failures might be revealed." S. Rep. No. 114-4, at 8, *as reprinted in* 2016 U.S.C.C.A.N. 321, 324. The Court should enter summary judgment for Plaintiffs.

ARGUMENT

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

A. Email exchange between Kuros Ghaffari and State's Operations Center (Documents C06827382, C06827384, C06827393, C06827424, C06827426, C06828153, and C06827478)

In this email exchange, Kuros Ghaffari—a Media Outreach Officer in State's Office of Press Relations ("Press Office"), *see* Second Declaration of Eric F. Stein ("2d Stein Decl.") ¶ 6, ECF No. 24-1—communicated with the agency's "Operations Center" to make logistical arrangements "for this afternoon's media calls," including the briefing call at issue here. Declaration of Lin Weeks ("Weeks Decl.") Ex. F, ECF No. 19-3. The Operations Center asked Ghaffari, "Please advise whether [redacted] should be included on any of the calls," to which Ghaffari responded "[redacted] does not/not need to be included on any of the calls." *Id.* As explained in Plaintiffs' opening memorandum, State's redactions are improper because there is nothing predecisional or deliberative about the email; it is instead a purely administrative communication in which Ghaffari relayed to the Operations Center the Press Office's previously-made decision about call invitees. Mem. in Supp. of Pls.' Cross-Mot. for Partial Summ. J. ("Pls.' Mem.") at 9-10, ECF No. 20.[1]

State's contrary arguments are unavailing. It first asserts that the Press Office's deliberations about which outlets to include in briefings with the Secretary implicate matters of

[1] State invoked both Exemption 5 and 6 to redact the email. *See* Weeks Decl. Ex. F. But since State only relies on Exemption 5 in moving for summary judgment, *see* Declaration of Eric F. Stein ("1st Stein Decl.") ¶ 38, ECF No. 18-2, it has abandoned any Exemption 6 claim as to these redactions. *See Burka v. HHS*, 87 F.3d 508, 514 (D.C. Cir. 1996) ("[T]he burden is on the agency to show that requested material falls within a FOIA exemption.").

"press strategy" that are protected by the privilege. Def.'s Opp. to Pls.' Cross-Mot. for Summ. J. ("State Opp.") at 2-6, ECF No. 24. But even assuming such deliberations would be privileged, they are nowhere to be found in the emails at issue here. Those emails include no back-and-forth discussion among Press Office officials—or any other employees with pertinent decisionmaking authority—about whom to invite to the briefing call. *See* Weeks Decl. Ex. F. Rather, the Operations Center asked Ghaffari to relay the Press Office's final decisions about call invitees so the Operations Center could "connect the calls," and Ghaffari responded to that logistical inquiry. *See id.*

Thus, even if the Press Office's deliberations regarding who to invite to the briefing call could fall within the privilege, the *Operations Center* was not part of the "agency give-and-take of the deliberative process by which the [Press Office's] decision . . . [was] made." *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 868 (D.C. Cir. 1980). The Operations Center performed only ministerial functions and merely executed the Press Office's instructions, as the emails themselves show. *See* Weeks Decl. Ex. F (Operations Center responded to Ghaffari's initial instructions with "Understood. We will connect the calls as outlined below," and responded to follow-up inquiry with "Thank you. Understood."). Because the Press Office's instructions to the Operations Center, as relayed by Ghaffari, were "the denouement of the decisionmaking rather than part of its give-and-take," they are not privileged. *Access Reports v. DOJ*, 926 F.2d 1192, 1195 (D.C. Cir. 1991); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975) (document not privileged where it merely relayed a decision "already reached" and recipient "ha[d] no decision to make"); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982)

(noting that "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" are key considerations).

State also tries to move the goalposts by reframing the deliberative process in question. Although State initially identified the relevant "final decision" as "the final list of invitees to the call with the Secretary," 1st Stein Decl. ¶ 38, it now insists that its decision only became "final" when "the call started" because invitations "can be extended or rescinded at any time until the event begins," 2d Stein Decl. ¶ 5. But this misstates the law. The mere fact that an otherwise definitive agency decision—here, the "final list of invitees" relayed by Ghaffari—is subject to change does not render it "non-final" for deliberative process purposes. *See Sears*, 421 U.S. at 158 n.25 ("[T]he possibility that the decision reached . . . may be overturned . . . does not affect its finality for [deliberative process] purposes."); *cf. U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016) (holding, under more rigorous finality standard governing judicial review of agency action, that mere "possibility" agency may "revise" its decision "does not make an otherwise definitive decision nonfinal"). Ghaffari's email to the Operations Center reflects a definitive decision by the Press Office on who would join the call, not a tentative recommendation or proposal. Because that communication was both post-decisional and non-deliberative, it must be released in full.[2]

[2] The Second Stein Declaration states that "the person whose name is redacted is not a representative or member" of the Council on American-Islamic Relations, despite Plaintiffs' suspicions to the contrary. 2d Stein Decl. ¶ 5; *see* State Opp. at 6. Even if true, that fact has no bearing on whether the redacted name is predecisional or deliberative.

B. Lists of pending calls with Secretary Pompeo (Documents C06827453 and C06827455)

State argues that disclosing lists of "pending" calls with Secretary Pompeo could reveal agency deliberations concerning the Secretary's schedule and which calls he prioritized over others. *See* State Opp. at 7-8; 2d Stein Decl. ¶ 7. But even if true, that would not justify State's wholesale redaction of pending calls from the emails at issue. *See* Weeks Decl. Exs. Q, R. At a minimum, State must release any "pending" calls that the Secretary ultimately took, because "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." *Coastal States*, 617 F.2d at 866. Since State itself likens the "pending calls" list to a "draft schedule[]," State Opp. at 7, it "must indicate whether the draft was . . . adopted" as the Secretary's final schedule, and its failure to do so precludes summary judgment in its favor. *Heffernan v. Azar*, 317 F. Supp. 3d 94, 125-26 (D.D.C. 2018) (Walton J.) (alterations omitted); *accord EFF v. DOJ*, 826 F. Supp. 2d 157, 170-71 (D.D.C. 2011) (Walton, J.); *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004) (Walton J.); *Judicial Watch, Inc. v. USPS*, 297 F. Supp. 2d 252, 261 (D.D.C. 2004).

C. Emails about media inquiries (Documents C06827968 and C06827969)

As previously explained, these withholdings are improper because "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" privileged. Pls.' Mem. at 11-12 (citing cases). State responds by citing non-binding decisions of other judges in this District that, it claims, hold that the privilege extends to agency

deliberations about responses to press inquiries, even absent any link to policy issues. *See* State Opp. at 3-5, 8-9. But, as those cases recognize, the D.C. Circuit has not yet "addressed the application of th[e] privilege to public-relations issues." *Am. Ctr. for Law & Justice v. DOJ*, 325 F. Supp. 3d 162, 171 (D.D.C. 2018). And D.C. Circuit precedent outside of the public-relations context cuts decidedly against State's position. *See, e.g.*, *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," but rather "simply explain[ed] and appl[ied] established policy"). State has no response to this authority.

This is not to say that predecisional deliberations about public statements are categorically unprotected, but rather that they are protected only "if their release would reveal the status of internal deliberations on substantive policy matters." *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 739 F. Supp. 2d 515, 545 (S.D.N.Y. 2010). This Court recognized as much in *Heffernan*, 317 F. Supp. 3d at 125-27. There, the Court held that an agency failed to show that a "pre-final draft press release" was privileged because its *Vaughn* submissions provided "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*." *Id.* at 126 (emphasis added) (citing *Mayer, Brown, Rowe & Maw LLP v. IRS*, 537 F. Supp. 2d 128, 139 (D.D.C. 2008) (rejecting deliberative process claims as to draft press releases that "d[id] not

bear on . . . policy formulation"), *aff'd*, 562 F.3d 1190 (D.C. Cir. 2009)). So too here. State has failed to show that the withheld emails include deliberations on any policy issue. The emails instead concern how the Press Office should respond to external inquiries about participation in the briefing call, *see* State Opp. at 8; 1st Stein Decl. ¶¶ 42-43, and thus fall outside the privilege.[3]

State fails altogether to address *Heffernan* or *Mayer*. It instead knocks down a straw man, insisting that public-relations deliberations need not culminate in a "specific government policy" in order to be privileged. State Opp. at 8-9. But that is not Plaintiffs' argument. Plaintiffs' position is that the documents "must bear on policy formulation" to be privileged, "not that they [must] necessarily *lead to policy change*." *Heffernan*, 317 F. Supp. 3d at 126 n.18 (emphasis added).

Finally, to the extent the withheld emails include any proposed statements that were ultimately "adopted . . . as the agency position" in its dealings with the press, *Coastal States*, 617 F.2d at 866, those portions must be segregated and released. Pls.' Mem. at 12-13. Here again, State's failure to provide any details on this point precludes summary judgment in its favor. *See Heffernan*, 317 F. Supp. 3d at 125-26; *EFF*, 826 F. Supp. 2d at 170-71; *Wilderness Soc'y*, 344 F. Supp. 2d at 14; *Judicial Watch v. USPS*, 297 F. Supp. 2d at 261.

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

Plaintiffs explained that State has failed to satisfy FOIA's foreseeable harm requirement in two respects: (1) by failing to meets its "independent and meaningful" burden to identify the

[3] The communications are also unprotected to the extent they "simply . . . apply established [agency] policy" regarding media calls with the Secretary. *Coastal States*, 617 F.2d at 869.

"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"; and (2) by improperly withholding material based not on any "exemption-protected" interest, but because State "might be embarrassed by disclosure" or "errors and failures might be revealed" concerning the agency's improper exclusion of media outlets from the briefing call solely on the basis of religious viewpoint (or lack thereof). Pls.' Mem. at 15-19. State fails to respond to the first argument. As to the second, State does not meaningfully contest the factual basis for Plaintiffs' argument, *see* State Response to Pls.' Stmt. of Facts ¶¶ 1-13, ECF No. 23-1, but defends its exclusion of outlets from the briefing call on the ground that "[n]o individual or press organization has an unlimited right to access the Secretary every time he speaks or makes himself available," State Opp. at 9.

State, again, misses the point. For starters, it disregards the emails showing that its own employees thought the Press Office's actions were "highly unusual" and "NOT a good look for the U.S.," Pls.' Mem. at 15, which *alone* indicates State is improperly withholding material due to potential "embarrass[ment]" or because "errors and failures might be revealed," S. Rep. No. 114-4, at 8. Moreover, Plaintiffs' claim is not that there is an unfettered right of access to the Secretary, State Opp. at 9, but rather that when the agency voluntarily opens up an event to members of the press, the First Amendment restricts its ability to use viewpoint-based criteria to deny access to certain members of the press, Pls.' Mem. at 18 n.3 (citing cases).[4] To be clear,

[4] Without addressing any of Plaintiffs' cited cases, State claims the "government speech doctrine" justifies its viewpoint-based exclusion of outlets from the briefing call. State Opp. at 10. But that doctrine is inapposite where, as here, the government selectively opens up an official briefing to some members of the press, while excluding

Plaintiffs need not—and do not—ask this Court to render a ruling as to whether State's conduct was unconstitutional; it suffices that State's actions raise serious First Amendment concerns that, in turn, support the inference that State's withholdings are not based on any "exemption-protected" interests. *See* Pls.' Mem. at 14-15, 17-18.

If the Court is not prepared to order disclosure of State's withholdings, it should at least review those withholdings *in camera* to determine whether the foreseeable harm requirement is satisfied. *See Rosenberg v. DOJ*, 342 F. Supp. 3d 62, 79 (D.D.C. 2018) (proceeding as such). Indeed, State itself acknowledges that *in camera* review would be minimally burdensome given "the short nature of the documents and their relatively small universe." State Opp. at 15; *see Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (identifying "number of the withheld documents" as an "important[] factor" in deciding whether to conduct *in camera* review).

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

State has not demonstrated a substantial privacy interest in the information withheld under Exemption 6. *See* Weeks Decl. Exs. Q, R, S, T. As pointed out in Plaintiffs' opening memorandum, such a showing must balance the individual's right of privacy against a "presumption in favor of disclosure [that] is strong as can be found anywhere in [FOIA]." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002); *Multi Ag Media LLC v.*

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others. That situation implicates the discrete "protection afforded newsgathering under the first amendment guarantee of freedom of the press." *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972); *Pell v. Procunier*, 417 U.S. 817, 829-35 (1974)); *see also Karem v. Trump*, 960 F.3d 656, 660 (D.C. Cir. 2020). No such issues were at play in the "government speech" case cited by State. *See Pulphus v. Ayers*, 249 F. Supp. 3d 238, 240 (D.D.C. 2017) (artist challenged removal of his painting from "Congressional Art Competition").

USDA, 515 F.3d 1224, 1227 (D.C. Cir. 2008). Because State has failed to show a substantial privacy interest—and even concedes that any such privacy interest is likely "modest," State Opp. at 12—the court need not consider the public interest in the release of the records. *See Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989).[5]

A. State has demonstrated no cognizable privacy interest in Secretary Pompeo's email username (Document C06827829).

The Second Stein Declaration states that Secretary Pompeo's email address was *not* in fact withheld from the email attached as Exhibit S to the Weeks Declaration. *See* 2d Stein Decl. ¶ 9; State Opp. at 12. This contradicts State's prior representation that it withheld "the Secretary of State's official government email address." 1st Stein Decl. ¶ 40. State now represents that "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; State Opp. at 12. State's contradictory representations give rise to a genuine issue of material fact, precluding summary judgment for State on this point. Fed. R. Civ. P. 56(a); *see, e.g.*, *Prop. of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 380, 388 (D.D.C. 2018).

Moreover, State makes no argument in its brief or in the Second Stein Declaration that Secretary Pompeo has a substantial privacy interest in a "username associated with" his email address, once stripped of the domain. The new description given by State is vague—because only a username is present, it is unclear how State can purport to know that the username is that

[5] Nonetheless, Plaintiffs respond to State's arguments about the public interest in the email domain of Andy Schachter, *see* State Opp. at 13, below in Part II.C.

"associated with Secretary Pompeo's '@state.gov' email address," 2d Stein Decl. ¶ 9, or whether it is associated with a different, non-governmental email address. Perhaps because of this discrepancy, State does not even attempt to resurrect the boilerplate recitation made in the First Stein Declaration that release of the email address in full could subject Secretary Pompeo to unwanted inquiries. *See* 1st Stein Decl. ¶ 40.[6]

B. State has demonstrated no cognizable privacy interest in the domain of then-Deputy Secretary John Sullivan's email address (Documents C06827453 and C06827455).

State's disclosure of then-Deputy Secretary (now Ambassador) John Sullivan's email domain in the publicly-filed Stein Declarations demonstrates that Ambassador Sullivan has no privacy interest in that information. *See* 1st Stein Decl. ¶ 39, 2d Stein Decl. ¶ 10. Thus, State cannot meet its burden of demonstrating that a substantial, rather than *de minimis*, privacy interest justifies withholding that information under Exemption 6 in the emails attached as Exhibits Q and R to the Weeks Declaration, and it should be ordered to release those documents without that redaction. *See Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998); 5 U.S.C. § 552(a)(4)(B). For the same reason, State cannot demonstrate that releasing the domain of Ambassador Sullivan's email address would foreseeably harm an exemption-protected interest. *See* 5 U.S.C. § 552(a)(8)(A)(i); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 98 (D.D.C. 2019).

[6] Because the contested portion of this document is small, Plaintiffs respectfully suggest that if the Court does not order disclosure of that information, it could alternatively review the document *in camera* to determine whether a substantial privacy interest exists in the "username associated with" Secretary Pompeo's email address.

State improperly attempts to flip this burden. While the domain is redacted in the document produced to Defendants, State argues it has "disclosed . . . that the domain name of that email address is '@state.gov'" in its declaration, and as such *Plaintiffs* have not demonstrated that "[r]emoving the redaction of the domain name would . . . provide any additional information." State Opp. at 12–13; *see* 1st Stein Decl. ¶ 39; 2d Stein Decl. ¶ 10. But this is not Plaintiffs' burden to demonstrate, and it does not justify the withholding. *See*, *e.g.* *Bloche v. Dep't of Def.*, 370 F. Supp. 3d 40, 59 (D.D.C. 2019) ("in FOIA cases, the burden is always on the agency to justify the withholding of requested information").

State's case on this point, *Boyd v. Criminal Division of U.S. Department of Justice*, 475 F.3d 381, 388 (D.C. Cir. 2007), does not say differently. *See* State Opp. at 13. In the portion of *Boyd* cited by State, the agency asserted Exemption 7(C) to withhold records requested by an individual who believed the government had failed to produce exculpatory documents during his criminal trial in violation of *Brady v. Maryland*, 373 U.S. 83, 86 (1963). *See Boyd*, 475 F.3d at 388. But *Boyd* does not stand for the proposition that the government can continue to withhold records requested under FOIA if it simply avers that it has released the information in those records elsewhere. Rather, in that case, the *actual records requested* had been previously produced. *See id.* (requested report "was located in the work file and subsequently disclosed," and additional records sought "were released"). In this case, however, the portions of the records requested by Plaintiffs containing the domain of Ambassador Sullivan's email address have not yet been disclosed.

C. State has demonstrated no cognizable privacy interest in the domain of Andy Schachter's private email address, in which there is a significant public interest (Document C06827940).

State makes no attempt in its brief to demonstrate that Andy Schachter has a substantial privacy interest in the domain portion of his private, non-governmental email address. *See* Weeks Decl. Ex. T. Rather, State once again argues that disclosure of Mr. Schachter's email address *in full* would invade his privacy. *See* State Opp. at 13–14.[7] But, as previously explained, Plaintiffs only seek disclosure of the domain portion of Mr. Schachter's private email address, not the full address. *See* Pls.' Mem. at 23-24. Thus, Plaintiffs' position is not like that of the requestors in *People for the Ethical Treatment of Animals v. Department of Health & Human Services*, who sought "personal email addresses" and URLs that could be used "to access the emails to which they correspond or even the entire email accounts in which those emails are contained." No. 17-CV-1395 (TSC), 2020 WL 2849906, at *5 (D.D.C. June 1, 2020). The same deficiency attends State's citation of *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010), in which the requestor sought the full personal email addresses of non-governmental employees, and *Judicial Watch, Inc. v. U.S. Department of State*, 306 F. Supp. 3d 97, 117 (D.D.C. 2018), in which the agency had already released email usernames prior to the requestor seeking the domains extensions. *See* State Opp. at 13 & n.2.

[7] State's citation to the Privacy Act, *see* State Opp. at 13–14 (citing 5 U.S.C. 552a), is unavailing. The Privacy Act provides a statutory exemption for any information whose disclosure is "required under Section 552 of this title"—i.e., FOIA. 5 U.S.C. § 552a(b)(2); *see Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982) ("[S]ection (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access."). Moreover, another judge of this court has held that the Privacy Act does not apply to agency emails. *See House v. DOJ*, 197 F. Supp. 3d 192, 210 (D.D.C. 2016).

State has not set forth evidence indicating that disclosure of Mr. Schachter's private email domain would necessarily lead to disclosure of his email username. The only justification offered by State for withholding the domain was a conclusory statement, which Plaintiffs previously demonstrated was insufficient. *See* Pls.' Mem. at 23 (addressing 1st Stein Decl. ¶ 45 ("[R]elease of this information would shed no light on the conduct of government business and would constitute an unwarranted invasion of personal privacy.")). Because State has not demonstrated that disclosure of Mr. Schachter's email domain would constitute a substantial invasion of his privacy, the court need not consider the public interest in such a disclosure.

In any event, the public interest is substantial. State declines to engage with the cases cited by Plaintiffs on this point, instead attacking only an example offered by Plaintiffs of the public interest in such information. *See* State Opp. at 14–15 (regarding the preservation of government records). But the domain of a government employee's private email address, used while employed by the State Department, could also demonstrate a significant conflict of interest with his governmental role (for instance, if the employee maintained simultaneous employment with an organization ideologically opposed to one left out of a press briefing). The nature of any such conflict, while undoubtedly in the public interest, would only become clear once the domain is disclosed.

CONCLUSION

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

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