

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CITIZENS FOR RESPONSIBILITY )  
AND ETHICS IN WASHINGTON, )  
) )  
*Plaintiff,* )  
) )  
v. )  
) )  
GENERAL SERVICES )  
ADMINISTRATION, )  
) )  
*Defendant.* )

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Civil Action No. 18-2071 CKK

**REPLY IN SUPPORT OF DEFENDANT’S MOTION ON THE PLEADINGS, TO  
DISMISS AND FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF’S  
CROSS-MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

▶ This Court should grant Defendant’s Motion for Partial Summary Judgment and deny Plaintiff’s Cross-Motion for Summary Judgment. Defendant has met its obligations under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to produce to Plaintiff responsive, non-exempt records and to justify any withholdings from responsive records. Plaintiff’s Memorandum In Support of Plaintiff’s Cross-Motion for Summary Judgment (ECF No. 20) (Pl. Mem.) fails to demonstrate otherwise.

First, Defendant’s search was not inadequate. GSA conducted a search for agency records per the search terms requested to be used by Plaintiff and subsequently provided Plaintiff with all non-exempt documents, accordingly.

Second, Defendant provided sufficient detail with respect to its application of the FOIA’s Exemption 5 regarding documents which reflects Defendant’s deliberative process to satisfy the “foreseeable harm” standard per the FOIA Improvement Act of 2016.

Third, Defendant properly invoked the Presidential Communications Privilege to the January 24, 2018 briefing itinerary, as this document was prepared by in the course of preparing advice for the President /or his advisors.

Fourth, Defendant properly applied the deliberative process privilege to the documents. The iteration of the documents that were returned in Defendant's search for responsive records (based upon the terms requested by Plaintiff, nonetheless) were all in draft form and not yet complete.

Fifth, Defendant did not withhold an email between GSA OIG and GSA pursuant to Exemption 7(E) as intimated by Plaintiff. Defendant only withheld a portion of the email correspondence reflecting information compiled for a law enforcement purpose, which was properly exempt from disclosure.

### **ARGUMENT**

Plaintiff moves for summary judgment and opposes Defendant's motion for summary judgment on various grounds: First, they argue that Defendant failed to conduct an adequate search for all responsive records. Second, they argue that Defendant is improperly withholding material under FOIA Exemption 5 and 7(E). Third, Plaintiff argues that Defendant has failed to demonstrate that it released all reasonably segregable non-exempt material. But Plaintiff's arguments are unavailing. Defendant has appropriately applied the aforementioned FOIA exemptions and provided Plaintiff with all segregable records that were returned in response to the search terms provide by Plaintiff. If the Court has further questions about the withheld materials, which consist of some 50 pages, Defendant proposes that the Court review them in camera.

As an initial matter, Plaintiff has not adequately contested the material facts laid out and appropriately supported with Defendant's motion. This Court was precise in how a party is to respond to a statement of material facts:

- (i) The Court **strictly adheres to the dictates of Local Civil Rule 7(h)**, which requires that each party submitting a motion for summary judgment attach a statement of material facts for which that party contends there is no genuine dispute, with specific citations to those portions of the record upon which the party relies in fashioning the statement. The party opposing the motion must, in turn, submit a statement enumerating all material facts which the party contends are genuinely disputed and thus require trial. *See* LCvR 7(h)(1). The parties are strongly encouraged to carefully review *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145 (D.C. Cir. 1996), on the subject of Local Civil Rule 7(h).
- (ii) The party responding to a statement of material facts must respond to each paragraph with a **correspondingly numbered paragraph**, indicating whether that paragraph is admitted or denied. If a paragraph is admitted only in part, the party must specifically identify which parts are admitted and which parts are denied.
- (iii) The Court may assume that facts identified by the moving party in its statement of material facts are **admitted**, unless such facts are controverted in the statement filed in opposition to the motion. *See* LCvR 7(h)(1).

September 7, 2018 Order (ECF No. 4) at 5-7.

Plaintiff has cited not a single record citation to controvert Defendant's statement of facts. *See* Plaintiff's Response To Defendant's Statement Of Material Facts (ECF No. 20-8) ("Pl. SMF Resp."). Plaintiff, instead, where not indicating "no dispute" (Pl. SMF Resp., ¶¶ 1, 3, 10), opts to claim a lack of knowledge (Pl. SMF Resp., ¶¶ 2-11), or merely to claim that the statements proffered by Defendant are legal conclusions in their entirety. Pl. SMF Resp., ¶¶ 12-27. As the Court can see, within Defendant's statement of material facts are significant, properly supported factual assertions that Plaintiff has offered no legitimate basis to reject. *See e.g.* All of these assertions should be accepted as true.

**I. DEFENDANT CONDUCTED AN ADEQUATE SEARCH FOR ALL RESPONSIVE RECORDS.**

Under FOIA, an agency is obligated to conduct a search that is “reasonably calculated to uncover all relevant documents.” *Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (“[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.”); *Media Research Ctr. v. U.S. Dep’t of Justice*, 818 F. Supp. 2d 131, 137 (D.D.C. 2011). A reasonable search is one that covers those locations where responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. To satisfy its obligation, “the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Id.*

Plaintiff raises a complaint regarding the adequacy of the search for responsive records and asserts that “there are positive indications of overlooked materials.” *See Plaintiff’s Mem.* at 6. Specifically, Plaintiff points to a series of GSA emails released by the House Oversight Committee which they assert are plainly responsive to Plaintiff’s FOIA request. *See Plaintiff’s Mem., Exhibit 1.* This, however, is untrue. The emails that were referenced by Plaintiff included those between GSA and the White House with the following terms:

Headquarters  
HQ  
demoli!  
renov!  
rebuild  
demo! W/3 rebuild [**explanation:** looking for all variations of demo! within three words of rebuild]  
"demolish rebuild"  
remodel!

"construction project"

"new construction"

President W/10 order! OR direct! OR instruct! OR decide! OR want! [**explanation:** looking for all variations of these words within 10 words of President]

POTUS W/10 order! OR direct! OR instruct! OR decide! OR want! [**explanation:** looking for all variations of these words within 10 words of POTUS]

operating lease

leaseback

PA Ave!

Pennsylvania Avenue.

*See* Exhibit 1.

When a plaintiff narrows his FOIA request in litigation, it supersedes any broader request set forth in the plaintiff's complaint. *Am. Ctr. for Law & Justice v. United States Dep't of Justice*, 325 F. Supp. 3d 162, 168-69 (D.D.C. 2018) (citing *DeFraia v. CIA*, 311 F. Supp. 3d 42, 47-48 (D.D.C. 2018); *Gilman v. DHS*, 32 F.Supp.3d 1, 22-24 (D.D.C 2014) (holding parties to narrowing of request in joint status report and subsequent order); *People for Am. Way Found. v. DOJ*, 451 F. Supp. 2d 6, 11-12 (D.D.C. 2006) (holding plaintiff may narrow request even without defendant's agreement)).

In any event, the only email that would have potentially been returned in this set of emails referenced by Plaintiff is the email between White House employee, Joseph Lai and GSA employee Brennan Hart in which the word "headquarter" appears. The email at the top of the chain between Mr. Lai and Mr. Hart does not have any of the terms Plaintiff proffered as the basis of the search query, which would explain why GSA's search did not return this single page as the term "headquarter" appears further in the email chain. The duration of the emails Plaintiff references do not contain communications between GSA and White House/EOP email address. Regarding the email from an OMB official, OMB email addresses do not use a White House/EOP email address. Their communications are sent using omb.eop.gov, not who.eop.gov, which is the email address URL for White House/EOP email addresses. Thus, despite Plaintiff's

contention here, Defendant, using terms proffered by Plaintiff as search parameters, conducted a proper search for all agency records per the Court in *Oglesby*. See Def. SMF, ¶¶ 2-9.

Moreover, “the mere fact that additional documents have been discovered does not impugn the accuracy of the [agency] affidavits.” *Barouch v. U.S. Dep't of Justice*, 962 F. Supp. 2d 30, 53 (D.D.C. 2013) (quoting *Goland v. CIA*, 607 F.2d 339, 369 (D.C.Cir.1978) (the issue is not whether any further documents might conceivably exist but whether the agency’s search for responsive documents was adequate)).

## **II. GSA PROPERLY APPLIED FOIA EXEMPTIONS 5 and 7 (E).**

Plaintiff argues that Defendant improperly withheld non-exempt material. Specifically, Plaintiff asserts that GSA failed to satisfy the FOIA’s foreseeable harm standard for each of its Exemption 5 withholdings. Plaintiff also asserts that the Presidential Communications Privilege does not apply to the January 24, 2018 Briefing Itinerary. Lastly, Plaintiff asserts that GSA’s Deliberative Process Privilege claim fails with respect to what it surmises was “draft material later adopted as final” and that GSA inappropriately applied Exemption 7(E). The Court should reject these arguments, as well. Defendant appropriately invoked the deliberative process and attorney-client privilege, along with appropriately applying Exemption 7(E) to the responsive documents. Moreover, GSA met its burden to satisfy the FOIA’s foreseeable harm standard with respect to the information withheld per the Deliberative Process Privilege.

### **A. GSA Properly Applied FOIA Exemption 5 to Protect Information Subject to the Deliberative Process Privilege**

Exemption 5 of FOIA exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The Supreme Court has interpreted Exemption 5 as allowing an agency to withhold from the public documents which a private party

could not discover in civil litigation with the agency. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975). Exemption 5 therefore protects from disclosure documents that “fall within the ambit of a privilege” such that they would not be “routinely or normally” disclosed in civil discovery. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *Fed. Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 26-27 (1983); *Martin v. Office of Special Counsel, Merit Sys. Protection Bd.*, 819 F.2d 1181 (D.C. Cir. 1987). Thus, Exemption 5 allows an agency to invoke traditional civil discovery privileges, including the deliberative process privilege, to justify the withholding of documents that are responsive to a FOIA request. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

FOIA Exemption 5 incorporates the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). This privilege protects the “quality of agency decisions.” *Id.* The content or nature of the document is the focus of the inquiry into the privilege as opposed to the manner in which the exemption is raised in a particular situation. *See Dow Jones & Co., Inc. v. Dep't of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990). The policy underlying this privilege is to encourage open, frank discussions of policy matters between government employees, consultants and other officials, to protect against premature disclosure of proposed policies before they become final, and to protect against public confusion by disclosing reasons and rationales that were not in fact the ultimate grounds for the agency's action. *See, e.g., Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States*, 617 F.2d at 866.

To withhold a responsive document under the deliberative process privilege, the agency

must demonstrate that the document is “both predecisional and deliberative.” *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A communication is predecisional if “it was generated before the adoption of an agency policy,” and it is deliberative if “it reflects the give and- take of the consultative process.” *Coastal States*, 617 F.2d at 866. The privilege “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Id.* The deliberative process privilege reflects Congress’ judgment that public disclosure of predecisional, deliberative documents would inhibit “the full and frank exchange of ideas on legal policy matters” within an agency. *Mead Data Cent. v. Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977). The Supreme Court has commented that, “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” *United States v. Nixon*, 418 U.S. 683, 705 (1974).

Here, Defendant met its burden by pointing to (1) a specific decision that each document in question pre-dates, or (2) absent a specific decision, the deliberative process to which the document relates. Def. SMF, ¶¶ 11-16.

**1. GSA Satisfied The Forseeable Harm Standard as to its Exemption 5 withholdings.**

Here, as explained in the Declaration of Travis Lewis (“Lewis Decl.”) and *Vaughn* index, GSA invoked Exemption 5 with respect to 1) “A draft copy of GSA’s responses to Questions for the Record from the U.S. Senate’s Committee on Environment and Public Works regarding the FBI Headquarters Project sent between White House Counsel and GSA’s Office of General Counsel” as this draft document, included herein are proposed GSA responses and interagency deliberations between the Office of White House Counsel and GSA’s Office of General Counsel

prior to any determination being reached on how GSA would move forward with responding to questions for the record regarding the FBI Headquarters project; 2) “A draft copy of GSA’s Office of the Inspector General’s (IG) Draft Review of GSA’s Revised Plan for the FBI Headquarters Consolidation Project sent between White House Counsel and GSA’s Office of General Counsel”. This is an investigation sensitive document that has been marked ‘Draft’ by the IG’s office and was provided to GSA in order to review/respond to the IG’s questions therein. Thus this draft document is part of the IG’s deliberative process of analyzing and determining what if any GSA action with respect to the FBI Headquarters project requires further inquiry /or investigation; 3) “A Draft copy of correspondence from GSA’s General Counsel to GSA IG’s Counsel to the Inspector General concerning a records request for the FBI Headquarters Project” as this record is a draft copy of the correspondence that GSA’s General Counsel wrote on behalf of the GSA Administrator to the IG’s office in anticipation of potential litigation. It represents the GSA Attorney– work product and is thus exempt from release accordingly; and 4) A White House Briefing Itinerary regarding a discussion of the future of the FBI headquarters on January 24, 2018.

Although Plaintiff references *Judicial Watch Inc. v. Dep’t of Commerce*, 2019 WL 1317557 (D.D.C. Mar. 22, 2019) as support for the claim that Defendant has failed to meet its burden of establishing foreseeable harm, this argument falls short. Defendant met the requirements outlined in *Judicial Watch* regarding agency communications, which was the subject matter of that case as well. Here, GSA applied the Deliberative Process Privilege in two sets of circumstances: To GSA’s draft proposed responses and intragency deliberations with White House Counsel and to the draft copy of the correspondence that GSA’s General Counsel wrote on behalf of the GSA Administrator to the IG’s office in anticipation of potential litigation.

In both instances Defendant met its burden by pointing to (1) a specific decision that each document in question pre-dates, or absent a specific decision, the deliberative process to which the document relates. *See Vaughn Index at 4-6; Lewis Decl.*, ¶ 11; Def. SMF, ¶¶ 12-13, 15-16. This is quintessentially the kind of material that falls under the deliberative process privilege and is shielded from disclosure by Exemption 5.<sup>1</sup>

## **2. GSA Properly Applied the Presidential Communication Privilege.**

Plaintiff first asserts that Defendant has not shown that the withheld itinerary “relates in any way to *presidential decisionmaking*.” Pl. Mem. at 15. This is inaccurate. As Plaintiff itself points out in its opposition, “[t]he withheld documents must also “reflect presidential decisionmaking and deliberations,” with a clear connection to “presidential powers and responsibilities.” Pl. Mem. at 14 (citing *In re Sealed Case*, 121 F.3d at 752-53 (emphasis added); *see also Prop. of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 389 (D.D.C. 2018)). With respect to the Itinerary, this was a document that was prepared for use by the President and his Advisors for purposes of conferring with the GSA Administrator about GSA’s decision to redevelop the Federal Bureau of Investigations (“FBI”) Headquarters.

Secondly, Plaintiff asserts that “GSA provided no detail on the role of the White House Staff who prepared the briefing itinerary and thus there is no basis to evaluate whether those staff qualify as ‘White House advisers who have ‘broad and significant responsibility for investigating and formulating the advice to be given the President.’” *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004). And, Plaintiff suggests there may be no basis to conclude

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<sup>1</sup> The document described in paragraph 11(3) of the Defendant’s Statement of Material Facts was also subject to withholding under the Attorney work-product doctrine, for which Defendant also explained the harm that its release would cause. Def. SMF, ¶¶ 14-16.

that the itinerary is a protected presidential communication because Plaintiff cannot identify the function, purpose, or recipients of the itinerary. However, there is no requirement to provide the specific identity of the White House Staffer who prepared the agenda. The FOIA does not require an agency to answer questions such as these. It requires an agency to provide segregable records in response to a request, which is what occurred in this instance. Moreover, it is now public knowledge that a meeting occurred whereby the GSA Administrator informed the President and his advisors about the FBI renovation project. Thus, logically, one can infer that the subject itinerary was use for and by the President and his Advisors as part and parcel of any action made or contemplated as a result of being informed of GSA's decision to renovate the FBI Headquarters. *See* Def. SMF, ¶ 11, 17; *Vaughn* Index at 7.

**3. Defendant's Deliberative Process Privilege was appropriately applied to draft documents.**

As Defendant explained in Defendant's Memorandum Of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings, to Dismiss and for Summary Judgment. ("Def's Mem.") and as reflected in the *Vaugh* Index, Defendant properly withheld certain information pursuant to the Deliberative Process Privilege. Def. SMF, ¶¶ 11-16. Plaintiff nonetheless asserts that Document 1, "the draft copy of GSA's responses to Questions for the Record" from a Senate Committee and Document 2, "the initial draft" of the OIG report both are not deliberative. Pl. Mem. at 17. This is incorrect. First, Plaintiff asserts that Document 2 is not predecisional because "there are strong indications that much of the report was ultimately adopted in the final report, which would defeat a deliberative process claim." Pl. Mem. at 17. With respect to the OIG report, this document was explicitly marked as deliberative by the OIG itself, as it had not been fully reviewed within by the OIG and thus subject to revision. Plaintiff asserts that this same analysis applies to Document 1 as well. Although

Plaintiff asserts that this draft document was “eventually released outside the agency.”

Moreover to the extent that the draft contains material that was adopted in the final version of the responses, it is not exempt.” However these arguments do not have merit.

Drafts are typically pre-decisional and deliberative. *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014); *see also Exxon Corp. v. Dep't of Energy*, 585 F.Supp. 690, 698 (D.D.C. 1983) (“Draft documents, by their very nature, are typically predecisional and deliberative.”). Almost by definition, they are “prior in time to the final decision on agency policy,” *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 132 (D.D.C. 2008), and represent the give-and-take process, rather than adopted policy itself, *see Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)) (noting that the Deliberative Process Privilege protects pre-decisional “recommendations, *draft documents*, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency”) (emphasis added). Although drafts are not automatically protected by the Deliberative Process Privilege, *see Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982), the drafts that Defendant withheld in this case meet both criteria of the Deliberative Process Privilege and are therefore exempt from disclosure under FOIA.

Indeed, “[t]he D.C. Circuit has found that where a plaintiff requests records of correspondence surrounding or leading up to an agency publication, the relevant decision for purposes of applying the deliberative process privilege is the decision *to publish*,” *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 57 (D.D.C. 2012) (emphasis added) (citing *Formaldehyde Inst. v. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1120 (D.C. Cir. 1989)), not the decision to begin drafting.

Plaintiff's additional argument—that some of the drafts withheld contain material that GSA ultimately adopted (Pl. Mem. at 17) fares no better. Defendant agrees that an alleged draft is not exempt under the Deliberative Process Privilege if the agency adopts the draft as its final position. *See, e.g., Arthur Anderson Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982). But Plaintiff identifies no examples of such “drafts” and, although they argue that there is evidence that the draft became adopted as final, they have failed to identify adequate supporting evidence.

Release of non-final documents such as these would inevitably reveal the editorial judgments of government staff and/or ongoing, collaborative dialog about the document under consideration, including information about agency personnel's decisions about which portions to keep and which portions to change. Such intrusion into the government's internal deliberations have been recognized as worthy of protection under the deliberative process privilege. *See, e.g., Dudman Commc'ns Corp. v. Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987); *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048-49 (D.C. Cir. 1982). As such, Defendant's withholdings of certain draft documents as discussed in the *Vaughn* Index should be upheld. Def. SMF, ¶¶ 11-16.

### **B. Exemption 7(E)**

Plaintiff argues that Defendant has failed to offer an adequate description of the law enforcement technique that it seeks to protect under Exemption 7(E). Pl. Mem. at 19. Defendant has proffered some detail, but cannot provide a full analysis on the public record of the technique, given that the value of the exemption would be lost. Defendant has indicated in is *Vaughn* Index as to the single page (Page 6 of an email) the following:

The information that has been withheld reflected a specific GSA IG investigative goal as part of its technique in conducting a law enforcement investigation regarding an ongoing investigation within the GSA IG's office. If this information

was made publicly available, this would likely cause a current or future subject of an IG investigation to undertake certain actions in order to circumvent the law.

*Vaughn* Index at 3; *see also* Lewis Decl., ¶ 11. Defendant submits that this adequately identifies a legitimate basis for withholding the material. If the Court desires further detail, Defendant would proffer the page for *in camera* review.

### **III. Defendant Produced Reasonably Segregable Information.**

Plaintiff's contention that Defendant failed to produce all reasonably segregable material is also without merit. See Def. SMF, ¶¶ 25-26; Lewis Decl., ¶¶ 12-14; *Vaughn* Index at 1-3. Defendant adequately explained its redactions and withholdings, and produced segregable material when possible.

### **IV. The Court Should Consider In Camera Review.**

Insofar as Plaintiff challenges the descriptions provided of the materials at issue, Defendant submits that, before directing disclosure of the withheld information, *in camera* review would be in order. *See* 5 U.S.C. § 552(a)(4)(B) (“the court . . . may examine the contents of such agency records *in camera* . . .”).

**CONCLUSION**

Defendant has adequately searched for agency records using terms proposed by Plaintiff, Defendant compiled a sufficiently detailed *Vaughn* Index, and appropriately withheld exempt material. Accordingly, the Court should grant Defendant's Motion For Judgment On The Pleadings, To Dismiss And For Summary Judgment and deny Plaintiff's Cross-Motion For Summary Judgment. 

Respectfully submitted,

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Dated: June 12, 2019

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CITIZENS FOR RESPONSIBILITY	)	)	
AND ETHICS IN WASHINGTON,	)	)	
	)	)	
<i>Plaintiff,</i>	)	)	
	)	)	
v.	)	)	Civil Action No. 1:18-cv-02071-CKK
	)	)	
GENERAL SERVICES	)	)	
ADMINISTRATION,	)	)	
	)	)	
<i>Defendant.</i>	)	)	
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**DEFENDANT’S RESPONSE TO PLAINTIFF’S  
STATEMENT OF UNDISPUTED MATERIAL FACTS<sup>2</sup>**

1. CREW submitted a FOIA request to GSA on July 30, 2018. GSA Ex. 1 [ECF No. 18-1]; Declaration of Travis Lewis [ECF No. 18-3] ¶ 4.

**Defendant’s Response: Defendant Concurs.**

2. CREW’s FOIA request sought “all communications from January 20, 2017 to [July 30, 2018] between GSA and the White House concerning the renovation of the FBI headquarters.” GSA Ex. 1.

**Defendant’s Response: Defendant Concurs.**

3. On August 27, 2018, the GSA’s Office of Inspector General released a report entitled “Review of GSA’s Revised Plan for the Federal Bureau of Investigation Headquarters Consolidation Project” (“GSA OIG Report”). CREW Ex. 2.

**Defendant’s Response: Defendant Concurs.**

<sup>2</sup> See ECF No. 20-8 at 4-7.

4. The GSA OIG Report describes three in-person meetings between GSA and White House officials concerning the FBI headquarters project, which were held on December 20, 2017; January 24, 2018; and June 15, 2018. CREW Ex. 2 at 5-6, 7-9, 11.

**Defendant's Response: Defendant Concur.**

5. The GSA OIG Report also describes specific "GSA emails" concerning the above-mentioned White House meetings. CREW Ex. 2 at 7, 9 & n.7.

**Defendant's Response: Defendant Concur.**

6. After GSA's statutory response deadlines elapsed, CREW filed this FOIA suit on September 4, 2018. *See* Compl. [ECF No. 1].

**Defendant's Response: Defendant Concur.**

7. On October 18, 2018, the U.S. House Committee on Oversight and Reform ("House Oversight") publicly released several GSA emails concerning the FBI headquarters project, including emails between GSA and White House officials that are responsive to CREW's FOIA request. *See* CREW Exs. 3, 7.

**Defendant's Response: Defendant Denies that the emails are responsive based upon the terms provided to Defendant by Plaintiff. *See* Exhibit 2 (ECF No. 18-2).**

8. The emails released by House Oversight included the following:
- a. A January 25, 2018 email exchange between Joseph Lai of the White House and Brennan Hart of GSA concerning the "path forward for the new FBI Headquarters announcement," which the "President" had "signed off on." CREW Ex. 3 at 2281.
  - b. A January 28, 2018 email exchange in which GSA officials discussed asking "DOJ/FBI" to draft a document to "memorializ[e] what was decided in the meeting with POTUS" regarding the FBI headquarters, which would both "recap

the oval meeting with what POTUS directed everyone to do,” and “then ask Emily [Murphy] (GSA) to execute POTUS’s orders.” CREW Ex. 3 at 2296-97.

- c. A January 28, 2018 email exchange in which GSA officials forwarded an email from officials of the Office of Management and Budget, and explained that the FBI headquarters project is now “a demolition/new construction [project] per the President’s instructions.” CREW Ex. 3 at 2290-91.

**Defendant’s Response: Defendant Concur.**

9. Later on October 18, 2018, the parties in this case held a phone call during which GSA stated that its search uncovered no records responsive to CREW’s FOIA request. GSA Ex. 2 at 2 [ECF No. 18-2].

**Defendant’s Response: Defendant Concur.**

10. CREW responded that House Oversight had earlier that day released the emails described above, which are plainly responsive to CREW’s FOIA request and thus casted doubt on GSA’s position that it had no responsive records. GSA Ex. 2 at 2.

**Defendant’s Response: Defendant Denies that the emails are responsive based upon the terms provided to Defendant by Plaintiff. See Exhibit 2 (ECF No. 18-2).**

11. By email dated October 25, 2018, GSA agreed to conduct another search using specific terms and parameters provided by CREW, which were formulated based partly on language from the emails released by House Oversight. GSA Ex. 2 at 1.

**Defendant’s Response: Defendant Concur**

12. By letter dated December 7, 2018, GSA informed CREW that it had completed its supplemental search and determined that all “responsive documents are exempt from release pursuant to exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5).” CREW Ex. 4.

**Defendant's Response: Defendant Concur**

13. CREW responded to GSA's letter by email dated December 10, 2018, asking GSA to specify how many responsive pages it was withholding, and the grounds for its Exemption 5 claim. CREW Ex. 5.

**Defendant's Response: Defendant Concur**

14. GSA responded to CREW's email by letter dated December 14, 2018, stating that the agency had located 52 pages of responsive records, was withholding 25 of these pages pursuant to Exemption 5, based on the presidential communications privilege and deliberative process privilege, and Exemption 7(C), based on GSA's finding that disclosure of the withheld material could reasonably be expected to constitute an unwarranted invasion of personal privacy. CREW Ex. 6.

**Defendant's Response: Defendant Concur**

15. GSA's December 14, 2018 letter added that GSA was withholding the remaining 27 responsive pages pursuant to Exemption 5 and the deliberative process privilege. CREW Ex. 6.

**Defendant's Response: Defendant Concur**

16. By letter dated March 15, 2019, GSA stated that "[a]fter a subsequent analysis" of the 25 pages it had originally withheld based on the presidential communications privilege, GSA had decided to release those documents to CREW with certain redactions. CREW Ex. 1 at 1.

**Defendant's Response: Defendant Concur**

17. GSA has provided no indication—in the Declaration of Travis Lewis, its Vaughn index, or elsewhere—that its search for responsive records uncovered any of the emails publicly

released by House Oversight on October 12, 2018, or described in the GSA OIG's August 2018 Report.

**Defendant's Response: Defendant Concur**

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that service of the foregoing Reply In Support Of Defendant's Motion For Summary Judgment And Opposition To Plaintiff's Cross-Motion For Summary Judgment, Defendant's Response To Plaintiff's Statement Of Undisputed Material Facts, and a proposed order has been made through the Court's electronic transmission facilities on this 12th day of June, 2019.

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