IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

GENERAL SERVICES ADMINISTRATION,

Defendant.

Civil Action No. 18-cv-2071-CKK

REPLY IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

GSA's opposition fails to address many of CREW's points and largely rehashes the agency's opening brief. Insofar as GSA does actually respond to CREW's assertions, it falls short. To begin, GSA is flatly wrong in claiming that CREW agreed to narrow its FOIA request in litigation merely by proposing search terms to GSA. CREW never offered—let alone agreed—to narrow its request. And even if its request were so narrowed, CREW has identified several known documents that CREW's proposed search terms should have captured had GSA properly implemented them, but that the agency's search did not uncover. GSA's contrary position rests on a flawed understanding of both the agency's FOIA obligations and CREW's proposed search terms. In short, there are still positive indications of overlooked materials that cast doubt on the adequacy of GSA's search.

GSA fares no better on its exemption claims. As to each, GSA makes no attempt to offer additional detail to satisfy FOIA's recently-codified foreseeable harm standard, or other critical information necessary to evaluate its exemption claims. The agency instead doubles down on its generic assertions of harm, even though several judges of this Court have rejected similar claims. GSA also continues to assert the presidential communications privilege as to a January 2018 briefing itinerary, in the face of undisputed facts showing that the briefing at issue entailed no *presidential* decisionmaking and thus falls outside the privilege's scope. Similarly, GSA insists on withholding certain communications between the GSA Inspector General and GSA because of its purported interest in protecting "law enforcement techniques," even though the withheld communication entailed the Inspector General disclosing those very techniques to the subject of

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

ARGUMENT

I. CREW Properly Contested GSA's Statement of Material Facts

GSA faults CREW for not including a "single record citation to controvert" GSA's statement of material facts, and urges the Court to deem the agency's factual assertions admitted pursuant to Local Rule 7(h). GSA Reply at 3 [ECF No. 22]. That argument is meritless. For starters, much of GSA's statement of facts consists of the agency's description of its search efforts. *See* GSA Stmt. of Facts ¶¶ 2-10 [ECF No. 18]. Given the "'asymmetrical distribution of knowledge'" inherent in FOIA litigation, "where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request," *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006), CREW is in no position to confirm or deny the veracity of those paragraphs. *See* CREW Response to GSA Stmt. of Facts ¶¶ 2-11 [ECF No. 19-9]. Nor is CREW required to do so. Rather, FOIA "places the burden '*on the agency* to sustain its action.'" *Judicial Watch*, 449 F.3d at 146 (quoting 5 U.S.C. §552(a)(4)(B)) (emphasis added). And here, CREW has pointed to other facts, with supporting record citations, that cast doubt on the adequacy of GSA's search, notwithstanding the agency's self-serving description of its search efforts. *See* CREW Stmt. of Facts ¶¶ 3-10, 17 [ECF No. 19-9]. This suffices to raise a disputed factual question as to the adequacy of GSA's search.

The remainder of GSA's statement consists of legal arguments, couched as factual assertions, concerning the agency's exemption claims and segregability obligations. *See* GSA Stmt. of Facts ¶¶ 12-27 [ECF No. 18]. Because these paragraphs "blend[] factual assertions with

legal argument," they do not comply with Local Civil Rule 7(h). *Jackson v. Finnegan*, *Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 153 (D.C. Cir. 1996); *see* Standing Order ¶ 12(B)(i) [ECF No. 4] ("The parties are strongly encouraged to carefully review *Jackson* . . . on the subject of Local Civil Rule 7(h)."). Consistent with *Jackson* and Rule 7(h), CREW appropriately responded to these paragraphs by stating they contain legal conclusions requiring no response. *See* CREW Response to GSA Stmt. of Facts ¶¶ 12-27 [ECF No. 19-9].

II. GSA Has Failed to Demonstrate It Conducted an Adequate Search for All Responsive Records

CREW's motion highlighted "positive indications of overlooked materials" demonstrating the inadequacy of GSA's search, including several emails released by Congress that are responsive to CREW's request and that CREW repeatedly brought to GSA's attention, but that GSA's searches did not uncover. CREW Mot. at 6-9 [ECF No. 19-1]. None of GSA's responses are persuasive.

A. CREW Did Not Agree to Narrow Its FOIA Request

GSA first asserts that CREW agreed to narrow its request in litigation by sending GSA proposed search terms. GSA Reply at 4-5. That is incorrect. 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 [ECF No. 18-1]. CREW never agreed to narrow this request. While CREW did send GSA an email with proposed search terms, GSA Ex. 2 [ECF No. 18-2], those terms were designed merely to assist the agency in identifying records responsive to CREW's FOIA original request, given that the agency's first search—which uncovered *no* responsive records—was plainly deficient. CREW Mot. at 6-7.

Moreover, CREW repeatedly advised GSA, both before and after providing the agency proposed search terms, that the congressionally-released emails were responsive to its FOIA request, and that it viewed GSA's failure to uncover those emails or any related communications as proof of a deficient search. *See* GSA Ex. 2 [ECF No. 18-2] (Oct. 18, 2018 email from CREW to GSA) (in response to GSA's representations that its initial search uncovered no responsive records, identifying congressionally-released emails as documents "responsive to [CREW's] request" in GSA's possession); CREW Reply Ex. 1 (March 15, 2019 email from CREW to GSA) (noting that CREW planned "to litigate adequacy of the search" and, "[i]n connection with" that issue, emphasizing that Congress "publicly released [documents] that are responsive to our FOIA request, which GSA has not produced to us"). Thus, separate and apart from CREW's proposed search terms, GSA was on notice of the need to utilize the congressionally-released emails in conducting its search. Its decision to disregard those emails is a textbook example of an agency failing to "follow through on obvious leads to discover requested documents." *Valencia-Lucena*, 180 F.3d at 325-26; *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998).[1]

GSA's cases are inapposite. *See* GSA Reply at 5 (citing cases). In each of those cases, the plaintiff explicitly agreed to narrow the scope of the case in a joint status report signed by both parties. *See Am. Ctr. for Law & Justice v. DOJ*, 325 F. Supp. 3d 162, 168-69 (D.D.C. 2018) (deeming FOIA case narrowed where the parties filed a joint status report making clear that "the parties had resolved any dispute over the adequacy of the search," which showed the plaintiff

[1] Apart from the congressionally-released emails, CREW's opening brief highlighted emails discussed in a GSA Inspector General report that GSA's search likewise failed to uncover. *See* CREW Mot. at 7-8 (citing CREW Ex. 2 at 5-9 & nn.7, 11). GSA does not respond to this point.

"knowingly and voluntarily waived . . . any challenge to the adequacy of DOJ's search"); *DeFraia v. CIA*, 311 F. Supp. 3d 42, 47-48 (D.D.C. 2018) (same, where "[t]he parties have expressly agreed, in a [joint status report] signed by attorneys for both sides, that the scope of the first portion of [the plaintiff's] 2014 Request is limited to" a specified set of documents); *Gilman v. DHS*, 32 F. Supp. 3d 1, 22-24 (D.D.C. 2014) (same, where "[t]he plain meaning of the joint status report" showed that certain documents "are not responsive to the plaintiff's amended FOIA request"). Here, by contrast, there is no joint status report in which CREW explicitly agreed to narrow the scope of this case or otherwise waived its right to *all* records responsive to its original FOIA request. There is only an email where CREW proposed search terms. Moreover, CREW could not have been clearer that it intended to challenge the adequacy of GSA's search based partly on the agency's failure to uncover the congressionally-released emails and any related communications. *See* GSA Ex. 2; CREW Reply Ex. 1.

The other case cited by GSA, *People for Am. Way Found. v. DOJ*, 451 F. Supp. 2d 6 (D.D.C. 2006), actually undermines its position. There, it was the *agency* that urged the Court to consider the plaintiff's initial FOIA request in assessing the agency's overbreadth argument, rather than a narrowed version of the request proposed by plaintiffs that had been memorialized in multiple joint status reports. *Id.* at 11-12. The Court rejected the government's argument, reasoning that the plaintiff is "the 'master' of the FOIA request" and thus is free to narrow its request, even without the government's consent. *Id.* at 12. Here, CREW has not agreed to any narrowing of its FOIA request, and GSA cannot unilaterally limit the scope of the request based solely on CREW's good faith proposal of search terms, given that CREW is the "master" of its request.

B. GSA's Failure to Uncover Documents That Should Have Been Captured By CREW's Proposed Search Terms Is Further Proof That Its Search Was Inadequate

Even if CREW's FOIA request were deemed to be narrowed in line with its proposed search terms, CREW has already explained that GSA's search failed to uncover known documents that should have been captured by those terms, further demonstrating the inadequacy of its search. *See* CREW Mot. at 7-8. GSA responds by disputing that CREW's proposed search terms would have captured a January 25, 2018 email exchange between Joseph Lai of the White House and Brennan Hart of GSA, GSA Reply at 5, which discusses the "path forward for the new FBI Headquarters announcement," CREW Ex. 3 at 2281. That is so, according to GSA, because the term "headquarters" does not appear in the top email in the email chain released by Congress, but rather appears in the second email in the chain. GSA Reply at 5. But that point is immaterial, and reflects a misunderstanding of the agency's search obligations. The email in question indisputably (1) is within the proposed date range; (2) includes proposed search terms; and (3) is between proposed custodians. Where the email appeared in the particular chain released by Congress—whether in the top, middle, or bottom—is not relevant, and GSA offers no explanation of why it should be (from a technological standpoint or otherwise). GSA should be in possession of the original email and any related responsive communications, and its failure to uncover the email casts doubt not only on its search efforts, but also its representations that it adequately implemented CREW's proposed search terms.

Similarly, GSA disputes that CREW's proposed search terms should have captured an email between GSA and the Office of Management and Budget ("OMB"), because CREW's terms sought emails from "any White House/EOP email address," and OMB email addresses use

"omb.eop.gov, not who.eop.gov," the latter of which is the "email address URL for White House/EOP email addresses." GSA Reply at 5-6. GSA's parsing of CREW's proposed search terms is inaccurate. CREW's reference to any "White House/EOP email address" plainly referred to any White House ***or*** EOP email address, not just White House EOP email addresses. Indeed, in common parlance, a forward slash ("/") is meant to indicate the word "or," or a set of alternatives. *See* Dictionary.com, *How to Use the Slash*, *available at* https://www.dictionary.com/e/slash/ ("Slashes are commonly used to signify alternatives as in 'and/or' and 'his/her.'"); Grammarly, *Slashes*, *available at* https://www.grammarly.com/blog/slash/ ("Often, when a slash is used in a formal or informal text, it is meant to indicate the word *or*."). GSA's reading, meanwhile, would render CREW's addition of the term "EOP" superfluous. Because OMB email addresses do in fact include the domain "eop.gov," they qualify as "EOP email address[es]" within the scope of CREW's proposed search terms.

Finally, GSA attempts to minimize its search deficiencies by arguing that "the mere fact that additional documents have been discovered does not impugn the accuracy of the [agency] affidavits." GSA Reply at 6 (quoting *Barouch v. DOJ*, 962 F. Supp. 2d 30, 53 (D.D.C. 2013)). GSA misses the point. This is not a case where the agency "uncovered additional documents *after* its initial search." *Barouch*, 962 F. Supp. 2d at 53 (emphasis added). Rather, *before* GSA conducted its supplemental search, CREW specifically flagged known responsive documents, and requested that GSA's search take those documents into account, yet GSA simply disregarded CREW's requests. In other words, this was not some after-the-fact discovery of responsive

documents, but rather a decision by the agency to disregard known leads in conducting its search. FOIA does not allow such willful blindness on the agency's part.

III. GSA is Improperly Withholding Material under FOIA Exemptions 5 and 7(E)

A. GSA's Exemption 5 Claims Fail

1. GSA Fails to Satisfy the Foreseeable Harm Standard as to Each of Its Exemption 5 Withholdings

CREW's motion asserted that GSA has not satisfied FOIA's foreseeable harm standard as to all four of the documents it is withholding under Exemption 5. CREW Mot. at 9-14. GSA responds largely by repeating the boilerplate language set forth in its *Vaughn* index, GSA Reply at 8-10, which, as CREW has already explained, is deficient as a matter of law, *see* CREW Mot. at 12-14 (citing *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 2019 WL 1317557, at *2 (D.D.C. Mar. 22, 2019); *Rosenberg v. DOD*, 342 F. Supp. 3d 62, 72 (D.D.C. 2018)). Because GSA still has not provided sufficient detail to establish that "it is reasonably foreseeable that" disclosure of the withheld documents "will chill speech," and has failed to specify any "link between this harm and the specific information contained in the material withheld," *Judicial Watch*, 2019 WL 1317557, at *5, it has not met its burden to establish foreseeable harm in support of its Exemption 5 claims.

2. The Presidential Communications Privilege Does Not Apply to the January 24, 2018 Briefing Itinerary

CREW's motion explained that GSA has not met its burden of establishing that the presidential communications privilege applies to the withheld January 24, 2018 briefing itinerary for three independent reasons: (1) GSA has not shown that the itinerary relates in any way to *presidential* decisionmaking and has, outside of this litigation, emphatically *disputed* that the

meeting at issue involved presidential decisionmaking; (2) GSA has provided insufficient detail on the role of the White House staff who purportedly prepared the itinerary; and (3) GSA has likewise provided insufficient detail on the function, purpose, or recipients of the itinerary. CREW Mot. at 15-16. GSA's response to each point is unpersuasive.

On the first point, GSA tellingly does not dispute that, in statements made outside of this litigation, it has insisted that the January 24, 2018 White House meeting did not entail any direction from or decisionmaking by the President, and that, at the time of the meeting, both GSA and FBI "had already agreed and decided" to keep the FBI headquarters at its current site in Washington, D.C. CREW Mot. at 15-16. GSA nonetheless argues that the briefing itinerary is privileged because it "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 Headquarters." GSA Reply at 10 (emphasis added). But, even accepting this explanation at face value, the only "decision" at issue was that of *GSA*, which does not provide grounds for invoking the *presidential* communications privilege. On this record, then, GSA's privilege claim fails as a matter of law. At minimum, GSA has failed to carry its burden because it has "offered no indication of the presidential powers at issue," and no support for "its contention that the" withheld document "relate[s] to presidential decisionmaking." *Prop. of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 389-90 (D.D.C. 2018).

On the second and third points, GSA argues—without citing any authority—that FOIA does not require agencies to provide any details on the "role of the White House staff who prepared" the withheld document, or the document's "function, purpose, or recipients." GSA Reply at 11. The case law holds otherwise. *See, e.g.*, *Prop. of the People,* 330 F. Supp. 3d at

388-90 (denying agency summary judgment where court could not "discern from [the agency's] broad and vague descriptions whether" presidential communications privilege applied, and rejecting agency's "contention that it is not required to reveal more about the nature of the calendar entries to show that the presidential communications privilege applies"). As with any FOIA exemption, GSA has the burden of justifying its withholding by providing *Vaughn* submissions describing "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Contrary to GSA's assertions, CREW is not demanding that the agency "provide the specific identity of the White House staffer [or staffers] who prepared the agenda," GSA Reply at 11; it instead seeks basic details about those individuals' *role* at the White House so that both CREW and the Court can assess whether they qualify as "immediate White House advisers who have 'broad and significant responsibility for investigating and formulating the advice to be given the President.'" *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1114 (D.C. Cir. 2004).

In sum, GSA's lackluster showing falls far short of establishing the presidential communications privilege, particularly given the D.C. Circuit's caution that the "privilege should be construed . . . narrowly." *Id* at 1116.

3. GSA's Deliberative Process Privilege Claim Fails Insofar as It Concerns Draft Material Later Adopted as Final

CREW's motion disputed GSA's deliberative process claims as to Documents 1 and 2, pointing to evidence that much of the withheld material was later adopted as final. CREW Mot.

at 17-18. Apart from a generic statement that CREW has "failed to identify adequate supporting evidence," GSA does not actually address, let alone refute, CREW's evidence. GSA Reply at 11-13. GSA also fails to address the case law, cited by CREW, rejecting deliberative process claims where, as here, the agency had "not indicated whether its designated 'draft' documents . . . have been formally or informally adopted or used in the agency's interactions with the public." *Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004); *accord Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 261 (D.D.C. 2004).

B. GSA's Exemption 7(E) Claim Fails

CREW's motion argued that GSA's Exemption 7(E) claim was both insufficiently detailed and highly dubious given that the email at issue was between the investigator and the subject of the investigation, belying GSA's claim that there is any law enforcement interest in keeping the information secret. CREW Mot. at 18-20. GSA's only response is that it cannot provide any more detail without disclosing the law enforcement technique at issue, and it thus requests *in camera* review if the Court desires further information. GSA Reply at 13-14. As outlined below in Part V, CREW does not oppose *in camera* review insofar as the Court finds that GSA's exemption claims are insufficiently detailed. But setting aside whether GSA has provided an adequate explanation, CREW's other point still stands—namely, GSA's Office of Inspector General does not have any plausible law enforcement interest in keeping secret information that it already willfully disclosed to the very agency and officials it is charged with investigating. Here again, GSA simply has no response to CREW's argument.

IV. GSA Has Failed to Demonstrate that It Released All Reasonably Segregable Non-Exempt Material

CREW challenged GSA's compliance with its segregability obligations, pointing to specific documents GSA has withheld in full that likely contain reasonably segregable, non-exempt information. CREW Mot. at 20-21. Again, GSA fails to respond to CREW's arguments. *See* GSA Reply at 14.

V. *In Camera* Review, If Permitted, Should Be Limited to Issues Where GSA Has Failed to Provide a Sufficiently Detailed Explanation to Justify its Withholding

Finally, GSA asks the Court conduct *in camera* review of any withheld material before it orders disclosure. GSA Reply at 14. Insofar as the Court accepts any of CREW's arguments challenging GSA's exemption claims *on the merits*, *in camera* review is neither necessary nor appropriate—the documents should be promptly produced to CREW. At most, *in camera* review might be appropriate solely with respect to those issues for which GSA has failed to provide a sufficiently detailed explanation for its withholding.

CONCLUSION

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

Date: July 8, 2019

Respectfully Submitted,

/s/ Nikhel Sus
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(D.C. Bar No. 1017937)
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CREW Reply Exhibit 1

CREW | citizens for responsibility and ethics in washington

Nikhel Sus <nsus@citizensforethics.org>

RE: Subsequent communication regarding CREW vs. GSA FOIA Lawsuit (CA No. 18-2171

Nikhel Sus <nsus@citizensforethics.org> Fri, Mar 15, 2019 at 4:08 PM
To: "Nebeker, Mark (USADC)" <Mark.Nebeker@usdoj.gov>
Cc: Duane Smith <duane.smith@gsa.gov>, Travis Lewis - H1F <travis.lewis@gsa.gov>

Hi Mark, we plan to litigate adequacy of the search and all Exemption 5 claims. In connection with both of these issues, I would flag--as I have in the past--that HOGR has publicly released docs that are responsive to our FOIA request, which GSA has not produced to us. I presume these docs are among those that GSA is withholding, but that is unclear. You can see some of those docs here: https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Emails%20on%20FBI%20HQ%20Decision.pdf

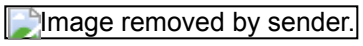
Happy to discuss further on Monday, if you'd like. I'm generally open.

Thanks,
Nik

On Fri, Mar 15, 2019 at 2:28 PM Nebeker, Mark (USADC) <Mark.Nebeker@usdoj.gov> wrote:

> When you have had a chance to look at this most recent release, could you give me a call to discuss what, if any, issues Plaintiff wants to continue to litigate in the case?
>
> W. Mark Nebeker
>
> Assistant United States Attorney
>
> Civil Division
>
> 555 4th Street, N.W.
>
> Washington, DC 20530
>
> (202) 252-2536
>
> **From:** Travis Lewis - H1F <travis.lewis@gsa.gov>
> **Sent:** Friday, March 15, 2019 2:08 PM
> **To:** nsus@citizensforethics.org
> **Cc:** Duane Smith <duane.smith@gsa.gov>; Nebeker, Mark (USADC) <MNebeker@usa.doj.gov>
> **Subject:** Subsequent communication regarding CREW vs. GSA FOIA Lawsuit
>
> Good afternoon Mr. Sus,

Please see the attached letter and documents.



U.S. General Services Administration

Travis Lewis

Deputy Director

Office of Accountability and Transparency

Office of Administrative Services

202-219-3078

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