

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

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

U.S DEPARTMENT OF JUSTICE, U.S.
DEPARTMENT OF HOMELAND
SECURITY, U.S. DEPARTMENT OF
DEFENSE,

Defendants.

Civil Action No. 19-CV-00398-TSC

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Department of Justice, Department of Defense and Department of Homeland Security, by and through undersigned counsel, hereby move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support of this Motion, Defendants submit the accompanying Memorandum, a Statement of Undisputed Material Facts, and the declaration of Paul P. Colborn and a *Vaughn* index. A proposed order is also attached.

Dated: September 16, 2019

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

 I. Overview of OLC’s Responsibilities 2

 II. Procedural History 3

ARGUMENT 4

 I. FOIA Statutory Overview and Standard of Review 4

 II. OLC Is Entitled to Summary Judgment With Respect to its Exemption 5 Withholdings 6

 A. OLC Properly Withheld Records Pursuant to the Presidential Communications Privilege..... 7

 B. OLC Properly Withheld Records Pursuant to the Attorney-Client Privilege 9

 C. OLC Properly Withheld Records Pursuant to the Deliberative Process Privilege..... 10

 III. OLC Has Disclosed All Reasonably Segregable Information..... 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

CASES

Advocates for the West v. DOJ,
331 F. Supp. 3d 1150 (D. Idaho 2018) 7, 8

Ancient Coin Collectors Guild v. U.S. Dep’t of State,
641 F.3d 504 (D.C. Cir. 2011) 11

CIA v. Sims,
471 U.S. 159 (1985)..... 4

Coastal States Gas Corp. v. U.S. Dep’t of Energy,
617 F.2d 854 (D.C. Cir. 1980)..... 11

Ctr. for Nat’l Sec. Studies v. DOJ,
331 F.3d 918 (D.C. Cir. 2003)..... 5

DiBacco v. U.S. Army,
795 F.3d 178 (D.C. Cir. 2015)..... 5

Electronic Frontier Foundation v. U.S. Dep’t of Justice
739 F.3d 1 (D.C. Cir. 2014).....6

Fisher v. United States,
425 U.S. 391 (1976)..... 9

Formaldehyde Inst. v. HHS,
889 F.2d 1118 (D.C. Cir. 1989)..... 11

Gov’t Accountability Project v. FDA,
206 F. Supp. 3d 420 (D.D.C. 2016)..... 6

* *In re Sealed Case*,
121 F.3d 729 (D.C. Cir. 1997)..... 7, 8, 10, 14

In re Sealed Case,
737 F.2d 94 (D.C. Cir. 1984)..... 9

John Doe Agency v. John Doe Corp.,
493 U.S. 146 (1989)..... 4, 5

Judicial Watch, Inc. v. Dep’t of Navy,
25 F. Supp. 3d 131 (D.D.C. 2014)..... 5

Judicial Watch, Inc. v. Export-Import Bank,
108 F. Supp. 2d 19 (D.D.C. 2000)..... 11

Judicial Watch, Inc. v. U.S. Dep’t of Treasury,
796 F. Supp. 2d 13 (D.D.C. 2011)..... 12

Judicial Watch, Inc. v. U.S. Dep’t of Treasury,
802 F. Supp. 2d 185 (D.D.C. 2011)..... 9

King v. DOJ,
830 F.2d 210 (D.C. Cir. 1987)..... 5

Kissinger v. Reporters Comm. for Freedom of the Press,
445 U.S. 136 (1980)..... 5

Kurdykov v. U.S. Coast Guard,
578 F. Supp. 2d 114 (D.D.C. 2008)..... 13

Loving v. DOD,
550 F.3d 32 (D.C. Cir. 2008)..... 6, 7, 8

Loving v. DOD,
496 F. Supp. 2d 101 (D.D.C 2007)..... 7, 14

Mapother v. DOJ,
3 F.3d 1533 (D.C. Cir. 1993)..... 11

Mead Data Cent., Inc. v. Dep’t of Air Force,
566 F.2d 242 (D.C. Cir. 1977)..... 13

Military Audit Project v. Casey,
656 F.2d 724 (D.C. Cir. 1981)..... 6

Minier v. CIA,
88 F.3d 796 (9th Cir. 1996) 5

Nat’l Sec. Archive Fund, Inc. v. CIA,
402 F. Supp. 2d 211 (D.D.C. 2005)..... 13

New York Times Co. v. DOJ,
282 F. Supp. 3d 234 (D.D.C. 2017)..... 9

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975)..... 6, 11

Protect Democracy Project, Inc. v. U.S. Dep’t of Defense,

320 F. Supp. 3d 162 (D.D.C. 2018).....8

Pub. Emps. for Envtl. Responsibility v. EPA,
211 F. Supp. 3d 227 (D.D.C. 2016)..... 9

Russell v. Dep’t of Air Force,
682 F.2d 1045 (D.C. Cir. 1982)..... 11

SafeCard Servs., Inc. v. SEC,
926 F.2d 1197 (D.C. Cir. 1991)..... 6

Tax Analysts v. IRS,
117 F.3d 607 (D.C. Cir. 1997)..... 9

Upjohn Co. v. United States,
449 U.S. 383 (1981)..... 9

STATUTES

5 U.S.C. § 552..... 5, 6, 13

LEGISLATIVE MATERIALS

H.R. Rep. No. 89-1497, *as reprinted in*
1966 U.S.C.C.A.N. 24189)..... 4,5

INTRODUCTION

This case concerns a Freedom of Information Act (“FOIA”) request submitted by Citizens for Responsibility and Ethics in Washington (“CREW”), requesting Department of Justice Office of Legal Counsel (“OLC”) opinions concerning the President’s power to invoke emergency powers, including his power to build a wall or other type of barrier along the U.S. border with Mexico. CREW requested opinions on this same subject from the Department of Defense (“DOD”) and the Department of Homeland Security (“DHS”).

In response to CREW’s FOIA request, OLC conducted a reasonable search and identified four responsive documents, one of which was provided to CREW in full. The other three documents were withheld in full because they contain predecisional legal advice regarding Presidential decision-making and are subject to the presidential communications, attorney-client, and deliberative process privileges and are therefore exempt from disclosure under Exemption 5 of FOIA.

After DOD and DHS conducted their own searches reasonably calculated to identify responsive documents, DOD informed CREW that it had not identified any responsive records, and DHS informed CREW that it had identified one responsive record which was referred to OLC for processing and direct response. *See* Joint Status Report ¶¶ 4-5, ECF No. 10. This document is a duplicate of one of the documents withheld in full by OLC under Exemption 5.

In email correspondence dated July 26, 2019 and September 12, 2019, CREW’s counsel informed the undersigned that CREW is not challenging the Defendants’ searches, and is only challenging OLC’s invocation of Exemption 5 for the three withheld documents. Accordingly, Defendants request that the Court enter summary judgment on behalf of DHS and DOD. In addition, for the reasons explained below and as demonstrated by OLC’s attached *Vaughn* index

and the Declaration of Paul P. Colborn (“Colborn Decl.”), Special Counsel at OLC whose responsibilities include supervising OLC’s responses to FOIA requests, OLC properly withheld the material at issue pursuant to the presidential communications, attorney-client, and deliberative process privileges. Accordingly, this Court should enter summary judgment for OLC as well.

BACKGROUND

I. Overview of OLC’s Responsibilities

The principal function of OLC is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. *See* Colborn Decl. ¶ 2; *see also* 28 C.F.R. § 0.25. OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch. *Id.* OLC does not purport to make policy decisions, and in fact lacks authority to make such decisions. *Id.* OLC’s legal advice and analysis may inform the decision-making of executive branch officials on matters of policy, but OLC’s legal advice is not itself dispositive as to any policy adopted.

II. Procedural History

On January 10, 2019, OLC received a FOIA request from CREW for “all opinions written by the Office of Legal Counsel (‘OLC’) that discuss in any way the power of the president to invoke emergency powers to declare a national emergency including, but not limited to, the president’s power to invoke those powers to build a wall or other type of barrier along the U.S. border with Mexico.” Colborn Decl. ¶ 9; *id.* Exhibit B. CREW subsequently agreed to narrow its request to documents dated on or after January 20, 2017 and to exclude economic sanctions-related opinions. *Id.* ¶ 11.

By letter dated July 15, 2019, OLC informed CREW that it had identified four responsive records, one of which was provided in full to CREW. Colborn Decl. ¶ 12; *id.* Ex. D. OLC explained that the remaining three documents were being withheld in full pursuant to Exemption 5, because they are protected by the presidential communications, attorney-client, and deliberative process privileges, and further stated that none of the withheld records was appropriate for discretionary release. *Id.* ¶ 12. OLC's July 15, 2019 letter also informed CREW that DHS had referred one record to OLC for processing and direct response, and that the referred record was duplicative of one of the three records already identified and withheld by OLC. *Id.*

Two of the three documents withheld by OLC, which are identified as Document Numbers 1 and 3 in OLC's attached *Vaughn* index, are known as Form and Legality Memoranda, which are memoranda to the President regarding the form and legality of a proposed presidential proclamation and which contain predecisional legal advice provided to the President for his consideration in deciding whether to sign the proposed proclamation. Colborn Decl. ¶¶ 15-16. The remaining withheld record, identified as Document Number 2 in OLC's index, is a memorandum provided to a senior adviser to the President as part of governmental deliberations submitted in connection with the President's decision-making. *Id.* ¶ 17. Document No. 2 is a duplicate of the document referred to OLC by DHS. *Id.*

ARGUMENT

OLC PROPERLY WITHHELD DOCUMENTS UNDER FOIA EXEMPTION 5

The Government demonstrates below that the compelled disclosure of the three memoranda at issue would disrupt the President's ability to carry out his constitutional responsibilities, would interfere with the government's deliberative processes, and would disrupt

the attorney-client relationship between OLC and the President and his advisers. Accordingly, they were properly withheld pursuant to Exemption 5 of FOIA. Before turning to this analysis, however, we provide a brief overview of FOIA and the standard of review that governs here.

I. FOIA Statutory Overview and Standard of Review

The “basic purpose” of FOIA reflects a “general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted). “Congress recognized, however, that public disclosure is not always in the public interest” *CIA v. Sims*, 471 U.S. 159, 166–67 (1985). Accordingly, in passing FOIA, “Congress sought ‘to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.’” *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As the D.C. Circuit has recognized, “FOIA represents a balance struck by Congress between the public’s right to know and the [G]overnment’s legitimate interest in keeping certain information confidential.” *Ctr. for Nat’l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). “A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records,” *i.e.* records that do “not fall within an exemption.” *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant”); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445

U.S. 136, 150 (1980) (“Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) ‘improperly’; (2) ‘withheld’; (3) ‘agency records.’”). While narrowly construed, FOIA’s statutory exemptions “are intended to have meaningful reach and application.” *John Doe Agency*, 493 U.S. at 152; *accord DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015).

The courts resolve most FOIA actions on summary judgment. *See Judicial Watch, Inc. v. Dep’t of the Navy*, 25 F. Supp. 3d 131, 136 (D.D.C. 2014). The Government bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987). A court may grant summary judgment to the Government based entirely on an agency’s declarations, provided they articulate “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); *accord Gov’t Accountability Project v. Food & Drug Admin.*, 206 F. Supp. 3d 420, 430 (D.D.C. 2016). Such declarations are accorded “a presumption of good faith, which cannot be rebutted by purely speculative claims[.]” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citation omitted).

II. OLC Is Entitled to Summary Judgment With Respect to its Exemption 5 Withholdings

The Court should grant summary judgment to OLC because the withheld material at issue is exempt from disclosure under Exemption 5, which protects from disclosure “inter-agency or intra-agency memorandums or letters that would not be available by law to a party. . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). Records are exempt from disclosure if they would be “normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*,

421 U.S. 132, 149 (1975). Exemption 5 thus “incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant,” including, as relevant here, the presidential communications, the attorney-client, and the deliberative process privileges. *See Loving v. Dep’t of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008) (internal quotation marks omitted). Courts routinely find that OLC may withhold its advisory opinions under Exemption 5. *See, e.g., Electronic Frontier Foundation v. U.S. Dep’t of Justice*, 739 F.3d 1, 4 (D.C. Cir. 2014) (holding that DOJ properly withheld OLC opinion under Exemption 5 because it was “an advisory opinion[], recommendation[] and deliberation[] comprising part of a process by which governmental decisions and policies are formulated”) (internal quotation marks omitted); *Advocates for the West v. U.S. Dep’t of Justice*, 331 F. Supp. 3d 1150, 1165 (D. Idaho 2018) (upholding application of Exemption 5 to OLC memoranda).

A. OLC Properly Withheld Records Pursuant to the Presidential Communications Privilege

The presidential communications privilege “preserves the President’s ability to obtain candid and informed opinions from his advisors and to make decisions confidentially.” *Loving*, 550 F.3d at 37. “As such, the privilege protects communications directly involving and documents actually viewed by the President,” *id.* (marks omitted), as well as “communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate,” *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). “The privilege covers documents reflecting ‘presidential decisionmaking and deliberations,’ regardless of whether the documents are predecisional or not, and it covers the documents in their entirety.” *Loving*, 550 F.3d at 37-38 (quoting *In re Sealed Case*, 121 F.3d at 744-45); *see also Loving v. U.S. Dep’t of Defense*, 496 F.

Supp. 2d 101, 110 (D.D.C 2007) (government not required to segregate factual information from document protected by presidential communications privilege). As seen below, all three documents withheld by OLC were properly withheld pursuant to this privilege.

Two of the three documents withheld here (identified in OLC's *Vaughn* index as Document Numbers 1 and 3) are Form and Legality Memoranda, which were provided by OLC to the President and describe a proposed presidential proclamation and state that the document "is approved with respect to form and legality." Colborn Decl. ¶ 16. In addition, each of these documents contains predecisional legal advice provided to the President for his consideration in deciding whether to sign the proposed proclamation. *Id.* ¶¶ 16, 19. Because they consist of legal advice made directly to the President, *id.*, the withheld Form and Legality Memoranda are subject in their entirety to the presidential communications privilege. *Loving*, 550 F.3d at 37-38; *see also Advocates for the West*, 331 F. Supp. 3d at 1165 (upholding DOJ's application of presidential communications privilege to withhold Form and Legality Memoranda).

The other withheld memorandum (Document Number 2) is also subject to the presidential communications privilege in its entirety.¹ In Document Number 2, OLC provided legal advice regarding the President's authority to take particular proposed actions to John Eisenberg, a Deputy Counsel to the President and the Legal Adviser to the National Security Council. Colborn Decl. ¶ 22. In those roles, Mr. Eisenberg is a senior adviser working directly with the Counsel to the President and the National Security Adviser. *See In re Sealed Case*, 121 F.3d at 752 ("[g]iven the need to provide sufficient elbow room for advisers to obtain

¹ As noted, Document Number 2 is a duplicate of the document identified by DHS and referred to OLC for processing and direct response. Colborn Decl. ¶¶ 12, 17. CREW has informed undersigned counsel in email correspondence dated July 26, 2019 and September 12, 2019 that only OLC's invocation of Exemption 5 is at issue for purposes of summary judgment and that CREW is not challenging the agency's searches.

information from all knowledgeable sources,” presidential communications privilege extends to staff members of immediate advisers to the President who have broad and significant responsibility for providing advice to the President). Accordingly, communications with Mr. Eisenberg on matters related to presidential decision-making are properly covered by the presidential communications privilege. See *Protect Democracy Project, Inc. v. U.S. Dep’t of Defense*, 320 F. Supp. 3d 162, 173-74 (D.D.C. 2018) (concluding that presidential communications privilege applied to Deputy Legal Adviser of the National Security Council).

B. OLC Properly Withheld Records Pursuant to the Attorney-Client Privilege

The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984). “The attorney-client privilege fully applies to communications between government attorneys and the government officials and agencies to which they render legal service.” *New York Times Co. v. U.S. Dep’t of Justice*, 282 F. Supp. 3d 234, 237 (D.D.C. 2017) (citing *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997)). As this Court has recognized, “[w]ithout protections for attorney-client communications, agency officials might not share information with their counsel in the first place, and would consequently be deprived of sound legal advice.” *Pub. Emps. for Envtl. Responsibility v. EPA (“PEER”)*, 211 F. Supp. 3d 227, 230 (D.D.C. 2016); see also *id.* at 233 (noting that “it is established that the attorney-client privilege may apply even where the relevant ‘legal advice concern[s] information originating with a third party’”) (quoting *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 802 F. Supp. 2d 185, 201 (D.D.C. 2011)); see also *Judicial Watch, Inc.*, 802 F. Supp. 2d at 201 (explaining that “[w]hen seeking legal advice concerning the

agency's own actions and legal interests, attorney-client privilege applies to communications containing third party facts").

The two withheld Form and Legality Memoranda were prepared by lawyers within OLC while providing legal advice to the President and his advisers. Colborn Decl. ¶ 21. The limited factual material contained in both documents was provided to OLC from officials in the White House Counsel's Office, as well as DHS and the Department of State in the case of Document Number 1, and DHS and DOD with respect to Document Number 3, all for the purpose of allowing OLC to provide the President predecisional legal advice. *Id.*; *see also Vaughn Index*. The memoranda were intended to be confidential and it is Mr. Colborn's understanding that they have maintained their confidentiality. *Id.* As Mr. Colborn explains, "[h]aving been asked to provide legal advice, OLC attorneys stood in a special relationship of trust with the President and his advisers." *Id.* "Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, so too would disclosure of the legal advice itself undermine that trust." *Id.* Accordingly, the Form and Legality Memoranda were properly withheld pursuant to the attorney-client privilege.

Document Number 2, OLC's memorandum to Mr. Eisenberg, a Deputy Counsel to the President and the Legal Adviser to the National Security Council, is likewise protected by the attorney-client privilege. The document was authored by the Assistant Attorney General in charge of OLC, providing legal advice to Mr. Eisenberg regarding the President's authority to direct certain proposed actions. Colborn Decl. ¶¶ 22, 24. The limited factual material contained in the document was provided to OLC by staff in the White House Counsel's Office for purposes

of obtaining confidential legal advice. *Id.* ¶ 24. The document was intended to be kept confidential and, to Mr. Colborn's knowledge, has remained confidential. *Id.*

C. OLC Properly Withheld Records Pursuant to the Deliberative Process Privilege.

The deliberative process privilege applies to decision-making of executive officials generally, and protects documents containing deliberations that are part of the process by which government decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir. 1997). The purpose of the deliberative process privilege is to encourage full and frank discussion of legal and policy issues within the government, and to protect against public confusion resulting from disclosure of reasons and rationales that were not ultimately the bases for the agency's action. *See, e.g., Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). The privilege is animated by the common-sense proposition that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process." *NLRB*, 421 U.S. at 150-51 (internal quotation marks omitted).

To fall within the scope of the deliberative process privilege, a document must be both predecisional and deliberative. *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document 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." *Id.* "To establish that a document is predecisional, the agency need not point to an agency final decision, but merely establish what deliberative process is involved, and the role the documents at issue played in that process." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1223 (D.C. Cir. 1989)).

Courts have held that the deliberative process privilege broadly applies to “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp.*, 617 F.2d at 866.

Exemption 5 covers “not only communications which are themselves deliberative in nature, but all communications which, if revealed, would expose to public view the deliberative process of an agency,” and, therefore, applies if, “disclosure of even purely factual material would reveal an agency’s decision-making process.” *Russell*, 682 F.2d at 1048; *see also Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (explaining that the legitimacy of withholding “does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency’s deliberative process”); *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13, 28 (D.D.C. 2011) (“Since the decision to include or exclude certain factual information from an analytical memorandum is an important part of the deliberative process, this Circuit has found factual information highlighted in internal analytical memoranda to be protected under the deliberative process privilege.”).

The withheld Form and Legality Memoranda (Document Numbers 1 and 3) are protected by the deliberative process privilege because the documents are predecisional and contain legal advice that was provided as part of a government deliberative process. Colborn Decl. ¶ 20. The documents are predecisional in multiple ways. *Id.* First, each is legal advice transmitted to a senior decisionmaker (the President) regarding a decision not yet made (a proposed presidential proclamation). *Id.* As with all such advice, the President was free upon receipt to accept or reject the advice, and to sign or not sign the proposed proclamation for any reason. *Id.* Second,

each document records legal advice provided as part of the review of a proposed proclamation, which reflects the give-and-take and candor of an Executive Branch deliberative process. *Id.*

OLC's memorandum to Mr. Eisenberg (Document Number 2) is also protected by the deliberative process privilege, because it contains advice that was predecisional and provided as part of a presidential deliberative process. Colborn Decl. ¶ 23. The advice was predecisional because it was provided to the President's legal advisers to aid the President in deciding whether to direct a particular government action, and the material is deliberative because it contains legal advice from OLC to decisionmakers for use in the deliberations over the President's decision regarding whether to direct the proposed action. *Id.*

According to Mr. Colborn, compelled disclosure of the three withheld memoranda would compromise the deliberative processes of the President and his advisers. Colborn Decl. ¶ 25. Attorneys at OLC are often asked to provide advice and analysis with respect to very difficult and unsettled questions of law, and on matters that can be quite controversial. *Id.* It is essential to the President in carrying out his mission and to the proper functioning of the Executive Branch overall that OLC's legal advice not be inhibited by concerns about the risk of public disclosure. *Id.* Protecting the confidentiality of OLC's legal advice provided in the context of presidential deliberations is essential both to ensure that creative and sometimes controversial legal arguments and theories may be examined candidly, effectively, and in writing, and to ensure that the President, his advisers, and other Executive Branch officials continue to request and rely on frank legal advice from OLC and other government attorneys on sensitive matters. *Id.*

Accordingly, for the reasons set forth above, the three withheld memoranda were properly withheld pursuant to the presidential, attorney-client, and deliberative process privileges.

III. OLC Has Disclosed All Reasonably Segregable Information

FOIA generally requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt,” 5 U.S.C. § 552(b)(9), unless the non-exempt portions are “inextricably intertwined with exempt portions,” *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kurdykov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). This FOIA provision does not require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat’l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (concluding that no reasonably segregable information existed because “the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words.”). Moreover, segregation is not required here due to the application of the presidential communications privilege. *See supra* (citing *Loving*, 496 F. Supp. 2d at 110). Mr. Colborn nevertheless personally reviewed the documents at issue to determine whether any withheld portion or portions could be released without divulging protected information. Colborn Decl. ¶ 26. Mr. Colborn determined that all factual information contained in the documents was provided to OLC in confidence for the purpose of seeking legal advice from OLC, and the documents do not contain reasonably segregable, nonexempt information. *Id.*

Furthermore, to the best of Mr. Colborn’s knowledge, the withheld records have never been publicly adopted or incorporated by reference by any policymaker as a basis for a policy decision, *id.* ¶ 27, and the withheld records have not been previously disclosed publicly nor is Mr. Colborn aware of any public statements by government officials that could constitute waiver of the privileges applicable to these documents, *id.* ¶ 28.

CONCLUSION

For the foregoing reasons, DOJ, DHS and DOD respectfully request that the Court enter judgment in their favor as a matter of law on the grounds that they have fully complied with FOIA in responding to Plaintiff's FOIA request, and that the withholding of the documents at issue in this case pursuant to FOIA Exemption 5 is proper.²

Dated: September 16, 2019

Respectfully submitted,

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² As explained above, CREW has stated that only OLC's invocation of Exemption 5 is at issue for purposes of summary judgment and that it is not challenging the agency's searches.

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

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

U.S DEPARTMENT OF JUSTICE, U.S.
DEPARTMENT OF HOMELAND
SECURITY, U.S. DEPARTMENT OF
DEFENSE,

Defendants.

Civil Action No. 19-CV-00398-TSC

DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h), Defendants submit the following statement of material facts as to which there is no genuine dispute:

1. On January 10, 2019, OLC received a request from Anne L. Weismann on behalf of plaintiff Citizens for Responsibility and Ethics in Washington ("CREW"), requesting the following records:

all opinions written by the Office of Legal Counsel ("OLC") that discuss in any way the power of the president to invoke emergency powers to declare a national emergency including, but not limited to, the president's power to invoke those powers to build a wall or other type of barrier along the U.S. border with Mexico.

See Declaration of Paul P. Colborn ("Colborn Decl.") ¶ 9; *id.* Exhibit B, at 1.

2. CREW requested legal opinions on this same subject written by the Department of Defense ("DOD") and the Department of Homeland Security ("DHS"). *See* Joint Status Report ¶ 1, ECF No. 10.

3. Following the commencement of this action, through counsel the parties reached a narrowing agreement, limiting the request to documents dated on or after January 20, 2017 and excluding economic sanctions-related opinions. Colborn Decl. ¶ 11. In addition, CREW has stated that it is not challenging the reasonableness of the agency's searches. *Id.* ¶ 13.

4. By letter dated July 15, 2019, OLC responded to plaintiff's FOIA request, informing CREW that a search of OLC's records had identified four records responsive to the request, as narrowed. OLC's letter stated that one of those records was enclosed in full, but that the remaining three documents were being withheld in full, pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5), because they are protected by the attorney-client, deliberative process, and presidential communications privileges, and that that none of the withheld records was appropriate for discretionary release. Colborn Decl. ¶ 12.

5. After conducting their own searches reasonably calculated to identify responsive documents, DOD informed CREW that it had not identified any responsive records, and DHS informed CREW that it had identified one responsive record which was referred to OLC for processing and direct response. *See* Joint Status Report ¶¶ 4-5. This record is a duplicate of the document identified as Document No. 2 in OLC's *Vaughn* index and was withheld in full by OLC under Exemption 5. Colborn Decl. ¶¶ 12, 17.

6. Two of the three documents withheld by OLC (identified in the agency's *Vaughn* index as Document Numbers 1 and 3) are Form and Legality Memoranda, which were provided by OLC to the President and describe a proposed presidential proclamation and state that the document "is approved with respect to form and legality." Colborn Decl. ¶ 16. Each of these documents contains predecisional legal advice provided directly to the President for his consideration in deciding whether to sign the proposed proclamation. *Id.* ¶¶ 16, 19. The limited

factual material contained in both documents was provided to OLC from officials in the White House Counsel's Office, as well as DHS and the Department of State in the case of Document Number 1, and DHS and DOD with respect to Document Number 3, all for the purpose of allowing OLC to provide the President predecisional legal advice. *Id.* ¶ 21; *see also Vaughn Index*. The memoranda were intended to be confidential and have maintained their confidentiality. Colborn Decl. ¶ 21.

7. The other withheld memorandum (identified as Document Number 2 in OLC's *Vaughn* index) is an OLC memorandum from the Assistant Attorney General in charge of OLC to John Eisenberg, a Deputy Counsel to the President and the Legal Adviser to the National Security Council, containing OLC's legal advice regarding the President's authority to direct a particular proposed action. Colborn Decl. ¶¶ 22, 24. The limited factual material contained in the document was provided to OLC by staff in the White House Counsel's Office for purposes of obtaining confidential legal advice. *Id.* ¶ 24. The document was intended to be kept confidential and has remained confidential. *Id.*

8. Paul Colborn, Special Counsel at OLC, personally reviewed the withheld documents at issue to determine whether any withheld portion or portions could be released without divulging information protected by one or more of the applicable FOIA exemptions. Colborn Decl. ¶ 26. Mr. Colborn attests that all factual information contained in the documents was provided to OLC in confidence for the purpose of seeking legal advice from OLC, and that the documents do not contain reasonably segregable, nonexempt information. *Id.* In addition, to Mr. Colborn's knowledge, the withheld records have never been publicly adopted or incorporated by reference by any policymaker as a basis for a policy decision, and the withheld records have not been previously disclosed publicly, nor is Mr. Colborn aware of any public

statements by government officials that could constitute waiver of the privileges applicable to these documents. *Id.* ¶¶ 27-28.

Dated: September 16, 2019

Respectfully submitted,

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