UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER,	)	
	)	
	)	
Plaintiff,	)	
v.	)	Civ. A. No. 18-1187 (TSC)
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
	)	
Defendant.	)	
	)	

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant U.S. Department of Justice respectfully moves for summary judgment on Plaintiff Campaign Legal Center's claim under the Freedom of Information Act. This motion is accompanied by a memorandum of law, statement of undisputed material facts, supporting declaration, exhibits, and a proposed order.

Respectfully submitted,

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United States Attorney

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/s/
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Counsel for Defendant

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Defendant.	)	
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STATEMENT OF UNDIPSUTED MATERIAL FACTS

Pursuant to Local Civil Rule 7(h), Defendant respectfully submits this Statement of Undisputed Material Facts in support of Defendant's Motion for Summary Judgment.

1. By letter dated February 1, 2018, Plaintiff sent a FOIA request to the Civil Rights Division at the Department of Justice. Declaration of Tink Cooper ("Cooper Decl.") ¶ 2. The request sought access to "all records pertaining to [General Counsel of DOJ's Justice Management Division] Arthur E. Gary's December 12, 2017 request to the Census Bureau to add a Citizenship question to the 2020 Census Questionnaire." *Id*. As part of this request, Plaintiff asked the Civil Rights Division to search for all documents to, from, or mentioning Dr. Ron Jarmin or Dr. Enrique Lamas; and all documents containing the following phrases: "2020 Census," "long form," "citizenship question," "question regarding citizenship," "ACS," "American Community Survey," or "CVAP." *Id*.

2. By letter dated February 9, 2018, the Civil Rights Division acknowledged receipt of the request, assigned it number 18-00145-F, and granted Plaintiff's request for expedited treatment. *Id*. ¶ 3.

3. On February 5, 2018, the Civil Rights Division began a search within the Division to locate any documents that would be responsive to Plaintiff's request. *Id.* ¶ 4. The Civil Rights Division's search was directed to the two offices likely to encompass all materials regarding Arthur Gary's December 12, 2017, letter to the Census Bureau. *Id.*

4. The Civil Rights Division referred a copy of Plaintiff's FOIA request to the Division's Voting Section. *Id.* ¶ 6. In response, the Voting Section determined that it did not have any responsive records. *Id.*

5. The Civil Rights Division also referred a copy of Plaintiff's request to the Office of the Assistant Attorney General's Office ("OAAG") of the Civil Rights Division. *Id.* ¶ 8. The OAAG determined that two members of that office had information relevant to the subject matter of Plaintiff's request. *Id.* The OAAG indicated that its responsive documents included internal email communications with attachments of draft documents circulated within the Department's components and with other federal agencies which were all internal, deliberative communications. *Id.* Further, these communications discussed draft documents and forwarded intra-agency and inter-agency comments and internal draft documents for review, edits, revisions, further edits, and comments. *Id.*

6. On February 28, 2018, the Civil Rights Division issued a response to Plaintiff's FOIA request and denied access to the documents in full. *Id.* ¶ 9.

7. On or about July 3, 2018, the Civil Rights Division conducted an electronic search for records using the term "census." *Id.* ¶ 10. The search was conducted for the emails of certain personnel within the OAAG from January 23, 2017, through July 3, 2018. *Id.* The search query was sent for those personnel who were likely to have responsive documents. *Id.*

Nearly all of the documents located through this electronic search were duplicative of the results of the initial search. *Id*.

8. On September 26, 2018, the Civil Rights Division provided a supplemental response letter to Plaintiff and released 59 pages of responsive documents in full or in part. *Id*. ¶ 11. The letter also explained that the Civil Rights Division was withholding 43 pages of documents in full. *Id*.

9. Civil Rights Division staff carefully reviewed the responsive records in an effort to find documents or portions of documents that might be disclosed. *Id*. As a result of the detailed review, the Civil Rights Division released all reasonably segregable portions of the responsive documents following a line-by-line review. *Id*.

10. The Civil Rights Division applied Exemption 5 to the materials protected by the deliberative process privilege and withheld those documents in full or in part. *Id*. ¶¶ 11-13. The Division also applied Exemption 6 for those materials the disclosure of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy. *Id*. ¶¶ 11, 14.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff brought this action against Defendant U.S. Department of Justice asserting claims under the Freedom of Information Act ("FOIA"). Summary judgment should be granted to Defendant because Defendant has conducted a reasonable search for responsive records and has produced all non-exempt, segregable documents subject to FOIA.

FACTUAL BACKGROUND

Defendant hereby incorporates its Statement of Undisputed Material Facts, the Declaration of Tink Cooper ("Cooper Declaration"), as well as the exhibits referenced therein.

LEGAL STANDARD

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. A genuine issue of material fact is one that "might

affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

The "vast majority" of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) ("*CREW*"). An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Media Research Ctr.*, 818 F. Supp. 2d at 137. "[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe '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.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'"

Media Research Ctr., 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

ARGUMENT

I. Defendant Complied with Its Obligations to Search for Responsive Information and Properly Applied FOIA Exemptions in Responding to Plaintiff's FOIA Requests

FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). Once the Court determines that an agency has released all non-exempt material, it has no further judicial function to perform under FOIA and the FOIA claim is moot. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982); *Muhammad v. U.S. Customs & Border Prot.*, 559 F. Supp. 2d 5, 7-8 (D.D.C. 2008). As demonstrated below, Defendant satisfied its obligation to conduct adequate searches for records responsive to Plaintiff's FOIA requests and properly withheld exempt information pursuant to applicable FOIA Exemptions 5 and 6.

A. Defendant Conducted Searches Reasonably Calculated to Uncover Responsive Records

Under FOIA, an agency must undertake 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 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."). A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (noting that "[p]erfection is not the standard by which the reasonableness of a

FOIA search is measured"). Rather, a search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68. An agency, moreover, is not required to examine "virtually every document in its files" to locate responsive records." *Steinberg v. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994); *see also Hall v. U.S. Dep't of Justice*, 63 F. Supp. 2d 14, 17-18 (D.D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject). Instead, as here, it is appropriate for an agency to search for responsive records in accordance with the manner in which its records are maintained. *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3, 13 (D.D.C. 1998).

Once an agency demonstrates the adequacy of its search, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith." *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993). Hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *Oglesby*, 920 F.2d at 67 n.l3. "Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents." *Chamberlain v. U.S. Dep't of Justice*, 957 F. Supp. 292, 294 (D.D.C. 1997), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997).

In response to Plaintiff's FOIA requests, Defendant searched all locations likely to contain responsive records. Specifically, the Civil Rights Division determined that the two offices likely to possess responsive records, if any, were the Division's Voting Section and the Office of the Assistant Attorney General's Office ("OAAG") of the Division. Cooper Decl. ¶¶ 4, 6, 8. Accordingly, the Civil Rights Division directed a copy of Plaintiff's request to those

offices. *Id*. ¶¶ 6, 8. In response, the Voting Section determined that it did not have any responsive records. *Id*. The OAAG identified two persons within that office that likely would have information relevant to the subject matter of Plaintiff's request. *Id*. ¶ 8. The OAAG located responsive documents consisting of internal email communications with attachments of draft documents. *Id*. Later, the Civil Rights Division followed up with an electronic search for records using the term "census." *Id*. ¶ 10. The Division searched emails of certain personnel within the OAAG who were likely to have responsive documents. *Id*. The timeframe for the search was January 23, 2017, through July 3, 2018. *Id*. Nearly all of the documents located through this electronic search were duplicative of the results of the initial search. *Id*.

In summary, Defendant conducted a sufficient search of all locations that were reasonably likely to contain records responsive to Plaintiff's FOIA requests. Accordingly, the Court should find that Defendant conducted a reasonable search for responsive documents. *See Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (observing that the adequacy of an agency's search "is measured by the reasonableness of the effort in light of the specific request"); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, Civ. A. No. 11-1971 (JEB), 2012 WL 5928643, at *4 (D.D.C. Nov. 27, 2012) (finding that agency's methodology was "sound" where agency compared the FOIA request to its program offices' functions in order to determine which component offices to search).

B. Defendant Properly Withheld Information Pursuant to Exemption 5

1. Legal Standard

Exemption 5 of FOIA protects "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). This exemption shields documents of the type that would be

privileged in the civil discovery context, including materials protected by the attorney-client privilege and the executive deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004); *Rockwell Int'l Corp. v. DOJ*, 235 F.3d 598, 601 (D.C. Cir. 2001).

Documents covered by the deliberative process privilege and exempt under Exemption 5 include those "'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Sears, Roebuck*, 421 U.S. at 150. As the Supreme Court has explained:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (internal quotation marks and citations omitted).

The deliberative process privilege is designed to prevent injury to the quality of agency decisions by (1) encouraging open, frank discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before they are adopted; and (3) protecting against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's decision. *See Sears, Roebuck*, 421 U.S. at 151-53; *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Examples of documents covered by the deliberative process privilege include: recommendations, draft documents, proposals, suggestions, advisory opinions and other documents such as email messages, that reflect the personal opinions of the author rather than the policy of the agency or the give and take of the policy making process. *See Bloomberg, L.P. v. U.S. Sec. & Exch. Comm'n*, 357 F. Supp. 2d 156, 168 (D.D.C. 2004).

To invoke the deliberative process privilege, an agency must show that the exempt document is both pre-decisional and deliberative. *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991); *Coastal States Gas*, 617 F.2d at 868; *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). For a document to be pre-decisional, it must be antecedent to the adoption of an agency policy or decision. *See Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). To show that a document is pre-decisional, however, the agency need not identify a specific final agency decision; it is sufficient to establish "'what deliberative process is involved, and the role played by the documents at issue in the course of that process.'" *Heggestad v. U.S. Dep't of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000); *see Gold Anti-Trust Action Comm. v. Board of Governors*, 2011 U.S. Dist. LEXIS 10319, at *22 (D.D.C. Feb. 3, 2011) ("even if an internal discussion does not lead to adoption of a specific government policy, its protection under Exemption 5 is not foreclosed as long as the document was generated as part of a definable decision-making process.").

A document is "deliberative" if it "'reflects the give-and-take of the consultative process.'" *McKinley v. FDIC*, 744 F. Supp. 2d 128, 138 (D.D.C. 2010). The privilege protects factual material in certain circumstances, such as if it is "inextricably intertwined" with deliberative material, *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 81 (D.D.C. 2010), or if disclosure "would 'expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Quarles* v. *Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990). "The 'key question' in identifying 'deliberative' material is whether disclosure of the information would 'discourage candid discussion within the agency.'" *Access Reports*, 926 F.2d at 1195.

2. Exemption 5 Withholdings

Here, Defendant properly withheld information under Exemption 5 pursuant to the deliberative process privilege. First, Defendant withheld portions of the 59 pages of emails between Arthur E. Gary, General Counsel for DOJ's Justice Management Division, and John Gore, Acting Assistant Attorney General for DOJ's Civil Rights Division, which were released in part. Cooper Decl. ¶ 12. Certain of the emails pertain to drafts of a letter regarding the 2020 census and the redacted portions of the emails reflect deliberative discussions concerning the contents of that letter. *Id*. Other redactions were applied to portions of emails discussing the addition of a citizenship question to the 2020 census. *Id*. Those portions reflect deliberations relating to the addition of the citizenship question, and they were drafted before a final decision had been made concerning the addition of the question to the census. *Id*. The redacted material contains candid, frank discussions, that, if released, would harm Defendant's capacity to conduct future exchanges without chilling the free expression of views. *Id*.

Defendant also withheld 43 pages in full under Exemption 5 pursuant to the deliberative process privilege. Cooper Decl. ¶ 12. Specifically, Defendant withheld eleven drafts of a letter from Arthur Gary to Dr. Ron Jarmin, Acting Director of the U.S. Census Bureau, regarding the 2020 census and the citizenship question. *Id*. "Draft documents, by their very nature, are typically predecisional and deliberative." *Blank Rome LLP v. Dep't of the Air Force*, Civ. A. No. 15-cv-1200 (RCL), 2016 U.S. Dist. LEXIS 128209, *14 (D.D.C. Sept. 20, 2016) (quoting *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983)). Here, the withheld drafts were attached to the emails described above. Cooper Decl. ¶ 12. The draft letters are deliberative in that they were circulated within DOJ for review and input, and they contain questions to elicit information and edits. *Id*. The drafts are predecisional because they were

prepared before determining the final contents of the letter. *Id*. The disclosure of the documents would harm the free exchange of views within the agency. *Id*.

Accordingly, disclosure of the materials withheld under Exemption 5 would reveal aspects of the Executive Branch's evaluative process and the manner in which relevant opinions and recommendations were formed. "The underlying purpose of the deliberative process privilege is to ensure that agencies are not forced to operate in a fish bowl," *Moye v. Nat'l R.R. Passenger Corp*., 376 F.3d 1270, 1278 (11th Cir. 2004), and disclosure of the materials at issue here would lead to such a result. Accordingly, the Court should uphold the Exemption 5 withholdings.

C. Defendant Properly Withheld Information Pursuant to Exemption 6

Exemption 6 permits the withholding of "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" is broadly construed and includes "Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) ("The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual."); *Govt. Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2010). In assessing the applicability of Exemption 6, courts weigh the "privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier*, 164 F.3d at 46; *Chang v. Dep't of Navy*, 314 F. Supp. 2d 35, 43 (D.D.C. 2004). "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the

information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 47 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)) (alterations in original); *Beck v. Dep't of Justice*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). "Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose." *Beck*, 997 F.2d at 1492.

Here, Defendant withheld under Exemption 6 personal information relating to DOJ employees. Cooper Decl. ¶ 14. Specifically, Defendant withheld the telephone numbers and email addresses of DOJ personnel. *Id.* Defendant determined that the individuals to whom this information pertains have a more than *de minimis* privacy interest in the information withheld and that there is no public value in the disclosure of this information. *Id.* Accordingly, the privacy interest of these individuals clearly outweighs the nonexistent public interest. *Id.*; *see also Beck v. Dep't of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993) ("something . . . outweighs nothing every time"); *see also Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18-19 (D.D.C. 2013) (finding that government employees had a privacy interest in preventing the disclosure of their work email addresses).

II. Defendants Complied With FOIA's Segregability Requirement

Under the FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information subject to FOIA must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they 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). To establish that all

reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

Here, after examining each of the records, Defendant determined that all reasonably segregable non-exempt information was disclosed and that the information withheld could not be segregated and released. Cooper Decl. ¶ 11. Therefore, the Court should find that Defendant properly complied with its duty to segregate exempt from non-exempt information.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant.

Respectfully submitted,

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