IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 18-1187 (TSC) Oral Argument Requested

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Campaign Legal Center ("CLC") hereby opposes the Motion for Summary Judgment filed by Defendant Department of Justice ("DOJ") and respectfully files this Cross-Motion for Summary Judgment in the above-captioned matter. Relief in favor of CLC is appropriate because DOJ has failed to conduct a reasonable search for responsive records and is withholding responsive materials not subject to the claimed exemptions. This motion is accompanied by and supported by a memorandum of law, statements of disputed and undisputed material facts, supporting declaration, exhibits, and a proposed order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
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INTRODUCTION

Plaintiff Campaign Legal Center ("CLC") respectfully requests that this Court deny Defendant Department of Justice's ("DOJ's") Motion for Summary Judgment ("DOJ-MSJ") in this FOIA matter and grant CLC's Cross-Motion for Summary Judgment instead. Relief in favor of CLC is appropriate because (1) DOJ's declaration is insufficient to adequately assess the reasonableness of its search; (2) the information provided by DOJ about its search raises substantial doubt about the adequacy of the search and indicates substantive deficiencies; and (3) the proffered Exemption 5, the deliberative process privilege, does not apply to the withheld materials. First, DOJ failed to meet its burden to sufficiently describe the records searched, why only those records were selected for search and not others, who conducted the search, and the search processes. For example, DOJ failed to explain what search, if any, was performed by the Voting Section, which the Civil Rights Division identified as one of two offices "likely to encompass all [responsive] materials." DOJ-MSJ at 2. Second, to the extent DOJ did provide information about its search, it revealed substantive deficiencies, raising doubt about the adequacy of the search. DOJ's electronic search included only one search term out of the seven reasonably requested by CLC, and limited the search to only certain personnel's email accounts without adequate explanation. The search apparently excluded all paper records and any electronic documents not stored in email (*e.g.* documents on file servers or computer hard drives). Third, the responsive materials withheld by DOJ fall outside of the proffered deliberative process exemption because they are not pre-decisional or deliberative. Rather, evidence indicates that the decision to add the citizenship question to the census occurred prior to the creation of the documents at issue. Accordingly, CLC respectfully requests that the Court compel DOJ to complete a reasonable search for responsive records and immediately produce the responsive withheld materials.

FACTUAL BACKGROUND

On March 26, 2018, Department of Commerce ("Commerce" or "the Commerce Department") Secretary Wilbur Ross announced his decision to add a question regarding citizenship status to the 2020 Census Questionnaire.[1] Secretary Ross claimed that his decision arose due to a December 12, 2017 request from Arthur Gary, the General Counsel of DOJ's Justice Management Division ("JMD"), to add the citizenship question to the 2020 Census Questionnaire (the "December 12, 2017 letter").[2] The purported reason for the request was to allow DOJ to better enforce Section 2 of the Voting Rights Act.[3] However, in a supplemental memorandum, issued months later, Secretary Ross acknowledged that the deliberative process for the decision occurred before the December 12, 2017 request.[4]

Internal documents recently released by the United States Census Bureau ("Census") and DOJ confirm that the decision to add the citizenship question was made well before DOJ's December 12, 2017 letter. Likewise, the decision by DOJ to issue the December 12, 2017 letter, providing a rationale for the addition, was also made well before the letter was drafted. On May 2, 2017 Secretary Ross wrote, "I am mystified as to why nothing have [sp] been done in response to my months old request that we include the citizenship question. Why not?" Earl Comstock, a commerce official, responded,

> "I agree Mr. Secretary. On the citizenship question we will get that in place.… We need to work with Justice to get them to request that citizenship be added back as a census question, and we have

[1] Ex. 1 (Mar. 26, 2018 Memorandum from Sec'y of Commerce Wilbur Ross to Under Sec'y of Commerce for Econ. Affairs Karen Dunn Kelley on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire).

[2] Ex. 2 (Dec. 12, 2017 Letter from A. Gary to Dr. R. Jarmin).

[3] *See* Ex. 2 (Dec. 12, 2017 Letter from A. Gary to Dr. R. Jarmin).

[4] Ex. 3 (Jun. 21, 2018 Supplemental Memorandum by Sec'y of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation).

> the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss."[5]

Given that Secretary Ross was only sworn in on February 28, 2017, the request to add the citizenship question must have been one of his earliest actions.[6]

With the decision to include the citizenship question in the census already made, Secretary Ross sought to have DOJ provide a post-hoc justification for the decision. On August 8, 2017, Secretary Ross inquired "where is the DoJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG."[7] On September 8, 2017, Mr. Comstock responded that: "I spoke several times with James McHenry [DOJ] by phone, and after considering the matter further James said that Justice staff did not want to raise the question… James directed me to … the Department of Homeland Security… after discussion DHS really felt it was best handled by the Department of Justice. At that point… I asked James Uthmeier [OGC at Commerce] to look into the legal issues and how Commerce could add the question to the Census itself."[8]

When DOJ staff initially balked at issuing the request, cabinet-level officials got involved. A call was set up for September 18, 2017 between Secretary Ross and Attorney General Sessions, whose office was "eager to assist" on the request for the citizenship question and ready to "do

[5] Ex. 4 (May 2, 2017 email correspondence between E. Comstock and Sec'y W. Ross).

[6] While the Court need not to address this question to rule on this FOIA request, there is substantial evidence that the administration's quest to add the citizenship question is no more than a political effort to discourage responses to the census by households with immigrants, and shift resources and political power to non-immigrant communities.

[7] Ex. 5 (August 8, 2017 email from Sec'y W. Ross to E. Comstock).

[8] Ex. 6 (Sept. 8, 2017 email from E. Comstock to Sec'y W. Ross)

whatever [Secretary Ross] need[s] us to do" on the issue.[9] With DOJ's agreement to request the citizenship question apparently in hand, Census pressed ahead with finalizing the questionnaire and the printing process. Two months later, on November 27, Secretary Ross contacted DOJ again to ensure that the request would be timely made, and shortly thereafter DOJ's Arthur Gary issued the December 12 letter.[10]

Despite this record of the DOJ letter as a for a post-hoc rationalization of an already made decision, Census continues to claim that the reason it plans to ask the citizenship question is to enable DOJ to enforce Section 2 of the Voting Rights Act ("VRA").[11] This explanation is dubious. The government's non-political experts have concluded that adding the citizenship question will result in "substantially less accurate citizenship status data than are available from administrative sources."[12] DOJ has never previously suggested that ACS data is insufficient to support their Voting Rights Act claims and the administration has never articulated any reasonable basis to believe that adding the citizenship question will result in any changes in VRA enforcement. Independent experts have echoed Census' internal conclusion and found that "adding a citizenship question is very likely to undermine the census."[13] Moreover, the groups that regularly enforce

[9] Ex. 7 (Sept. 18, 2017 email from D. Cutrona to W. Teramoto).

[10] Ex. 8 (Nov. 27, 2017 email from Sec'y W. Ross to P. Davidson re: Census Questions).

[11] *See* U.S. CENSUS BUREAU, WHY WE ASK (2018) (https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/why-we-ask-fact-sheet.pdf) (last accessed Oct. 22, 2018).

[12] Memorandum from John M. Abowd, Chief Scientist and Associate Director for Research and Methodology, U.S. Census Bureau, Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census (Jan. 19, 2018) (http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bCERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf#page=1289) (last accessed October 23, 2018).

[13] *See* American Statistical Association, The American Statistical Association Strongly Cautions against Addition of a Citizenship Question on the 2020 Census (August 2, 2018) (https://www.amstat.org/asa/files/pdfs/POL-2020CensusCallForComments.pdf) (last accessed

the VRA in court as well as VRA experts agree that the move will harm, not help, Latino communities' voting power and represention.[14]

But the question in this case is not whether the administration's explanation is truthful, but rather whether the public has a right to know the truth.[15] Public release of documents is particularly important where other avenues to accountability have failed. In sworn congressional testimony, Secretary Ross stated that the addition of the citizenship question was added "solely" in response

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Oct. 22, 2018); Jan. 26, 2018 letter from six former directors of the Census Bureau to Secretary Ross (https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2018/03/27/Editorial-Opinion/Graphics/DOJ_census_ques_request_Former_Directors_ltr_to_Ross.pdf) (last accessed October 23, 2018); *see also See, e.g.*, DOJ-MSJ Ex. E, p. 55 (12/22/2017 email from Ron Jarmin to Arthur Gary explaining that "the best way to provide … block level data with citizenship voting population … would be through utilizing [data] the Census Bureau already possesses.") (last accessed October 23, 2018).

[14] *See, e.g.*, Letter from Chiraag Bains, Dir. of Legal Strategies, and Brenda Wright, Demos, to Jennifer Jessup, Dep'tl Paperwork Clearance Officer, Dep't of Com. (Aug. 7, 2018), https://www.demos.org/publication/demos-sends-letter-urging-department-commerce-reject-last-minute-addition-citizenship-qu (last accessed October 24, 2018)("[E]nforcement of voting rights and other key civil rights laws will be dramatically undermined by adding a question to the census that is certain to drive down the response rates of communities that already feel under siege from the current Administration's constant vilification and targeting of immigrants."); Letter from Faiz Shakir, Nat'l Pol. Dir., and Jennifer Bellamy, Senior Legis. Couns., Am. C.L. Union, to Jennifer Jessup, Dep'tl Paperwork Clearance Officer, Dep't of Com. (Aug. 6, 2018), https://www.aclu.org/letter/aclu-comments-opposing-inclusion-citizenship-question-2020-census (last accessed October 24, 2018); Brief for the Leadership Conf. on Civ. and Hum. Rts. et al. as Amici Curiae Supporting Plaintiffs, California v. Ross, No. 3:18-cv-01865-RS (N.D. Cal. Jul. 24, 2018) ("Even setting aside the adequacy of current citizenship data for Section 2 enforcement, adding a citizenship question would not help the communities that amici represent to vindicate their rights under the Voting Rights Act. Indeed, it would have precisely the opposite effect."); Letter from Eric Schneiderman, Atty. Gen. of N.Y., et al. to Wilbur Ross, Sec'y, Dep't of Com. (Feb. 12, 2018), https://www.brennancenter.org/sites/default/files/legal-work/Multi-State-Attorney-General-Letter-re-2020-Census.pdf (last accessed October 24, 2018) ("[R]equesting citizenship data would undermine the purposes of the Voting Rights Act and weaken voting rights enforcement across the board.").

[15] To deny DOJ's motion for summary judgment, the Court does not need to find that Secretary Ross' explanation was false, only that DOJ has not met its burden to show that it conducted a search reasonably calculated to uncover all relevant records and that withheld materials are predecisional and deliberative. *See infra.* Legal Standard.

to DOJ's request.[16] The glaring inconsistency of Secretary Ross' statements to Congress with the available record has been of immense public and media interest.[17] The effects of the decennial census directly implicate bedrock features of our system of representative government, including Congressional apportionment. The people have a right to review for themselves all DOJ records subject to FOIA on this topic and come to their own conclusions about the pretextual nature of the VRA explanation.

On February 1, 2018, CLC submitted a FOIA request to the Civil Rights Division at the Department of Justice seeking all records pertaining to Mr. Gary's December 12, 2017 letter to the Census Bureau.[18] In particular, CLC sought (1) documents to, from, or mentioning Dr. Ron Jarmin or Dr. Enrique Lamas; and (2) documents containing the phrases "2020 census," "long form," "citizenship question," "questions regarding citizenship," "ACS," "American Community Survey," "citizen voting age population," *or* "CVAP," dating from January 20, 2017 to the present. This request was reasonable and narrowly tailored because CLC specified the relevant time period and provided a detailed list of search terms that were targeted to the addition of the citizenship question and unlikely to be present in unrelated DOJ records. For instance, Dr. Jarmin and Dr.

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[16] *FY19 Budget Hearing – Department of Commerce: Hearing Before the Subcomm. On Commerce, Justice, Science, and Related Agencies* of the H. Comm. on Appropriations, 115th Cong. (2018) (statement of Sec. Wilbur Ross, Commerce Sec.)

[17] *See, e.g.*, Salvador Rizzo, *Wilbur Ross's false claim to Congress that the census citizenship question was DOJ's idea*, WASH. POST, July 30, 2018, https://www.washingtonpost.com/news/fact-checker/wp/2018/07/30/wilbur-rosss-false-claim-to-congress-that-the-census-citizenship-question-was-dojs-idea/?utm_term=.b14d19800e60; Michael Wines, *Census Bureau's Own Expert Panel Rebukes Decision to Add Citizenship Question*, N.Y. TIMES, March 30, 2018, http://www. nytimes.com/2018/03/30/us/census-bureau-citizenship.html.

[18] DOJ Motion Ex. A (FOIA Request).

Lamas are Commerce Department employees unlikely to have interacted with DOJ in other context.[19]

CLC's FOIA request sought expedited processing because there is an "urgency to inform the public" about the "actual or alleged government activity" covered by the request and because the requested records involve "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence." 28 C.F.R. § 16.5(e)(1)(iv). The Civil Rights Division recognized the urgency of the FOIA request when it granted "expedited processing" on February 9, 2018.[20] DOJ then denied CLC's request in its entirety, claiming a blanket application of Exemption 5.[21] Only after CLC initiated this action did DOJ "conduct[] a further electronic search," using a single search term for the emails of "certain personnel."[22] DOJ does not explain why it chose this single term from the list requested by CLC.[23] Nor does it explain which records were searched or how other than "emails of certain personnel" in a single office.[24] Finally, after nearly eight months, DOJ released a mere 59 pages of heavily redacted and duplicative emails on September 26, 2018.[25] DOJ refused to release the documents attached to the emails, including drafts of the December 12, 2017 letter.

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[19] *See* DOJ Motion Ex. A (FOIA Request).

[20] DOJ Motion Ex. B (Civil Rights Division Feb. 1, 2018 Response to FOIA).

[21] *See* Declaration of Tink Cooper ("Cooper Decl.") at ¶¶ 8-9; DOJ-MSJ Exhibit C.

[22] *See* Cooper Decl. at ¶ 10.

[23] *See id.*

[24] *See id.*

[25] *See* Cooper Decl. at ¶¶ 10-11; DOJ Motion Ex. D (Civil Rights Division Sept. 26, 2018 Response to FOIA).

LEGAL STANDARD

Summary judgment is appropriate where, viewing the record in the light most favorable to the non-moving party, "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992). In FOIA cases, an agency "must demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Palmieri v. United States*, 194 F. Supp. 3d 12, 17 (D.D.C. 2016) (quoting *Valencia-Lucerna v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999)) (internal quotation marks omitted). To make this showing, the agency must submit an affidavit "describ[ing] what records were searched, by whom, and through what process." *Nat'l Sec. Couns. v. Cent. Intelligence Agency*, 849 F. Supp. 2d 6, 11 (D.D.C. 2012) (quoting *Steinberg v. U.S. Dep't of Just.*, 23 F.3d 548 (D.C. Cir. 1994)) (internal quotation marks omitted). Summary judgment cannot be granted if "a review of the record raises substantial doubt as to the search's adequacy, particularly in view of well defined requests and positive indications of overlooked materials." *Reporters Comm. for Freedom of Press v. Fed. Bureau of Investigation*, 877 F.3d 399, 402 (D.C. Cir. 2017) (quoting *Valencia-Lucerna v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999)) (internal quotation marks omitted).

Similarly, in a FOIA case, the burden is on the agency to show that requested material is covered by a statutory exemption. 5 U.S.C. § 552(a)(4)(B); *Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992). "In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). To meet its burden, a defendant agency must "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." *Military Audit Project v. Casey,* 656 F.2d 724, 738 (D.C. Cir. 1981).

ARGUMENT

I. DOJ HAS NOT SHOWN THAT IT CONDUCTED A SEARCH REASONABLY CALCULATED TO UNCOVER ALL RELEVANT RECORDS.

A. DOJ Has Not Demonstrated the Reasonableness of its Search Process

DOJ's statement of undisputed material facts and the Cooper declaration fail to provide sufficient information for the Court to conclude that DOJ's search was reasonable. Agency declarations must "describe what records were searched, by whom, and through what processes." *Sea Shepherd Conservation Soc'y v. Internal Revenue Serv.*, 208 F.Supp.3d 58, 69 (D.D.C. 2016). An agency's declaration is inadequate where it fails "to describe the records [components] normally maintain, why they were selected for the search, or why others were excluded." *Palmieri v. United States,* 194 F. Supp. 3d 12, 18 (D.D.C. 2016). DOJ's statement and declaration are deficient because they fail to provide a sufficient description of (1) the records searched, (2) who conducted the search, and (3) the search processes.

1. Inadequate Description of Records Searched

DOJ does not meet its burden to adequately describe what records it searched. DOJ states that it initially directed the FOIA request to the Voting Section as the Section most likely to have relevant information. When the Voting Section reported that it had no responsive records, DOJ forwarded CLC's request to the Office of the Assistant Attorney General (OAAG).[26] However, DOJ did not explain what records in either of those sections were searched, or why these components were selected for review and others were not. DOJ merely restates a general policy

[26] "OAAG has senior management authority over the Civil Rights Division's twelve sections." Cooper Decl. at ¶ 7.

in an apparent attempt to explain why CLC's request was assigned to the Voting Section. *See* Declaration of Tink Cooper ("Cooper Decl.") at ¶ 5.

Similarly, DOJ merely recites policy in discussing what types of records (paper and electronic) the Civil Rights Division *tends* to search generally when it receives FOIA requests. Cooper Decl. at ¶ 7. But DOJ fails to describe what records were actually searched by the Voting Section and fails to describe whether it searched any paper records at all or any electronic records other than the email accounts of certain OAAG personnel. Cooper Decl. at ¶¶ 6, 8; *see Murray v. Federal Bureau of Prisons*, 741 F. Supp. 2d 156, 163 (D.D.C. 2010) (Rejecting agency motion for summary judgment where "the declaration does not describe 'with particularity the files that were searched [or] the manner in which they were searched.'") (*quoting Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994)).

2. Inadequate Description of Who Conducted the Search

DOJ's statements also fail to meet its burden because they do not disclose who carried out the searches. DOJ states only that the "Civil Rights Division" conducted the searches. *See* Cooper Decl. at ¶¶ 4, 6, 10. However, DOJ does not indicate whether the employee who submitted the declaration regarding the search or another employee performed these searches as required for an evaluation of the adequacy of the agency's search. *Cf. Pulliam v. U.S. Envtl. Prot. Agency*, 235 F. Supp. 3d 179 (D.D.C. 2017) (identifying the employee by name); *Sea Shepherd Conservation Soc'y v. Internal Revenue Serv.*, 208 F.Supp.3d 58 (D.D.C. 2016) (accord); *Nat'l Sec. Couns. v. Cent. Intelligence Agency*, 849 F. Supp. 2d 6, 11 (D.D.C. 2012) (finding declaration inadequate based in part on the fact that the agency failed to identify who performed the search).

3. Inadequate Description of Search Process

DOJ also fails to meet its burden to adequately describe how it conducted its searches. *See Palmieri v. United States*, 194 F. Supp. 3d 12, 17 (D.D.C. 2016) (quoting *DeBrew v. Atwood*, 792

F.3d 118 (D.C.Cir.2015)) (Agency must submit "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed."). None of the statements submitted by DOJ describe how the Voting Section's records were searched. That is particularly troubling given that DOJ represents that the Voting Section did not find any responsive documents despite its Voting Rights Act work being cited as the rationale for adding the citizenship question and therefore identified as the Section most likely to have responsive documents. Although DOJ states that the OAAG initially found that two individuals in that office had relevant information about the records sought, they did not say how this determination was made or how their records were searched. DOJ explains that the OAAG located responsive electronic communications held by these two employees, but does not say how the emails were initially located, nor how – if at all – computer files or paper files were searched. *See* Cooper Decl. at ¶ 8.

Further, DOJ reports that a subsequent electronic search using the keyword "census" was conducted "for the emails of certain personnel" within the OAAG, but does not specify what this search entailed – for example, whether DOJ searched archived electronic materials, or whether it did a simple term search in Outlook. *See* Cooper Decl. at ¶ 10. It is also unclear whether these personnel were the same two employees previously identified by the OAAG or why these employees and not others were selected. *See* Cooper Decl. at ¶ 10.

Thus, DOJ has not met its burden of proving that its "search was reasonably calculated to uncover all relevant documents" because it did not provided sufficient information for the Court or CLC to understand the extent of its search. *Palmieri*, 194 F. Supp. 3d at 17 (D.D.C. 2016). Summary judgment for DOJ must therefore be denied.

B. DOJ's Search Was Substantively Deficient

To the extent DOJ did disclose information about its search, the disclosure raises substantial doubt as to the adequacy of the search and indicates multiple deficiencies. Substantial

doubt precluding summary judgment exists when (i) the plaintiffs have set out well-defined requests, and (ii) there are positive indications of overlooked materials. *See Reporters Comm. for Freedom of Press v. Fed. Bureau of Investigation*, 877 F.3d 399, 402 (D.C. Cir. 2017) (quoting *Valencia-Lucerna v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999)) (internal quotation marks omitted). Both of those factors are present here.

1. DOJ Ignored CLC's Well-Defined Reasonable Search Request

Regarding the first factor, CLC provided a well-defined and narrow request in which it carefully detailed the objective of its request, the types of materials it believed would satisfy its request, and seven particular search terms that would help locate responsive material. CLC sought documents containing the phrases "2020 census," "long form," "citizenship question," "questions regarding citizenship," "ACS," "American Community Survey," "citizen voting age population," *or* "CVAP." In contrast to the specificity of CLC's request, DOJ used a single term ("census") to search certain OAAG personnel's email records, without providing any reasoning. *See Wiesner v. Fed. Bureau of Investigation*, 577 F. Supp. 2d 450, 458 (D.D.C. 2008) (court harbored "substantial doubt" as to adequacy of search because of FBI's "failure to explain adequately why it did not search its files using the additional search terms supplied by the plaintiff in his February 28, 2006 letter to the FBI."). Neither did it provide the parameters it used to search Voting Section records or in the initial search of OAAG records. *See* Cooper Decl. ¶ 8.

2. DOJ's Search Disclosures Indicate It Overlooked Substantial Materials

Regarding the second factor, DOJ's statements indicate that its search overlooked responsive material. As noted above, in searching OAAG personnel emails, DOJ used only one term, "census", instead of those requested in CLC's FOIA request. Limiting the search to the term "census" assumes that officials wrote "census" in every exchange on this topic, instead of starting discussions from a common place of knowledge and focusing on more specific subtopics like

"citizenship question," "question regarding citizenship," "citizen voting age population," or "CVAP." CLC also included terms like "citizen voting age population" or "CVAP" to uncover documents that would show whether DOJ officials have previously opined that the ACS data available on citizen voting age population is currently deficient. None of these records would be included in DOJ's unilaterally chosen single search term. Limiting the search to "census" also runs the risk of excluding documents that mention critical Census personnel, such as Drs. Lamas and Jarmin, but do not explicitly use the term "census." Drs. Lamas and Jarmin are Commerce Department officials involved in the preparation for the 2020 census and any mention of them in DOJ's records is highly likely to be relevant to CLC's request. By failing to search for these terms, DOJ has deprived CLC of significant categories of responsive documents.

In addition, DOJ appears to have failed to search any paper records or any electronic records beyond a small number of email accounts. Such a limited search undoubtedly failed to account for responsive paper records and non-email electronic files (*e.g.* Word documents). *See Cause of Action v. Internal Revenue Serv.*, 253 F. Supp. 3d 149, 157–158 (D.D.C. 2017) (agency's initial declaration was inadequate because agency was required, in part, "to explain why it looked where it did and used the search terms it selected," but had failed to do so.).

Finally, DOJ claims that there are no responsive documents from the Voting Section. That is odd given that Mr. Gary cited the Voting Section's work as the impetus for requesting the citizenship question. *See* Ex. 2 (Dec. 12, 2017 Letter to Census). It is also contradicted by the materials that DOJ did release, which include an email from Chris Herren, Chief of the Voting Section, with comments on a draft of the December 12 letter. *See* DOJ-MSJ Exhibit E (Doc. 12-4), at p. 59. This email was apparently discovered during the email search of certain OAAG personnel, but was not reported by the Voting Section. *See* Cooper Decl. at ¶¶ 6, 10-11.

II. DOJ HAS NOT SATISFIED ITS BURDEN TO SHOW THAT EXEMPTION 5 APPLIES

"The strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173 (1991). Further, "[i]n light of the FOIA's strong policy in favor of disclosure, … Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" *Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (Ginsburg, J.) (*quoting EPA v. Mink*, 410 U.S. 73, 87, 93 (1973)). DOJ has not met that burden because it has not shown that the withheld materials are predecisional and deliberative in nature. *See Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) ("To qualify for withholding under Exemption 5's executive privilege, information must be both 'predecisional' and 'deliberative.'").[27]

DOJ identifies two "deliberative processes:" (i) "deliberative discussions of the contents of [the December 12, 2017] letter," and (ii) "the addition of the citizenship question."[28] DOJ-MSJ at p. 8, § B.2. As an initial matter, the evidence released by Commerce and DOJ thus far strongly suggests that the December 12, 2017 letter was merely a pretext because the decision to add the citizenship question had been made months earlier, well before the materials at issue were created. DOJ contends that the content of the December 12 letter is a separate deliberative process from

[27] The majority of material withheld by DOJ is claimed to fall under Exemption 5; CLC does not challenge DOJ's Exemption 6 redactions. However, DOJ withheld some material without identifying a FOIA exemption, only identifying the redaction as "duplicate." *See* DOJ-MSJ Exhibit E p. 58. CLC objects to this material being withheld without a valid exemption claim.

[28] DOJ does not identify which redactions pertain to which process, further preventing the Court from evaluating DOJ's Exemption 5 claim. *See Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105, 108 at n.1 (D.D.C. 2005) (The need for "a detailed description of the withheld documents is of particular importance . . . where the agency is claiming that the documents are protected by the deliberative process privilege under Exemption 5").

the addition of the citizenship question, but the decision to issue the request also took place prior to discussions of the content and wordsmithing of the request, rendering them neither pre-decisional nor deliberative.

Shielding the deliberations about the content of the request cannot promote effective agency decision making because DOJ was not engaging in policy making when it was drafting the request. It was, instead, devising a post-hoc rationale for an already decided policy. DOJ should not be able to use Exemption 5 to shield its deliberations on how to most effectively obscure the rationale for critical public policy decisions. *See Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement Agency*, 811 F. Supp. 2d 713, 741-42 (S.D.N.Y. 2011) ("The concern of the privilege is to prevent the chilling of internal agency discussions that are necessary to the operation of good government; it is not concerned with chilling agency efforts to obfuscate, which are anathema to the operation of democratic government.") (footnotes omitted).

As explained by the Supreme Court, "[t]he ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions…However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached, and therefore equally difficult to see how the quality of the decision will be affected by the forced disclosure of such communications[.]" *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

A. The Withheld Materials Are Not Pre-decisional

DOJ has not met its burden of demonstrating that the withheld materials were generated prior to the relevant agency decision being made. "A document is predecisional [only] if it was 'prepared in order to assist an agency decisionmaker in arriving at his decision,' rather than to support a decision already made." *Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (Ginsburg, J.) (*quoting Renegotiation Bd. v. Grumman Aircraft*, 421 U.S.

168, 184(1975)). "The most basic requirement of the [deliberative process] privilege is that a document be *antecedent* to the adoption of an agency policy. A post-decisional document, draft or no, by definition cannot be 'predecisional.'" *Judicial Watch, Inc. v. U.S. Postal Service,* 297 F.Supp.2d 252, 260 (D.D.C. 2004). Here, public documents show that the ultimate agency decisionmaker, Secretary Ross, had decided to add the citizenship question long before the creation of the withheld materials.

1. The Withheld Materials Were Created After the Decision to Add the Citizenship Question

The relevant inquiry in determining if a document is predecisional is "whether it was generated before the adoption of an agency policy." *See Coastal States Gas Corp. v. Dep't of Energy*, 617, F.2d 854, 866 (D.C. Cir. 1980). Here, the only adoption of an agency policy was the decision to add the citizenship question to the 2020 Census by the Commerce Department.

DOJ's assertion that withheld materials "were drafted before a final decision had been made concerning the addition of the [citizenship] question to the census" are contradicted by documents released by the Commerce Department. On May 2, 2017, Secretary Ross emailed Earl Comstock "I am mystified as to why nothing have [sp] been done in response to my months old request that we include the citizenship question." Comstock responded "I agree Mr. Secretary. On the citizenship question we will get that in place.… We need to work with Justice to get them to request that citizenship be added back as a census question[.]" *See* Ex. 4 (May 2, 2017 email exchange between Secretary Ross and Earl Comstock).

This indication that Secretary Ross had already decided to "include the citizenship question" and the response from his subordinate that "we will get that in place" show that the decision to add the citizenship question was made prior to Commerce reaching out to DOJ and

prior to the creation of the withheld material discussing the issue.[29] In an attempt to reconcile his previous public statements with newly released materials that directly contradicted them, Secretary Ross released a memo acknowledging that he brought the issue up with DOJ.[30] But that does not tell the full story. He did not merely raise the issue with DOJ. The limited evidence already available makes clear that he had already decided to add the citizenship question, and everything that followed was about justifying that decision. Therefore, DOJ has not met its burden to show that the materials it is now withholding pursuant to Exemption 5 were "prepared in order to assist an agency decisionmaker in arriving at his decision." *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).

2. The Withheld Materials Were Created After DOJ's Decision to Request the Citizenship Question

Even if DOJ's decision to request the addition of the citizenship question was an independent deliberative process (as opposed to a non-deliberative post-hoc effort to justify Secretary Ross's decision), DOJ has not demonstrated that these materials were generated prior to that decision. *See Coastal States Gas Corp. v. Dep't of Energy*, 617, F.2d 854, 866 (D.C. Cir. 1980). Notably, some of the withheld material is dated after the December 12, 2017 letter was sent to the Commerce Department. *See e.g.* DOJ-MSJ Exhibit E (Doc. 12-4) at p. 57 (January 3, 2018 email from Gary Arthur to John Gore). DOJ has not put forth any explanation of what deliberative process was ongoing on January 3, 2018 and therefore has failed to meet its burden with respect to that material.

[29] Other materials disclosed by Commerce confirm that the decision to add the citizenship question was made prior to the discussions with DOJ. *See supra* Factual Background Section.

[30] Ex. 3 (Jun. 21, 2018 Supplemental Memorandum by Sec'y of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation).

With respect to materials generated prior to finalization of the December 12 letter, documents released by the Department of Commerce suggest that DOJ had decided to make the request by September 18, 2017 at the latest. On that date, Secretary Ross spoke with Attorney General Sessions who was "eager to assist" in supporting the citizenship question decision and DOJ was ready to "do whatever [Commerce] need us to do" on the issue.[31] Similarly, the emails released by DOJ between Arthur Gary and John Gore, read as a whole, leave the impression that the decision to draft the request letter had already been made and the only task left to do was wordsmithing.[32] Consistent with that, on November 27, 2018 Secretary Ross sent an email indicating that Commerce had already committed itself to adding the question by taking significant steps towards implementing the addition and was anxious to receive the finalized request it was expecting from DOJ. *See* Ex. H (November 27-28, 2017 email exchange between Secretary Ross and Peter Davison).

Thus, even if DOJ's "decision" to issue the December 12 letter could be deemed deliberative, its motion and declaration do not meet its burden to show that the withheld materials were "prepared in order to assist an agency decision maker in arriving at his decision." *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Rather, these documents suggest that the decision to issue the request for the citizenship question was made well in advance of the creation of the withheld materials and therefore are not pre-decisional.

B. The Withheld Materials Are Not Deliberative

The DOJ has not met its burden to show that the withheld materials are deliberative. Documents are deliberative if they are "a part of the agency give-and-take of the deliberative

[31] Ex. 7 (Sept. 18, 2017 email from D. Cutrona to W. Teramoto).

[32] *See generally* DOJ-MSJ, Ex. E.

process by which the decision itself is made." *Vaughn v. Rosen*, 523 F.3d 1136, 1144 (D.C. Cir. 1975); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (A deliberative document "reflects the give-and-take of the consultative process."). When determining whether a document is deliberative, the Court must "must examine the information requested in light of the policies and goals that underlie the deliberative process privilege." *See Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988). Here, documents released by the Commerce Department and DOJ indicate that the decision to add the citizenship question to the census and DOJ's decision to request the addition were both decided at the cabinet level *prior* to the creation of the documents at issue. Therefore, the materials do not reflect the "give-and-take of the consultative process."

Documents released by the Commerce Department indicate that Commerce made the decision to add the citizenship question on its own and later shopped for assistance from other agencies to justify the addition. In a September 8, 2017 memo to Secretary Ross, Commerce's Earl Comstock wrote that he discussed the citizenship question with a DOJ official, but "after considering the matter further [the official] said that Justice staff did not want to raise the question given the difficulties Justice was experiencing in the press at the time (the whole Comey matter). [The official] directed me to … the Department of Homeland Security... after discussion DHS really felt that it was best handled by the Department of Justice. At that point the conversation ceased and I asked … [an official in] the Department of Commerce Office of General Counsel, to look into the legal issues and how Commerce could add the question to the Census itself." *See* Ex. 6. Similarly, the decision by Justice to issue the request then appears to have been made during a September 18, 2017 call between Secretary Ross and Attorney General Sessions. *See* Ex. 7.

Post-hoc documents providing justifications for a pre-decided policy do not reflect the "give-and-take of the consultative process." *See Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980); *see also Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement Agency,* 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011) ("Nevertheless, a draft is only privileged if it contains discussions that reflect the policy-making process. It is not privileged if it reflects the personal opinions of a writer with respect to how to explain an *existing* agency policy or decision." (emphasis in original) (footnotes omitted)). Therefore, DOJ has not met its burden to show the withheld material is deliberative.

C. Withholding Does Not Advance the Purposes of Exemption 5

Finally, a recently released decision in the Southern District of New York that found that draft versions of the December 12, 2017 letter were protected by the deliberative process privilege for "messaging communications" should not control here. *See State of New York v. U.S. Dep't of Commerce,* at *2 (18-cv-2921, S.D.N.Y. Oct. 5, 2018) (*citing Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196-97 (D.C. Cir. 1991). In that case, the court examined whether documents deliberating about "messaging" to explain an already made decision to the public could be protected under the privilege. The court found that they could, but even if that is the case, the court did not provide any analysis of how the drafts of the December 12, 2017 letter constitute such documents. The letter is not addressed to Congress, the public, or the press. *Id.* at *3 (noting that such messaging communications may involve substantive policymaking). Rather, it is styled as a policy document from one agency to another requesting a policy change. Indeed, as the court there recognized a "messaging" communication is not protected under the privilege if it is "little more than deliberations over how to spin a prior decision." *Id.* at *4. If any agency document that may become public can be categorized as a "messaging" document, then virtually any draft would be privileged. *Cf. Judicial Watch, Inc. v. U.S. Postal Service,* 297 297 F.Supp.2d 252, 260 (D.D.C.

2004) ("[D]rafts are not presumptively privileged."). Regardless, for the "messaging" deliberative privilege to apply, the posture of this action places the burden on DOJ to establish that the documents are messaging documents and were created primarily for that purpose. DOJ has made no such claim, let alone put forward any admissible facts that would meet this burden.

Meanwhile, DOJ has not met its burden to show that release of the materials would hinder agency decisionmaking. "Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). DOJ states that release of the withheld materials would cause harm, but "[a]n agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that the disclosure would defeat, rather than further, the purposes of the FOIA." *See Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). *See also Formaldehyde Inst. v. Dep't of Health and Human Services*, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989) (overruled on other grounds) ("The pertinent issue here is what harm, if any, the [withheld material's] release would do to [the agency's] deliberative process."); *Lee v. FDIC*, 923 F. Supp. 451, 456 (S.D.N.Y. 1996) ("[T] the exemption should only be invoked when the dangers which motivated the enactment of the exemption are present[.]").

It is true that Exemption 5 typically protects "recommendations, draft documents, proposals, suggestions, and other subjective documents," but "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2nd Cir. 1999) (internal citations omitted). Indeed, "[t]he mere fact that a document is a draft … is not a sufficient reason to automatically exempt it from disclosure... [T]he policy reasons for the existence of the privilege must be implicated in order for the Court to find

withholding of information necessary." *Lee v. F.D.I.C.*, 923 F. Supp. 451, 458 (S.D.N.Y. 1996). *See also Judicial Watch, Inc. v. U.S. Postal Service*, 297 297 F.Supp.2d 252, 260 (D.D.C. 2004) ("[D]rafts are not presumptively privileged.").

In a case such as this, where the decisions to add the question and make the request had already been made, withholding these materials cannot encourage open, frank discussion on matters of policy, because the materials were not generated as part of a process by which policies are formulated. The documents would have been created regardless of the specter of future publication because they were created as part of an effort to justify an agency decision that had already been made. "Deliberations about how to present an already decided policy to the public, or documents designed to explain that policy to—or obscure it from—the public, including in draft form, are at the heart of what should be released under FOIA… The concern of the privilege is to prevent the chilling of internal agency discussions that are necessary to the operation of good government; it is not concerned with chilling agency efforts to obfuscate, which are anathema to the operation of democratic government." *See Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement Agency*, 811 F. Supp. 2d 713, 741-42 (S.D.N.Y. 2011) (footnotes omitted).

Accordingly, DOJ has failed to meet its burden of demonstrating that the withheld materials qualify under Exemption 5.

CONCLUSION

For the reasons set forth above, Plaintiff Campaign Legal Center respectfully requests that the Court deny summary judgment in favor of Defendant DOJ, grant summary judgment in favor of CLC, and order DOJ to conduct a reasonable search and produce all responsive documents that are not properly exempt.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 18-1187 (TSC) Oral Argument Requested

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE AND STATEMENT OF ADDITIONAL MATERIAL UNDISPUTED FACTS

Pursuant to Local Civil Rule 7(h), Plaintiff Campaign Legal Center ("CLC") hereby sets forth its response to Defendant DOJ's Statement of Undisputed Material Facts and further submits its statement of additional material facts as to which there is no genuine issue.

CLC disputes paragraph 9 of Defendant's statement to the extent it states that "Civil Rights Division carefully reviewed the responsive records in an effort to find documents or portions of documents that might be disclosed." CLC further disputes paragraph 9 of Defendant's statement to the extent it states that "Civil Rights Division released all reasonably segregable portions of the responsive documents following a line-by-line review." These are legal conclusion CLC strongly contests.

CLC disputes paragraph 10 of Defendant's statement to the extent that it states "Civil Rights Division applied Exemption 5 to the materials protected by the deliberative process privilege," which is a legal conclusion CLC strongly contests.

In addition, there is no genuine dispute with respect to the following additional material facts:

1. On May 2, 2017 Secretary Ross wrote in an email to Earl Comstock, a Commerce official, "I am mystified as to why nothing have [sp] been done in response to my months old request that we include the citizenship question. Why not?" On the same day, Earl Comstock responded, "I agree Mr. Secretary. On the citizenship question we will get that in place.… We need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss." Ex. 4.

2. On August 8, 2017, Secretary Ross wrote in an email to Earl Comstock "where is the DoJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG." Ex. 5

3. On September 8, 2017, Earl Comstock responded, "I spoke several times with James McHenry [DOJ] by phone, and after considering the matter further James said that Justice staff did not want to raise the question… James directed me to … the Department of Homeland Security… after discussion DHS really felt it was best handled by the Department of Justice. At that point… I asked James Uthmeier [OGC at Commerce] to look into the legal issues and how Commerce could add the question to the Census itself." Ex. 6.

4. On September 17, 2017, Danielle Cutrona, a DOJ official, wrote in an email to Wendy Teramoto, a Commerce official, "The Attorney General is available on his cell… [I]t sounds like

we can do whatever you all need us to do and the delay was due to a miscommunication. The AG is eager to assist." Ex. 7.

5. On November 27, 2017, Wilbur Ross wrote in an email to Peter Davidson, a DOJ official, "Census is about to begin translating the questions into multiple languages and has let the printing contract. We are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved." Ex. 8.

6. On December 12, 2017, Arthur E. Gary sent a letter to the Census Bureau requesting that a citizenship question be added to the 2020 Census Questionnaire. Ex. 2.

7. On March 26, 2018, Secretary Ross issued a memorandum regarding the reinstatement of a citizenship question on the census. Ex. 1.

8. On June 21, 2018, Secretary Ross caused the Census Bureau to file a supplemental memorandum to the administrative record regarding the deliberative process for adding the citizenship question to the census. Ex. 3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 24th day of October, 2018, I electronically filed the foregoing document with the Clerk of Court via ECF, which will send electronic notification of such filing to all counsel of record.

__/s/ Nadav Ariel_____
Nadav Ariel

Counsel for Plaintiff Campaign Legal Center