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.	)	
	)	

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff's Opposition and Cross-Motion ("Opp'n") fail to overcome the showing made in Defendant's Motion for Summary Judgment ("Motion") that Defendant conducted a reasonable search for responsive records and properly withheld materials pursuant to applicable Freedom of Information Act ("FOIA") exemptions. Although Plaintiff nit-picks the level of detail with which the Department of Justice ("DOJ" or "Defendant") described the searches conducted, Defendant has provided a supplemental declaration providing additional and ample description of those searches. Ultimately, Plaintiff's belief that the agency's searches were defective is based on speculation and Plaintiff's subjective opinion as to what a reasonable search should entail, which are insufficient to overcome Defendant's showing. *See Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 67 n.13 (D.C. Cir. 1990) (hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency's search). Likewise, Plaintiff has failed to undermine Defendant's showing that it properly applied FOIA exemptions. In particular, Defendant invoked the deliberative process privilege to withhold drafts of a letter and emails discussing and proposing revisions to that letter, all of which are quintessentially

Exemption 5-protected material. Indeed, numerous courts have approved the withholding of similar materials and Plaintiff presents no persuasive reason to deviate from those decisions here. Accordingly, the Court should grant Defendant's summary judgment motion and deny Plaintiff's cross-motion.

ARGUMENT

I. Defendant Conducted a Reasonable Search

A. Defendant Provided a Sufficient Description of Its Search

Plaintiff raises various challenges to Defendant's searches for responsive records. At the outset, most of Plaintiff's arguments relate not to the actual search process but to the specificity with which Defendant has described the search. Defendant, however, has submitted the Supplemental Declaration of Tink Cooper, which provides additional detail regarding the searches that were conducted and further establishes that Defendant's searches were reasonable and met the requirements of the FOIA.

First, Plaintiff argues that Defendant did not explain what records in the Voting Section and the Office of the Assistant Attorney General ("OAAG") were searched. Opp'n at 9. The Supplemental Cooper Declaration explains that, within the Voting Section, the Outlook email files of Chris Herren were searched. Suppl. Cooper Decl. ¶ 4. Within the OAAG, the email files of John Gore, the relevant Deputy Assistant Attorney General, were searched. *Id*. ¶¶ 6-9.

Plaintiff next claims, incorrectly, that Defendant did not explain why the Voting Section and OAAG were selected for review and others were not. Opp'n at 9. Defendant did provide a detailed description of why those offices were selected. The first Declaration of Tink Cooper explained that when the Civil Rights Division receives a FOIA request, "the Division will contact the Section that specializes in the enforcement of the particular Civil Rights Division

statute or issues referenced in the request, or that otherwise is likely to have information relevant to the subject matter of the request." Cooper Decl. ¶ 5. The Division will also "contact the [OAAG], or respective Deputy Assistant Attorney General, with supervisory responsibility over the Section that specializes in the enforcement of the particular Civil Rights Division statute or issues referenced in the request, or that otherwise is likely to have information relevant to the subject matter of the request." *Id*. ¶ 7. Here, 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. Those two offices are the Voting Section (the section that specializes in the enforcement of the issue referenced in the request) and the OAAG. *Id*. ¶¶ 6, 8. Plaintiff fails to identify any other office within the Division that Plaintiff believes should have been searched, nor is there any reason to believe that other offices, such as the Disability Rights Section or the Housing and Civil Enforcement Section, would possess records relating to a letter about adding a citizenship question to the Census.

For reasons that are unclear, Plaintiff also demands to know the name of the DOJ employees who carried out the searches. Opp'n at 10. But there is no requirement that an agency provide such information and the cases cited by Plaintiff do not suggest otherwise. *See* Opp'n at 10. The fact that some agencies have provided such information in other FOIA lawsuits does not reflect any requirement. And the search in *National Security Counselors v. CIA*, 849 F. Supp. 2d 6, 11 (D.D.C. 2012), was deficient because it failed to provide any basic information regarding the search, unlike here.

Plaintiff next argues that Defendant has not shown "how it conducted its searches." Opp'n at 10. Again, the Supplemental Cooper Declaration provides additional detail regarding how the searches were conducted. It describes what locations were searched, who made the

decisions regarding where to search, how those decisions were made, and how the searches were carried out. *See* Suppl. Cooper Decl. ¶¶ 4-9.[1] The declaration also provides additional detail regarding the subsequent email search, including that the search was conducted of Mr. Gore's Outlook account. *Id*. ¶ 9.

B. Defendant's Search Was Reasonably Calculated to Locate All Responsive Records

Plaintiff criticizes Defendant for not using every one of Plaintiff's proposed search terms, Opp'n at 12-13, but it is well settled that a "FOIA petitioner cannot dictate the search terms for his or her FOIA request." *Canning v. U.S. DOJ*, Civ. A. No. 11-1295, 2017 U.S. Dist. LEXIS 85348, at *11 (D.D.C. June 5, 2017) (quoting *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015)). This is because "a federal agency has discretion in crafting a list of search terms that they believe[] to be reasonably tailored to uncover documents responsive to the FOIA request." *Bigwood*, 132 F. Supp. 3d at 140 (internal quotation marks omitted). So long as "the search terms are reasonably calculated to lead to responsive documents, a court should neither 'micromanage' nor second guess the agency's search." *Id*. (citing, among others, *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) ("FOIA, requiring as it does both systemic and case-specific exercises of discretion and administrative judgment and expertise, is hardly an area in which the court should attempt to micromanage the executive branch.")).

Here, Defendant constructed a search that it determined was reasonably tailored to uncover all responsive records within the records systems searched. Defendant searched for records using the most comprehensive search term ("census") and it also reviewed emails within

[1] Plaintiff notes that the first Cooper Declaration stated that the Voting Section did not find any responsive records. Opp'n at 11, 13. The Supplemental Cooper Declaration explains that the first declaration contained an error and that certain email exchanges were found both through the OAAG's searches and also through the Voting Section's searches. Suppl. Cooper Decl. ¶ 4.

Mr. Gore's account to or from Arthur Gary or Bethany Pickett. Suppl. Cooper Decl. ¶¶ 9-10. Plaintiff's additional proposed terms are too general and could potentially encompass many records unrelated to the 2020 Census and the December 12, 2017 letter. *Id*. ¶ 11. For example, Plaintiff proposed the term "ACS," but ACS data is widely used in the course of Division enforcement actions such as in the Housing and Civil Enforcement Section and the Employment Litigation Section. *Id*. Likewise, the proposed term "CVAP" is a legal term used routinely in certain claims involving the Voting Rights Act. *Id*.

Plaintiff's argument for why it believes Defendant should have used the terms "citizen voting age population" and "CVAP" only demonstrates why those terms are overbroad and unnecessary for a reasonable search. Plaintiff argues that those terms would "uncover documents that would show whether DOJ officials have previously opined that the ACS data available on citizen voting age population is currently deficient." Opp'n at 13. But such documents, to the extent they may exist, would fall well outside the scope of Plaintiff's request. Plaintiff's request sought "all records pertaining to Arthur E. Gary's December 12, 2017 request to the Census Bureau to add a Citizenship question to the 2020 Census Questionnaire." Compl., Ex. 1, at 1. Documents showing DOJ officials "previously opined that the ACS data available on citizen voting age population is currently deficient" would not necessarily be responsive to Plaintiff's request. Accordingly, Defendant did not have to search for records beyond those requested, and Defendant's search was reasonable. So long as "the agency's search terms are reasonable," courts "will not second guess the agency regarding whether other search terms might have been superior." *Canning*, 2017 U.S. Dist. LEXIS 85348, at *11 (quoting *Liberation Newspaper v. U.S. Dep't of State*, 80 F. Supp. 3d 137, 146 (D.D.C. 2015)).

Lastly, Plaintiff criticizes Defendant for not searching for paper records or electronic records other than email. Opp'n at 13. The Supplemental Cooper Declaration explains why the searches were limited to email. Senior officials within the Voting Section, based on their review and discussion of the request and their knowledge of the Section's records and activities, determined that there were no responsive records in the Division's official case management system, that there were no hard copy documents, and that the only location in the Voting Section likely to contain responsive records would be the electronic files of Chris Herren. Suppl. Cooper Decl. ¶ 4. Similarly, senior officials within the OAAG considered locations likely to contain responsive records and determined that such records would only be located within the email of John Gore. *Id*. ¶¶ 6-8.

II. Defendant Properly Applied Exemption 5 to Withhold Exempt Materials[2]

A. The Withheld Materials are Prototypical Examples of Deliberative and Pre-Decisional Information

Defendant's Motion established that Defendant properly withheld portions of email communications and drafts of a December 2017 letter pursuant to the deliberative process privilege and Exemption 5 of the FOIA. *See* Motion at 5-9. In response, Plaintiff argues against application of Exemption 5 to the withheld materials because, Plaintiff claims, the materials were created after the relevant agency decisions were made. Opp'n at 14-22. Defendant had explained that there were two deliberative processes implicated by the withheld materials. First, some of the emails pertained "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*. at 8. The relevant agency decision for those withholdings is the agency's determination of the

[2] Defendant also withheld information under Exemption 6 but Plaintiff is not challenging those withholdings. Opp'n at 14 n.7. Plaintiff notes that one redaction was marked as a "duplicate," *id*., but that redaction has been removed.

contents of the letter. Second, "[o]ther redactions were applied to portions of emails discussing the addition of a citizenship question to the 2020 census." *Id*. As to those withholdings, the relevant agency decision is the decision to add a citizenship question.

Importantly, as to some of the withheld materials, Plaintiff's argument is now moot because Defendant has exercised its discretion to withdraw the redactions pertaining solely to the addition of a citizenship question. *See* Suppl. Cooper Decl. ¶¶ 12-13. Accordingly, the Court need not resolve whether "the decision to add the citizenship question had been made months earlier," Opp'n at 14, as Plaintiff argues, because that decision is no longer implicated by this case.

The Exemption 5 withholdings that remain in dispute pertain only to the contents of the December 2017 letter from Arthur Gary to Ron Jarmin. Suppl. Cooper Decl. ¶ 13. Specifically, Defendant withheld drafts of the letter as well as portions of emails that reflect deliberations about the contents of the letter. Cooper Decl. ¶¶ 12-13. Such materials are quintessentially deliberative and pre-decisional. Indeed, "[d]raft documents, by their very nature, are typically predecisional and deliberative," *Blank Rome LLP v. Dep't of the Air Force*, Civ. A. No. 15-1200, 2016 U.S. Dist. LEXIS 128209, at *14 (D.D.C. Sept. 20, 2016), and the D.C. Circuit has held that draft letters "reflect advisory opinions that are important to the deliberative process." *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993). In affirming the application of the deliberative process privilege to a draft letter, one court explained that the draft letter was "precisely the type of document that would come within this privilege." *Brown v. Dep't of State*, 317 F. Supp. 3d 370, 376-77 (D.D.C. 2018). And, as Plaintiff concedes, certain of the same draft letters at issue here have already been determined to be protected by the deliberative process privilege by another federal court. Opp'n at 20; *see New York v. U.S. DOC*, Civ. A. No. 18-

2921, 2018 U.S. Dist. LEXIS 172468, at *20 (S.D.N.Y. Oct. 5, 2018) ("[T]he Court concludes that the drafts of the 'Gary Letter' . . . are protected by the deliberative process privilege[.]").

Likewise, portions of emails discussing the contents of the draft letters and proposing revisions thereto are at the very heart of the deliberative process privilege because they reveal internal discussions about what information to include or not include in the letter. *See Judicial Watch, Inc. v. U.S. Dep't of State*, Civ. A. No. 16-885, 2018 U.S. Dist. LEXIS 170199, *10 (D.D.C. Oct. 2, 2018) ("[S]oliciting revisions and feedback on a draft is plainly predecisional and deliberative."). The D.C. Circuit has explained that the deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). For this reason, courts routinely uphold the application of the deliberative process privilege to similar emails as those withheld in part by Defendant here. *See, e.g.*, *Hunton & Williams LLP v. U.S. EPA*, Civ. A. No. 15-1203, 2018 U.S. Dist. LEXIS 166174, *26-27 (D.D.C. Sept. 27, 2018) ("emails seeking and giving input on drafts of letters . . . fall squarely within the privilege"); *Hooker v. HHS*, 887 F. Supp. 2d 40, 56-59 (D.D.C. 2012) (withholding communications discussing development of draft because disclosure would reveal "ongoing, collaborative dialogue about the manuscript").

Plaintiff's argument that the withheld materials are not protected by Exemption 5 is based on a misidentification of the relevant agency decision. Plaintiff argues that the relevant agency decision is "DOJ's decision to request the addition of the citizenship question[.]" Opp'n at 17. According to Plaintiff, "the decision to draft the request letter had already been made and the only task left to do was wordsmithing." *Id.* at 18. But the pertinent agency decision here was

the determination of the *contents* of the December 2017 letter, not the decision about whether to send a letter. Cooper Decl. ¶ 12. Indeed, if Plaintiff's position were correct, then draft letters would almost never be protected by the deliberative process privilege because the decision to send a letter is typically made before the letter is actually drafted. The Court should not endorse Plaintiff's incorrect and unsupported view. Instead, it should hold that the relevant agency decision is the determination of the contents of the letter.

With the correct agency decision defined, there can be no question that the withheld materials are predecisional. As common sense would indicate, the fact that DOJ officials were circulating drafts of the letter and proposing edits to those drafts means DOJ had not yet determined the contents of the letter at the time the records were created. Accordingly, the records are necessarily predecisional. Plaintiff's attempt to downplay the significance of the drafting process by describing it as merely "wordsmithing" ignores the D.C. Circuit's view that draft letters are "important to the deliberative process," *Krikorian*, 984 F.2d at 466, and further ignores numerous other authorities protecting similar materials from disclosure. *See, e.g.*, *Blank Rome*, 2016 U.S. Dist. LEXIS 128209, *14; *Brown*, 317 F. Supp. 3d at 376-77 ("draft letter" that "appears to have been developed as part of a pre-decisional and deliberative process leading up to the drafting and transmission of a final letter, . . . is precisely the type of document that would come within this privilege").

Accordingly, the Court should reject Plaintiff's attempt to re-define the relevant agency decision as the "'decision' to issue the December 12 letter," Opp'n at 18, as other courts have done when faced with similar arguments. For instance, in *Sierra Club v. U.S. Department of Interior*, 384 F. Supp. 2d 1 (D.D.C. 2004), the plaintiff challenged the agency's application of Exemption 5 to draft letters on the grounds that they related to an agency policy that had already

been finalized. *Id*. at 19-20. Nevertheless, the draft letters were exempt because "the specific 'decision' [at issue] was how best to respond to a related congressional inquiry," not the over-arching agency policy that was the subject matter of the letter. *Id*. at 20. Similarly, in *Radiation Sterilizers, Inc. v. U.S. Department of Energy*, No. 90-880, 1991 U.S. Dist. LEXIS 4669 (D.D.C. 1991), the plaintiff argued that a draft letter was "not predecisional because it was written after the [agency] decided to revise an advisory" and was not deliberative because the agency had "finished deliberating and the letter merely announced the results of a completed deliberative process." *Id*. at *17. The Court rejected those arguments, holding that the "draft letter was predecisional to the final letter and was part of the deliberative process which led to the creation of the final letter." *Id*. Here, too, the draft letters and emails discussing the contents of the drafts are plainly pre-decisional and deliberative because they pre-date the final version of the letter and reflect the agency's discussions about what the letter should say.

Accordingly, Plaintiff is incorrect in describing the withholdings as "[p]ost-hoc documents" which supposedly "do not reflect the 'give-and-take of the consultative process.'" Opp'n at 20. Again, the documents relate directly to the agency's decision concerning the drafting of the December 2017 letter, and it is well-settled that "the drafting process is itself deliberative in nature." *Skull Valley Band of Goshute Indians v. Kempthorne*, 2007 U.S. Dist. LEXIS 21079, *46 (D.D.C. Mar. 26, 2007); *see also Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 132 (D.D.C. 2016) ("The deliberative process privilege protects not only the content of drafts, but also the drafting process itself."); *United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d 29, 44 (D.D.C. 2008) (holding that certain "drafts are clearly predecisional and deliberative, reflecting the give and take of the deliberative process that is

typical of drafts that precede a final document."). Notably, Plaintiff has cited no decisions from within this Circuit ordering the disclosure of draft letters or communications about such letters.

B. Withholding Advances the Purposes of Exemption 5

Plaintiff argues that release of the withheld materials would not "hinder agency decisionmaking" and that withholding the materials does not advance the purposes of Exemption 5. Opp'n at 20-22. But disclosure of these materials would hinder agency decisionmaking and otherwise undermine the purposes of Exemption 5 for precisely the same reasons that courts have explained numerous times previously when approving the withholding of similar materials. The deliberative process privilege "serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also EPA v. Mink*, 410 U.S. 73, 87 (1973) (the privilege arises out of a recognition "that it would be impossible to have any frank discussion legal or policy matters in writing if all such writings were to be subjected to public scrutiny"). Accordingly, "draft documents are exempt from disclosure under the deliberative process privilege because they 'reflect the personal opinions of the writer rather than the policy of the agency.'" *Skull Valley Band of Goshute Indians v. Kempthorne*, 2007 U.S. Dist. LEXIS 21079, *46 (D.D.C. Mar. 26, 2007) (quoting *Coastal States*, 617 F.2d at 866). "Furthermore, disclosure of draft documents 'could lead to confusion of the public' because they might 'suggest 'as agency position that which is as

yet only personal position.'" *Id.* (quoting *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982)). "Finally, because the drafting process is itself deliberative in nature, the disclosure of draft documents could 'expose to public view the deliberative process of an agency.'" *Id.*

These important goals of the deliberative process privilege would be defeated if the materials withheld in this case were disclosed. As Defendant explained, "[t]he documents contain candid, frank discussion of vital enforcement interests that, if disclosed, would harm the [Civil Rights] Division's capacity to conduct future exchanges without chilling the staff's exchange and presentation of views." Cooper Decl. ¶¶ 12-13. If the withheld materials were released, DOJ employees would feel less free to offer their own candid views when crafting important agency documents – particularly documents that may elicit significant public attention – for fear that their views will be publicly aired, scrutinized, and criticized. Release could also stifle internal dissent, for fear that internal disagreement, if disclosed, would lead to public ridicule of the dissenter or embarrass the employer. Also, releasing documents reflecting the *personal* views of agency employees would lead to public confusion about what the *government's* official position is on the citizenship question. In short, disclosing internal deliberations about a high-profile agency letter would undermine the fundamental purposes of the deliberative process privilege.

Notably, the D.C. Circuit has found precisely the same concerns to justify the withholding of a draft document under the deliberative process privilege. In *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987), the court explained that "the disclosure of editorial judgments – for example, decisions to insert or delete material or to change a draft's focus or emphasis – would stifle the creative thinking and candid

exchange of ideas necessary to produce good historical work." *Id*. at 1569. An "author would hesitate to advance unorthodox approaches if he knew that the Department's rejection of an approach could become public knowledge" and "editors would place pressure on authors to write drafts that carefully toe the party line." *Id.*

Lastly, Plaintiff suggests that Exemption 5 should not apply here because Plaintiff believes the documents in question are not sufficiently connected to policy matters. Opp'n at 22. That argument fails for at least two reasons. First, the documents are closely intertwined with an important government policy determination, namely, the addition a citizenship question to the Census. As Plaintiff recognizes, the December 2017 letter "is not addressed to Congress, the public, or the press" but rather "is styled as a policy document from one agency to another requesting a policy change." Opp'n at 20.

But even were the letter not related to a policy matter, Exemption 5 would still apply here. Courts have "clarified that the deliberative process privilege is not limited to consultations over official agency policy." *Sensor Sys. Support v. FAA*, 851 F. Supp. 2d 321, 330 (D.N.H. 2012). "Rather, the appropriate judicial inquiry is whether the agency document was prepared to facilitate and inform a final decision or deliberative function entrusted to the agency." *Id*. Moreover, the Supreme Court has explained that "cases uniformly rest the privilege on the policy of protecting the 'decision making processes of government agencies,' and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental *decisions* and policies are formulated.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal citations omitted; emphasis added). Accordingly, the privilege protects the process leading to agency decisions generally, not just formal acts of agency policymaking. *See, e.g., Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552,

560 (1st Cir. 1992) (upholding application of deliberative process privilege where "agency decision whether Army personnel are to be disciplined for alleged misconduct, or prosecuted under the Uniform Code of Military Justice for alleged criminal activity . . . is no less an agency function than the formulation or promulgation of agency disciplinary policy"); *Sensor Sys. Support*, 851 F. Supp. 2d at 330 (finding "argument that the deliberative process privilege does not attach to the draft responses because responding to a congressional inquiry involves neither the agency's decisional nor its policymaking function is unpersuasive" because agency response "involved a deliberative function entrusted to the agency" and noting that the "fact that the response is not a formal act of agency policymaking is irrelevant"); *In re World Trade Ctr. Disaster Site Litig.*, Civ. A. No. 05-9141, 2009 U.S. Dist. LEXIS 114910, at *6, 10-11 (S.D.N.Y. Dec. 9, 2009) (applying FOIA law to subpoena dispute and holding that "the deliberative process privilege is not limited to high-level government officials making policy decisions" but instead applies "to a range of agency decisions"); *Dean v. FDIC*, 389 F. Supp. 2d 780, 792 (E.D. Ky. 2005) (rejecting argument "that the deliberative process privilege under Exemption 5 is limited to materials that relate to the process by which agency policies are formulated, not simply agency decisions").

"Thus, even if an internal discussion does not lead to the 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." *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 135-36 (D.D.C. 2011) (citing *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir.

1992)). For these reasons, the withholdings at issue are protected by the deliberative process privilege under Exemption 5. [3]

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant and deny Plaintiff's cross-motion for summary judgment.

Respectfully submitted,

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[3] Plaintiff discusses whether the December 2017 letter qualifies as a "messaging" document and cites a decision from the Southern District of New York holding that messaging documents are not protected by the deliberative process privilege. Opp'n at 20-22 (citing *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 741-42 (S.D.N.Y. 2011)). But the "D.C. Circuit[] ha[s] held that deliberations about such 'messaging' decisions can be protected by the deliberative process privilege." *New York*, 2018 U.S. Dist. LEXIS 172468, at *16-17 (citing *Nat'l Day Laborer* as an example of a case that has reached a different conclusion than the D.C. Circuit). Instead of relying on an out-of-Circuit decision, Plaintiff should have cited D.C. Circuit authority, in which "messaging" documents may be protected by the deliberative process privilege. *See Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (applying deliberative process privilege to memorandum prepared "to help [the author's] superiors in the process of defending the legislative package that the Department had already offered"). In any event, the focus on whether the December 2017 letter is a "messaging" document misses the mark. As noted above, the letter was not intended to "explain an already made decision to the public," Opp'n at 20, but rather was an inter-agency letter about an important government policy determination.