IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	Civil No. 1:17-cv-0410 (TNM)

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

The United States Department of Justice ("DOJ") produced to Plaintiff Electronic Privacy Information Center ("EPIC"), all responsive records that are not exempt from FOIA and could reasonably be segregated for release. In its opposition to Defendant's Motion for Summary Judgment and Cross-Motion for Summary Judgment ("Pl. Mem."), Plaintiff challenges DOJ's withholdings pursuant to the deliberative process and presidential communications privileges encompassed in FOIA Exemption 5.. Through examination of DOJ's *Vaughn* Index, the detailed declaration of Vanessa Brinkmann, and the segregated portions of the records produced by DOJ, it is clear that DOJ's withholdings pursuant to FOIA Exemption 5 were justified and proper. There are no material facts in dispute that would prevent entry of summary judgment for DOJ.

For the reasons set forth in DOJ's Motion for Summary Judgment and below, DOJ respectfully requests the Court grant summary judgment in its favor and deny Plaintiff's Cross-Motion for Summary Judgment.

BACKGROUND

DOJ incorporates by reference the background statement set forth in its Motion for Summary Judgment. *See* Mem. of Law in Support of Mot. for Summ. J. ("Def. Mem.") at 1-2.

ARGUMENT

I. The DOJ Has Lawfully Withheld Records Categorized as "*Presidential Communications Documents*," "*Predictive Analytics Report Research*," "*Predictive Analytics Report Research—Consultant Corollary*," and "*Briefing Material*" Pursuant to FOIA Exemption 5.

A. The DOJ Properly Withheld the Predictive Analytics Report in Full Pursuant to FOIA Exemption 5, the Deliberative Process Privilege.

Plaintiff contends that DOJ's withholding of the Predictive Analytics Report and cover letter ("Report"), created for and sent to the White House Counsel's Office, pursuant to the deliberative process privilege encompassed in FOIA Exemption 5, was unlawful strictly because the word "final" is found in the title of the report. Plaintiff's Brief at 9. Plaintiff further argues that DOJ failed to support the claim that this Report can be pre-decisional and can point to no valid reason why a final agency report should be shielded from public view. *Id*. As set forth below, Plaintiff's arguments are flawed and based solely on the term "final" being used as part of the title of the report. Additionally, their arguments fail to take into consideration controlling case law.

. It has been widely understood that among the policy purposes of protecting records pursuant to the deliberative process privilege, there are three that have garnered the most attention: "(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action." *See,*

e.g., *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980); and *Jordan v. DOJ*, 591 F.2d 753, 772-73 (D.C. Cir. 1978). Even if certain records reflect completed actions by an agency, they can still be protected pursuant to the deliberative process privilege if these records were pending final approval by the ultimate decision-maker. *Wolfe v. HHS*, 839 F.2d 768, 775 (D.C. Cir. 1988) (protecting records indicating what actions had been completed by FDA, but that awaited final decision or approval by Secretary of HHS or OMB). Releasing records prematurely, prior to their finality and adoption, would harm the integrity of the deliberative process, and disclosure of this report would certainly reveal Executive Branch agency policies prematurely.

This report is a recommendation that was created for, and reviewed by, the White House, who was the ultimate decision-maker on the topic of predictive analytics. As evidenced in the records released to Plaintiff, the White House specifically solicited this review and report from the DOJ as part of a broader initiative, i.e. the big data review. This report has never been made available to the public. Furthermore, this report reflected DOJ's findings regarding the benefits and challenges of the current use of predictive analytics and posed further consideration questions to the White House. Revealing such recommendations would chill an agency's ability to conduct work at the direction of a decision-maker, and in this case, it would reveal recommendations that were formulated for use by the White House.

Moreover, Plaintiff states that OIP's application of the deliberative process privilege fails because Defendant has "provided no hint of [what] final agency policy its 'predecisional' material preceded." Plaintiff's Brief at 11. Again, this argument is without merit for the reasons set forth below.

"Courts have found that an agency does not necessarily have to point specifically to an agency final decision, but must instead establish 'what deliberative process is involved, and the role played by the documents in issue in the course of that process.'" *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 373 (4th Cir. 2009) ("Contrary to [plaintiff's] argument, the Agencies were not required to identify the specific policy judgment at issue in each document."); *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 26-27 (D.D.C. 2011) (rejecting plaintiff's argument that defendants failed to show pre-decisional nature of certain documents where they did not "match the document with the corresponding final document"); *Gold Anti-Trust Action Comm. Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 136 (D.D.C. 2011) (rejecting plaintiff's contention that "the Board must identify a specific decision corresponding to each [withheld] communication"). Here, OIP applied the deliberative process privilege in accordance with standing precedent. Plaintiff alleges that the Brinkmann Declaration simply "alludes to a nebulous and unbounded 'decision-making process in follow up to the Big Data Report.'" Plaintiff's Brief at 11-12. But Plaintiff is clearly missing the Defendant's "definable" decision-making process: to aid the White House with recommendations and further considerations regarding the current use of predictive analytics in law enforcement. The White House solicited these findings from DOJ as part of its big data review, and DOJ complied by researching and compiling such research for review by the White House. To say that the research, reviewing process, and drafting of recommendations solicited by the White House is "nebulous" and "unbounded" is an egregious mischaracterization and would diminish the importance of an agency's efforts in informing the decisionmaking processes of the White House.

Additionally, Plaintiff argues that even if this Court were to accept the assertion that the deliberative process privilege applies to the Report, OIP "concedes that the Report would only be 'partially protected.' Plaintiff's Brief at 12, *quoting* Brinkmann Decl. ¶ 44. However, Plaintiff fails to quote paragraph 44 of the Brinkmann Declaration in its entirety, and is thus highlighting a position that is completely inaccurate.

The Brinkmann Declaration at ¶ 44 specifically states that "[a]lthough ***wholly protected by the presidential communications privilege***, the records protected by OIP in the [categories of] '*Presidential Communications Documents*'[1] and '*E-mails with the White House*'…are also partially or fully protected by the deliberative process privilege." *Id*. (emphasis added). The Brinkmann Declaration emphasizes that the Report would be protected in its entirety pursuant to both presidential communications privileges. Absent the presidential communications privilege, the Report could be segregated; however, the presidential communications privilege encompassed in FOIA Exemption 5, protects it in its entirety.

Preliminary research, recommendations, findings, and further questions on the use of predictive analytics are all found in this Report. It was never made public, and it was provided to the White House, at their direction, who was the final decision-maker on the topic. It is entirely proper to withhold this record in full pursuant to the deliberative process privilege. Plaintiff's focus and arguments are heavily geared toward the fact that the report has the word "final" in its title. The title of a record, however, should not be the determining factor as to whether the deliberative process privilege can or cannot apply.

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[1] The "Final Report" is included in this category of records and is entirely protected pursuant to both the presidential communications privilege encompassed in FOIA Exemption 5 and the deliberative process privilege. A detailed explanation of the presidential communications privileges is below.

B. The DOJ Properly Withheld Research Records Regarding the Predictive Analytics Report and Briefing Materials Pursuant to the Deliberative Process Privilege.

Plaintiff argues DOJ's withholding of research records, records with outside consultants, and briefing materials, all of which consist of aggregated factual material, cannot be subject to the deliberative process privilege. Plaintiff's Brief at 13. Plaintiff further contends, in a conclusory manner, that facts are not deliberative and their disclosure would have no impact on the DOJ's ability to engage in candid deliberations. *Id*. Plaintiff's statements, however, are conclusory and inaccurate. As explained below, factual material, which includes research and briefing materials, can be properly withheld pursuant to the deliberative process privilege..

The D.C Circuit Court has emphasized that Exemption 5 was intended to protect not simply deliberative material, but also the deliberative process of agencies. *Mapother v. Department of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993). When a summary of factual material on the public record is prepared by the staff of an agency administrator, for his use in making a complex decision, such a summary is part of the deliberative process, and is exempt from disclosure under FOIA Exemption 5. *Id*. *See also Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68, 70, 71 (D.C. Cir. 1974).

On several occasions, the Court in this District has permitted agencies to withhold factual material on the ground that its disclosure would expose an agency's policy deliberations to unwarranted scrutiny. *Mapother v. Department of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993). In *Montrose Chemical,* the Administrator of the Environmental Protection Agency asked three aides to summarize the more than 9,200-page record generated by an administrative proceeding in order to help him determine whether the pesticide DDT was injurious to the environment. 491

F.2d at 65. The Court upheld the Administrator's decision to withhold the summaries in the face of a later FOIA request.

Also, in *Russell v. Department of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), and again in *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987), the Court shielded from disclosure draft versions of official Air Force histories. Each history covered certain Air Force operations conducted during the Vietnam War and was produced to inform future policy decisions. *Russell*, 682 F.2d at 1046-1047; *Dudman Communications*, 815 F.2d at 1566. In *Russell*, the court reasoned that "disclosure of the material sought . . . would reveal the Air Force's deliberative process" because "a simple comparison between the pages sought and the [final, published] document would reveal what material supplied by subordinates senior officials judged appropriate for the history and what material they judged inappropriate." 682 F.2d at 1049, *see also Dudman Communications*, 815 F.2d at 1569 (reaffirming *Russell*'s rationale).

As explained pursuant to the Brinkmann Declaration and the Vaughn Index, records categorized as "*Predictive Analytics Report Research*" include research that has been selected, reviewed, and culled together to aid with the initial drafting of the Report. Although this source material may include facts, the process of determining what facts should be included in this material is in and of itself a part of the deliberative process. *See Hardy v. ATF*, No. 15-1649, 2017 WL 1102649 (D.D.C. Mar. 22, 2017 (Howell, C.J.) (finding factual material is covered by Exemption 5 because it would reveal the agency's deliberative process, and the records are factual summaries culled by employees from a much larger universe of facts and therefore reflects an exercise of judgment as to what issues are most relevant to the pre-decisional findings and recommendations). Revealing these records and the process by which the facts are selected

from a larger universe would seriously impair the deliberative process. Department employees would no longer feel comfortable providing candid advice to others based on their research because of the possibility that their candidness might later be revealed. A Department employee's deliberative process should not be subject to scrutiny by the public.

With specific regards to briefing materials, courts agree that such material may be withheld pursuant to the deliberative process privilege of Exemption 5. *See Competitive Enter. Inst. v. Environmental Protection Agency,* No. 12-1617, 2014 WL 308093, at 11 (D.D.C. Jan. 29, 2014) (holding that internal agency communications discussing "'*how* to communicate with members of Congress . . . and *how* to prepare for potential points of debate or discussion [in upcoming congressional testimony],'" and "'related to . . . how to prepare for potential points of debate or discussion'" are predecisional) (internal citation omitted); *Judicial Watch, Inc. v. DHS*, 880 F. Supp. 2d 105, 111-12 (D.D.C. 2012) (holding that deliberations regarding "how to present [a previously decided] policy in the press" qualified as a decision making process for purposes of the deliberative process privilege and finding that documents prepared in advance of that type of press statement were predecisional); *Performance Coal Co. v. U.S. Dep't of Labor*, 847 F. Supp. 2d 6, 15-16 (D.D.C. Mar. 7, 2012) (allowing withholding of documents that discussed how to respond to certain allegations made against government agency). In this case, Defendant withheld 49 pages of briefing material that consisted of a briefing or "prep" paper prepared by Department staff to assist in the preparation of former Attorney General Holder for a media interview, and an internal briefing presentation prepared by Departmental employees to aid in briefing OLP staff on the predictive analytics review. Brinkmann Decl. ¶ 32. The Department staff authoring these "prep" material implemented the deliberative process of selecting facts and source material to include in these memoranda. The process of picking and choosing which facts

to present to other Department employees is itself part of the deliberative process inherent to the preparation of briefing memoranda. These records are protected in full pursuant to FOIA Exemption 5. *See Mapother*, 3 F.3d at 1538. Although Plaintiff opines that DOJ's deliberative process would not be impacted with the release of this factual, source material, their opinion is inferior to the opinions of this Court. "The legitimacy of withholding does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency's deliberative process." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (citation omitted).

Plaintiff further challenges DOJ's application of Exemption 5 to 282 pages of withheld records that constitute "[c]ommunications and attachments sent between DOJ and third-party consultants." Plaintiff argues that the corollary test cannot be satisfied by the conclusory assertions that the DOJ makes. Plaintiff's Brief at 16. However, as set forth below, such an argument lacks merit.

This Court has previously extended the protection of Exemption 5 to documents prepared for a federal government agency by outside consultants. Such documents are based on that consultant's expertise and knowledge of a certain topic or area of law that the agency has specifically solicited advice. "In such cases, the records submitted by outside consultants played essentially the same part in an agency's deliberative process as documents prepared by agency personnel." *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001). Courts have allowed agencies to protect advice generated by a wide range of outside experts, regardless of whether these experts provided their assistance pursuant to a contract, on a volunteer basis, or in some other capacity, creating what courts

frequently refer to as the "consultant corollary" provision of the Exemption 5 threshold. *See Klamath*, 532 U.S. at 11; *see also Nat'l Inst. of Military Justice v. DOD*, 512 F.3d 677, 682 (D.C. Cir. 2008). Courts have emphasized that because these agencies sought outside advice from consultants, and that in providing their expertise, the consultants effectively functioned as agency employees, providing the agencies with advice similar to what it might have received from an employee. *See Nat'l Inst. of Military Justice v. DOD*, 404 F. Supp. 2d 325, 345 (D.D.C. 2005).

Here, the records included in the category "*Predictive Analytics Report Research—Consultant*," which were withheld pursuant to the consultant corollary to Exemption 5, consist of communications and attachments sent between outside expert consultants and the Department. Brinkmann Decl. ¶ 19. These consultants were solicited by the DOJ and provided advice similar to what it might have received from Department employees. Since DOJ sought out the advice of these consultants, and not vice versa, it is reasonable to conclude that the consultants were not seeking a government benefit. Moreover, it is one thing to state that these consultants were not seeking a government benefit, but it is another thing to firmly state that these consultants never received a benefit from DOJ by offering their personal research and advice. There is no evidence that these consultants received any government benefit from their advice. They provided such advice solely because of DOJ's solicitation, and to suggest otherwise is incorrect. DOJ's application of Exemption 5 to 282 pages of advice and expertise provided by consultants was proper and completely in line with controlling case law.

II. The DOJ Has Disclosed all Reasonably Segregable Material.

Plaintiff argues that the DOJ's motion and supporting exhibits show that the agency has not met its segregability obligations as to the Report, research materials, and briefing materials. This is incorrect.

When an agency has validly withheld information, it must demonstrate that all reasonably segregable material has been released. 5 U.S.C. § 552(b). Courts are required to find expressly that the agency produced all reasonably segregable portions of a record. *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007). In making such a finding, courts recognize that "agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). 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).

Here, the DOJ has met its burden by establishing that all reasonably segregable, non-exempt information has been disclosed. OIP conducted a line-by-line and page-by-page review of each of the records and withheld from disclosure only those records or otherwise portions, thereof, which would reveal the Department's pre-decisional decision-making process and/or would reveal the nature of communications with the White House on matters of presidential concern. Brinkmann Decl. ¶ 46. All other reasonably segregable, non-exempt information from these records has been disclosed to Plaintiff.

III. The DOJ has Properly Withheld the Report, Pursuant to the Presidential Communications Privilege.

Plaintiff contests the protection of the Report, based on the flawed argument that DOJ's assertion of the presidential communications privilege requires invocation of privilege by the President.

The presidential communications privilege under Exemption 5 is broader in its coverage because it "applies to documents in their entirety, and covers final and post-decisional materials

as well as pre-deliberative ones." *See Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (quoting *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997)); *see also Elec. Privacy Info. Ctr. v. Department of Justice*, 584 F. Supp. 2d 65, 81 (D.D.C. 2008) (citing *In re Sealed Case* on greater breadth of presidential communications privilege).

Plaintiff's first incorrect argument is that an agency cannot independently invoke the presidential communications privilege. Plaintiff's Brief at 21. To support this contention Plaintiff cites to the *Judicial Watch* case, supra, which states that the D.C. Circuit expressed concern that even a White House Counsel's declaration might be insufficient to invoke the privilege because it did not specifically state that the White House Counsel was authorized by the President to invoke the presidential communications privilege. *Id*. However, the *Judicial Watch* case only expresses an opinion rather than a final decision regarding the President's sole authority to invoke this privilege. The D.C. Circuit has expressly stated that there is no indication in the text of the FOIA that the decision to withhold documents pursuant to the presidential communications privilege of Exemption 5 must be made by the President. *See Elec. Privacy Info. Ctr. v. Department of Justice*, 584 F. Supp. 2d 65, 81 (D.D.C. 2008).

Furthermore, Plaintiff states that the extension of the presidential communications privilege beyond the President himself is limited strictly to "top presidential advisers" such as the "White House Counsel, Depute White House Counsel, Chief of Staff and Press Secretary." See Plaintiff's Brief at 22-23; however the *Judicial Watch* case never mentions that these are the only persons who can claim the privilege. The *Judicial Watch* case that Plaintiff references throughout their argument held that the presidential communications privilege applies to pardon documents "solicited and received" by the President or his immediate advisers in the Office of the President, and that the deliberative process privilege applies to internal agency documents

that never make their way to the Office of the President. *Judicial Watch*, 365 F.3d at 1123—24. Specifically, the case holds, "[i]t is only those documents and recommendations of Department staff that are not submitted . . . for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege." *Id*. Both of these types of records were provided to and exchanged with the White House Counsel's Office – i.e. senior advisors to the President. "The presidential communications privilege applies to memoranda that were not only prepared for the purpose of advising the President and his closest advisers but also were solicited, reviewed, and formed an integral part of the President's decision. *Judicial Watch v. DOD*, No. 16-360, 2017 WL 1166322 (D.D.C. March 28, 2017). There is no argument that this Report was solicited and reviewed by the White House. DOJ properly protected the Report pursuant to Exemption 5, consistent with controlling FOIA precedent.

CONCLUSION

For the reasons set forth in Defendant's opening brief and as discussed above, Defendant respectfully requests that the Court grant their Motion for Summary Judgment and deny Plaintiff's Cross-Motion for Summary Judgment.

Respectfully submitted,

JESSIE K. LIU, D.C. BAR # 472845
United States Attorney
for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092
Civil Chief

By: _____/s/_____
ALEXANDER D. SHOAIBI, D.C. Bar #423587
Assistant U.S. Attorney
555 Fourth St., N.W.
Room E4218
Washington, D.C. 20530
(202) 252-2511
Alexander.shoaibi@usdoj.gov