

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

ELECTRONIC PRIVACY INFORMATION
CENTER,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant.

Civil Action No. 17-410 (TNM)

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF FACTS AS TO WHICH
THERE IS NO GENUINE DISPUTE AND PLAINTIFF’S STATEMENT OF FACTS AS TO
WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Civil Rule 7(h) and § 14 of this Court’s Standing Order, Plaintiff Electronic Privacy Information Center (“EPIC”) hereby submits the following Response to Defendant United States Department of Justice (“DOJ”)’s Statement of Material Facts as to Which There is No Genuine Dispute, ECF No. 23, along with Plaintiff’s Statement of Material Facts as to Which There is No Genuine Dispute.

1. EPIC admits the facts set forth in ¶ 1 of Defendant’s Statement.
2. EPIC admits the facts set forth in ¶ 2 of Defendant’s Statement.
3. EPIC admits the facts set forth in ¶ 3 of Defendant’s Statement.
4. EPIC admits the facts set forth in ¶ 4 of Defendant’s Statement.
5. EPIC admits in part the facts set forth in ¶ 5 of Defendant’s Statement. EPIC admits that the Office of Information Policy (“OIP”) provided its final response to EPIC’s FOIA request by letter dated October 31, 2017. EPIC admits that OIP provided 359 pages of material to EPIC with some excisions made. EPIC respectfully denies that 2,367 pages were withheld in full; by Defendant’s revised accounting, 2,363 pages were withheld in

full. Brinkmann Decl. ¶ 14, ECF No. 23–1. EPIC submits that whether material was withheld “pursuant” to one or more FOIA exemptions constitutes a legal conclusion, one which EPIC disputes as to many of the records at issue in this case.

6. EPIC challenges the Defendant’s withholding of 371 pages in full and 2 additional pages in part.
7. Defendant has withheld 26 pages consisting of a “Department of Justice report and cover letter regarding predictive analytics in law enforcement.” Ex. E of Def.’s Mot. Summ. J. (“Vaughn Index”) 7, ECF No. 23-1.
8. Defendant asserts that the report and cover letter are “partially protected” from FOIA disclosure by the deliberative process privilege. Brinkmann Decl. ¶ 44.
9. The report and cover letter were composed, edited, and reviewed by numerous DOJ personnel. Exs. C–G.
10. The report and cover letter were submitted to DOJ leadership for clearance prior to being finalized. Exs. D, E, G.
11. The report was submitted to Associate White House Counsel Kate Heinzelman under the filename “Predictive Analytics – FINAL.pdf.” Ex. A.
12. Office of Legal Policy (“OLP”) attorney Alexander Krulic circulated the report to colleagues under the filename “Predictive Analytics – FINAL.pdf.” Ex. B.
13. Krulic identified the report to colleagues as a “[f]inal copy of the Predictive Analytics paper.” Ex. B.
14. Defendant does not claim that the report contains any advisory opinions, recommendations, or personal opinions. *See* Brinkmann Decl. ¶¶ 44–45.
15. Defendant has not identified any decision or contemplated decision that the report and

- cover letter preceded. *See* Brinkmann Decl. ¶¶ 44–45.
16. Defendant has not released any factual or other material from the report. Vaughn Index 7.
 17. Defendant also asserts that the report and cover letter are protected from FOIA disclosure by the presidential communications privilege. Brinkmann Decl. ¶¶ 41–43.
 18. Defendant has offered no evidence that President Trump has asserted the presidential communications privilege as to the report and cover letter. *See* Brinkmann Decl. ¶¶ 41–43.
 19. Defendant has offered no evidence that former President Obama has asserted the presidential communications privilege as to the report and cover letter. *See* Brinkmann Decl. ¶¶ 41–43.
 20. Defendant has offered no evidence that any immediate presidential advisor, past or present, has asserted presidential communications privilege as to the report and cover letter. *See* Brinkmann Decl. ¶¶ 41–43.
 21. Defendant has offered no evidence that any White House personnel other than Associate Counsel Kate Heinzelman received the report and cover letter from the DOJ. *See* Brinkmann Decl. ¶¶ 41–43.
 22. Defendant has withheld 296 pages of “research materials” and 49 pages of “briefing materials” in full. Vaughn Index 3–7.
 23. Defendant has also withheld portions of two records that the DOJ disclosed to EPIC in part. Exs. H, I.
 24. Defendant asserts that these records are protected from FOIA disclosure by the deliberative process privilege. Brinkmann Decl. ¶ 44.
 25. Defendant represents that the research materials consist of “bullet points,” “a source list,”

“research,” “e-mails,” and “communications” with third-party consultants. Brinkmann Decl. ¶¶ 26–27.

26. Defendant represents that the briefing materials consist of “facts,” “issues,” and “source materials.” Brinkmann Decl. ¶¶ 33, 35.

27. Defendant has not released any factual or other material from the research and briefing documents. Vaughn Index 3–7.

28. EPIC does not challenge the withholding of 1,934 pages containing “Draft Predictive Analytics Report and Cover Letters.” Brinkmann Decl. ¶ 15.

29. EPIC does not challenge the withholding of 45 pages containing a “Draft Speech.” Brinkmann Decl. ¶ 15.

30. EPIC does not challenge the withholding of 7 pages containing “Preliminary, draft outline[s] of the Predictive Analytics Report” submitted by the DOJ to the White House Counsel’s Office. Vaughn Index 8–9; *see also* Brinkmann Decl. ¶ 15.

31. EPIC does not challenge the withholding of 6 pages containing “White House Memorand[a]” to the Attorney General and other “heads of Departments and Agencies” by the White House Chief of Staff. Vaughn Index 9–10; *see also* Brinkmann Decl. ¶ 15.

32. With exception of the two documents comprising Exhibits H and I, EPIC does not challenge the withholding of redacted portions of the 128 records disclosed in part to EPIC. *See* Brinkmann Decl. ¶ 15.

Dated: March 16, 2018

Respectfully submitted,

MARC ROTENBERG, D.C. Bar # 422825
EPIC President and Executive Director

ALAN JAY BUTLER, D.C. Bar # 1012128

Senior Counsel

ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Ave., NW
Suite 200
Washington, DC 20009
(202) 483-1140

Counsel for Plaintiff