IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Fort Myers Division

THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant*.	Case No. 2:22-cv-00252-JLB-MRM

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this case arising under the Freedom of Information Act ("FOIA"), Plaintiff, the Foundation for Government Accountability ("FGA"), challenges whether specific records responsive to its request are exempt from disclosure pursuant to FOIA Exemption 5 and whether the search for responsive records was adequate. The Civil Rights Division ("CRT") of the Department of Justice ("DOJ"), which is the component to which FGA submitted its request, has conducted an adequate search and produced all responsive, non-exempt records; any withheld records or portions thereof fall within an exemption to FOIA. DOJ has therefore satisfied its obligations under FOIA, and the Court should accordingly grant summary judgment to DOJ.

STATEMENT OF UNDISPUTED FACTS

1. President Biden issued Executive Order 14019 (EO 14019) on March 7, 2021. Among other things, the Order required federal agencies to submit a strategic plan to the White House within 200 days outlining "ways . . . the agency can promote voter registration and voter participation." 86 Fed. Reg. 13,623 § 3(b).
2. FGA submitted a FOIA request to CRT on July 30, 2021, requesting records related to the implementation of EO 14019. *See* Compl. ¶ 17, ECF No. 1.
3. FGA requested five categories of records: (1) DOJ's "strategic plan developed pursuant to . . . [EO] 14019"; (2) if DOJ had "declined to consent to a request by a State to be designated as a voter registration agency pursuant to section 7(a)(3)(B)(ii) of the National Voter Registration Act, . . . a copy of the written explanation for th[at] decision provided by the head of [DOJ] to President Biden"; (3) "any formal notifications provided to any State in which [DOJ] provides services notifying the State that [DOJ] would agree to designation as a voter registration agency pursuant to section 7(a)(3)(B)(ii) of the National Voter Registration Act"; (4) "all communications with the White House related to [EO] 14019 and/or the strategic plan requested through EO 14019," including "any and all communications with the Vice President's Office and staff, as well as with Domestic Policy Advisor Susan Rice and her staff related to EO 14019"; and (5) "all communication between [DOJ] and the non-profit organization Demos and/or any of its employees or officers of the 501(c)4 organization associated with Demos, known as 'Demos Action,' related to EO 14019,"

including "the dates, time, and purpose of any meeting(s) . . . that [DOJ] conducted with Demos, Demos Action, or any of its employees or officers." *Id.* Ex. B at 1.

4. On March 23, 2022, FGA emailed CRT about the status of its FOIA request, and CRT responded on March 25, 2022, that the search was being conducted but that it could not provide an estimated date of completion. *Id.* Ex. C.
5. FGA filed this suit on April 20, 2022, because it had not yet received any records responsive to its FOIA request from CRT. *Id.*¶ 1.
6. Thereafter, CRT informed FGA that it had located approximately 5,500 records that were potentially responsive to FGA's FOIA request. *See* Case Management Report at 10, ECF No. 24.
7. CRT offered to process over 1,000 records per month, while FGA requested that CRT process and produce all responsive, non-exempt records within approximately one month. *See id.* at 9-10.
8. The Court ordered CRT to process and produce all responsive, non-exempt records within approximately two months. Scheduling Order, ECF No. 31.
9. After receiving one, unopposed one-week extension, CRT produced the responsive, non-exempt records on September 8, 2022. *See* ECF No. 35.
10. After further discussions with FGA's counsel, CRT re-produced two documents with discretionary releases of portions of previously withheld information and reconsidered the responsiveness of one previously unproduced, three-page document, which DOJ determined was exempt from disclosure

under FOIA Exemption 5. *See* Joint Status Report at 2-3, ECF No. 49. DOJ has now decided, however, in consultation with the White House, to make a discretionary release of the entire three-page document. Ex. A., Decl. of Kilian Kagle ¶ 35.

11. In total, CRT located 153 pages of responsive records, and produced these records to FGA, with some withheld in part and some withheld in full. For the documents withheld in full or in part, DOJ asserted FOIA Exemptions 5 and 6. *See* 5 U.S.C. §§ 552(b)(5), (b)(6).

12. FGA has conveyed to DOJ that it intends to challenge the assertion of Exemption 5 over a draft document, which was withheld in full, *see* Ex. B, *Vaughn* Index at 3-4 (entry 12); deliberative email communications, which were withheld in part, *see id.* at 4, 9 (entries 17 & 51); notes that a DOJ employee took during a listening session to inform internal DOJ deliberations, which were withheld in part, *see id.* at 9-10 (entries 53 & 71); an agenda for a consultation meeting on Native American voting rights, with embedded talking points, which was withheld in full, *see id.* at 20-21 (entry 132); and DOJ's Strategic Plan, as sent to the White House, which was withheld in full, *see id.* at 21. *See also* Joint Status Report at 3.

13. FGA has also conveyed to DOJ that it intends to dispute the adequacy of CRT's search as to categories 2-5 of its FOIA request. *Id.*

14. As expressed in the declaration of Kilian Kagle, the Chief of the FOIA Unit of CRT, the declaration of Vanessa Brinkmann, Senior Counsel in the Office of

Information Policy at DOJ, and the *Vaughn* Index, DOJ maintains that CRT's search was adequate and that the challenged withholdings under Exemption 5 were appropriate. *See* Ex. A; Ex. B; Ex. C, Decl. of Vanessa Brinkmann.

STANDARD OF REVIEW

Most FOIA cases are resolved on summary judgment. *See Brayton v. Off. of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011). Under Federal Rule of Civil Procedure 56, a court should grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, a court may base its grant of summary judgment "on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Aguiar v. DEA*, 865 F.3d 730, 734-35 (D.C. Cir. 2017) (citation omitted). "[A]n agency is entitled to summary judgment if no material facts are in dispute and if it demonstrates that each document that falls within the class requested either has been produced or is wholly exempt from FOIA's inspection requirements." *Elec. Priv. Info Ctr. v. U.S. Dep't of Just.*, 18 F.4th 712, 717 (D.C. Cir. 2021) (citation, internal quotation marks, brackets, and ellipses omitted).

ARGUMENT

I. CRT's search was reasonable, adequate, and satisfies its obligations under the FOIA.

CRT has submitted a reasonably specific declaration describing an adequate search that CRT conducted for records responsive to FGA's FOIA request. *See* Ex. A ¶¶ 8-27. The Court should therefore grant summary judgment in favor of DOJ on the adequacy of the search. On a motion for summary judgment, "the agency must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (citation omitted). It is well-established that "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Id.* (citation omitted); *see also SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) ("Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.") (citations omitted). The "adequacy of the search . . . is judged by a standard of reasonableness and depends . . . upon the facts of each case." *Weisberg*, 745 F.2d at 1485 (citation omitted). Because FOIA requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise," it "is hardly an area in which the courts should attempt to micro manage the executive branch." *Schrecker v. DOJ*, 349 F.3d 657, 662 (D.C. Cir. 2003) (citation omitted).

Although the defendant in this case is DOJ as an agency, FOIA within DOJ is decentralized, "with each component handling requests for its records." *See* 28 C.F.R. § 16.1(c). Because Plaintiff directed its FOIA request specifically to CRT, *see* Ex. A ¶ 6, the question of the adequacy of the search is limited to a question of whether CRT adequately searched its records. *See* 28 C.F.R. § 16.1(c); *id.* § 16.3 (a requester who is unsure of which component maintains the records it seeks should submit the request to the FOIA/PA Mail Referral Unit, which "will forward the request to the component(s) that it determines to be most likely to maintain the records that are sought"); *id.* § 16.4(a) (with limited exceptions not applicable here, "the component that first receives a request for a record and maintains that record is the component responsible for responding to the request," and "[i]n determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that it begins its search"); *id.* § 16.4(c) (requiring re-routing of a FOIA request to a different DOJ component only where a component "determines that a request was misdirected within the Department"); *see also Antonelli v. U.S. Parole Comm'n*, 619 F. Supp. 2d 1, 4 (D.D.C. 2009) (citation omitted) (rejecting search adequacy challenge because "an agency component is obligated to produce only those records in its custody and control at the time of the FOIA request"). Plaintiff's request was not misdirected to CRT, because it was logical that a requester seeking records about a voting rights issue would direct a request to CRT which handles voting rights issues, and—as evidenced by the production of documents in this case—CRT possessed responsive records.

CRT conducted a search reasonably calculated to uncover all relevant records by (1) electronically searching the records of five Civil Rights Division Senior Executives and one Executive Office Detailee who had been identified as potential custodians for material that could be responsive to the material requested; (2) ordering a self-collection of records from eight Senior Officials and Attorneys who were identified by the Chief of Staff as "having a possible nexus to the material requested;" (3) inquiring with the Civil Rights Division's Voting Section regarding whether it possessed any responsive records; and (4) following any leads generated by these searches. Ex. A ¶¶ 13-14. CRT carefully developed the list of potentially relevant employees for the first search by consulting with the Chief of Staff to determine who was likely to have communicated about EO 14019 based on their job responsibilities. *Id.* ¶ 14. CRT conducted an electronic search based on carefully crafted search terms of the email records of the individuals identified as potential custodians for responsive materials. *Id.* ¶¶ 16-21. CRT also sent an email questionnaire to the eight Senior Attorneys who had been identified by the Chief of Staff as potentially having a nexus to the material requested. *Id.* ¶ 25. Seven of these attorneys either conveyed that they had never had any involvement concerning EO 14019 and its implementation or that they had performed a self-search of their records and had not uncovered any material that would not appear in the IT collection of records from their superiors that was underway. *Id.* One attorney located three potentially responsive emails and provided them. *Id.* These emails led to follow-up searches to determine whether one of the emails, providing a copy of DOJ's Strategic Plan, represented the final copy of the plan

that was submitted to the White House, which it was. *Id.* ¶ 27. The Voting Section of the Civil Rights Division indicated that it did not believe it had any independent records responsive to Plaintiff's request. *Id.* ¶ 26.

By taking the steps described above, CRT employed a reasonable and adequate search "reasonably calculated to uncover all relevant documents." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1248 (11th Cir. 2008) (citation omitted). For these reasons, CRT's search was consistent with its obligations under the FOIA.

II. DOJ properly withheld records under FOIA Exemption 5.

FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). In other words, Exemption 5 incorporates civil litigation privileges. Unlike in civil litigation, however, a court must determine only whether the information at issue would "routinely" be disclosed in civil litigation. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) (citation omitted). Accordingly, for privileges that would in civil litigation require a balancing, such as documents for which a party would have to make a showing of need, no balancing or showing of need is undertaken. *FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983). Instead, an agency need only make a threshold showing that information would ordinarily be protected by one or more privileges, which include the deliberative process privilege and the presidential communications privilege, *see Loving v. Dep't of Def.*, 550 F.3d 32,

37 (D.C. Cir. 2008); *Miccosukee Tribe*, 516 F.3d at 1263, to properly withhold it under Exemption 5. DOJ has made such a showing.

In addition to showing that a withholding meets an applicable FOIA exemption, DOJ must show that it "reasonably foresees that disclosure [of any of the withholdings] would harm an interest protected by an exemption" or that "disclosure is prohibited by law." Pub. L. No. 114-185, 130 Stat. 538 (2016) (codified at 5 U.S.C. § 552(a)(8)(A)(i)).

a. DOJ properly withheld information under the presidential communications privilege.

DOJ appropriately withheld in full pursuant to FOIA Exemption 5 DOJ's Strategic Plan that it submitted to the White House in response to EO 14019. *See* Ex. B at 21. The presidential communications privilege is "presumptive," and it "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Loving*, 550 F.3d at 37 (citations omitted); *see also United States v. Nixon*, 418 U.S. 683, 706, 708 (1974) (the "President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately"), *superseded by statute on other grounds*. The privilege extends to "documents solicited and received by the President or his immediate White House advisers with broad and significant responsibility for investigating and formulating the advice to be given the President." *Loving*, 550 F.3d at 37 (internal quotation marks, brackets, and ellipses omitted). The privilege "applies to documents in their *entirety*, and covers final

and post-decisional materials as well as pre-deliberative ones," thus no segregability analysis is required. *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (emphasis added). Because the presidential communications privilege is "rooted in constitutional separation of powers principles and the President's unique constitutional role," judicial negation of the privilege is "subject to greater scrutiny than denial of the [common-law] deliberative privilege." *Id*.

The presidential communications privilege applies to the Strategic Plan because it was "solicited and received by the President['s] . . . immediate White House advisers with broad and significant responsibility for investigating and formulating the advice to be given the President" regarding voting rights issues. *Loving*, 550 F.3d at 37 (citation and internal quotation marks, brackets, and ellipses omitted); *see* Ex. C ¶ 16. The President solicited the Strategic Plan in EO 14019. 86 Fed. Reg. 13,623 § 3(b). One of the President's immediate White House advisers, Ambassador Susan E. Rice, who serves as the Assistant to the President for Domestic Policy, and as head of the Domestic Policy Council (DPC) within the White House, was directly responsible for receiving the strategic plans from federal agencies and formulating advice to the President based on those plans. Ex. C ¶¶ 7, 14; 86 Fed. Reg. 13,623 § 3(b). Ambassador Rice's staff "compiled highlights from the agency strategic plans," including DOJ's Strategic Plan for Ambassador Rice to "use in White House policy formulation and in briefing the President." Ex. C ¶ 15. The advice provided on the basis of the strategic plans, including DOJ's, "informed the President on the extent of DOJ and other agency actions and proposals on relevant voting matters and on areas

where further Executive Branch action might be needed or considered within the scope of the President's executive authority." *Id.* Ambassador Rice's position and role qualify her as a "White House adviser with broad and significant responsibility for investigating and formulating the advice to be given the President." *Loving*, 550 F.3d at 37 (internal quotation marks, brackets, and ellipses omitted); *see also, e.g.*, *New York Times Co. v. Off. of Mgmt. & Budget*, 531 F. Supp. 3d 118, 129 (D.D.C. 2021) (holding the presidential communications privilege was properly asserted over agency emails to "a member of the staff of an immediate advisor to the President, [who] . . . had broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate[d]"); *Buzzfeed, Inc. v. FBI*, No. 18-cv-2567, 202 WL 2219246, at *8 (D.D.C. May 7, 2020) (upholding the application of the presidential communications privilege to the entirety of the FBI's background investigation file of a Supreme Court nominee because the file, which was solicited and received by immediate White House advisers responsible for advising on the nomination). The Strategic Plan therefore falls squarely within the scope of the presidential communications privilege. Ex. C ¶ 16.

Disclosure of DOJ's Strategic Plan would cause specific foreseeable harm, including impairing the ability of the President's "DPC advisors . . . to obtain the comprehensive information they need from agencies in order to inform policy recommendations to the President and to drive formulation and implementation of the President's policy agenda on voting rights and access issues." *Id.* ¶ 19; *see Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstruction*, No. 18-2622 (ABJ), 2021 WL 4502106

(D.D.C. Sept. 30, 2021), at *23 (finding the foreseeable harm standard was satisfied for the presidential communications privilege where the declarant explained that disclosure would "burden[] the ability of the President and his advisors to engage in a confidential and frank decision-making process and chill[] or inhibit[] their ability to have candid discussions, thus impacting the efficiency of government policy-making"). Such disclosure would also deter DOJ employees from "providing a full range of options, plans, or propositions for future potential actions out of concern for creating . . . public confusion." Ex. C ¶ 20. And such public confusion would result from disclosure of the Strategic Plan because it contains many proposed actions that the public might construe as "future commitments, past actions, or provisions already in place." *Id.* DOJ therefore properly withheld the Strategic Plan in its entirety.

b. DOJ properly withheld information under the deliberative process privilege.

FOIA Exemption 5 also incorporates the deliberative process privilege, which "protects documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Campaign Legal Ctr. v. U.S. Dep't of Just.*, 34 F.4th 14, 19 (D.C. Cir. 2022) (citation omitted); *see Moye, O'Brien, O'Rourke, Hogan, & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1281 (11th Cir. 2004) ("[I]n order for the deliberative process privilege to apply, the decision-making process must bear a reasonable nexus to the documents sought."). To qualify for protection under this privilege, material must be

inter- or intra-agency,[1] and both pre-decisional and deliberative. *See Miccosukee Tribe*, 516 F.3d at 1263. A document is predecisional if it was "prepared in order to assist an agency decision maker in arriving at his decision." *Id.* (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.,* 421 U.S. 168, 184 (1975)); *see Moye*, 376 F.3d at 1277 (predecisional documents "may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency") (citations omitted). A document is deliberative if it was "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Miccosukee Tribe*, 516 F.3d at 1263 (citation omitted).

The deliberative process privilege is designed to protect (1) "creative debate and candid consideration of alternatives within an agency, . . . thereby[] improv[ing] the quality of agency policy decisions;" (2) "the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon," and (3) "the integrity of the decision-making process itself." *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also*

[1] Because all of the challenged withholdings stem from materials generated by, exchanged within, and wholly internal to DOJ or exchanged between DOJ and the White House, all the challenged withholdings satisfy this threshold requirement. *See* Ex. C ¶ 11; *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 129 (D.C. Cir. 2005) ("[T]he Supreme Court deemed it 'beyond question' that documents prepared by agency officials to advise the President were within the coverage of Exemption 5 because they were 'intra-agency or 'inter-agency memoranda or letters that were used in the decisionmaking processes of the Executive Branch'") (quoting *EPA v. Mink*, 410 U.S. 73, 85 (1973)).

Moye, 376 F.3d at 1278. Courts "should be wary of interfering with th[e] process" by which agencies "examin[e] their policies." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

i. Draft document

DOJ properly withheld a draft document (complete with redline edits) proposing answers to questions posed by the White House Counsel's Office, which contained potential DOJ actions and discussion of potential issues pertaining to the implementation of EO 14019. *See* Ex. A ¶ 40; Ex. B at 3-4 (entry 12). The draft document is predecisional. To determine whether a draft document is predecisional, courts look to "the context of the administrative process which generated [a draft]" to "confirm[] that [it consists of] . . . what [it] sound[s] like: opinions that were subject to change." *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021). Here, not only did the draft reflect "opinions that were subject to change" on how to implement EO 14019, *id.*, but it also reflected potential changes to those opinions by including proposed edits in redline, *see* Ex. A ¶ 40. The draft also was circulated on April 19, 2021—over five months before DOJ sent its Strategic Plan to the White House describing the status of DOJ's deliberations regarding potential future actions to implement EO 14019. *See id.* And the draft was developed in order to inform later draft answers by DOJ leadership offices in response to the questions posed by the White House Counsel's office. *Id.* Therefore, both the timing of the draft, and its context reveal that it is predecisional in nature.

To determine whether a draft document is deliberative in nature, courts look to the draft's content. *Reps. Comm. for Freedom of the Press*, 3 F.4th at 367. Courts have recognized that the deliberative process privilege often applies to draft documents that "discuss and debate proposed agency policies, positions, and actions." *Id.* In *Miccosukee Tribe*, the Eleventh Circuit upheld as appropriate the government's withholding of documents and portions thereof under Exemption 5 for deliberative process privilege where the documents included "draft documents . . . that contained or incorporated comparisons, analyses, and evaluations of legal and policy considerations," because those documents were "pre-decisional and deliberative in nature." 516 F.3d at 1263-65. Similarly, here, the withheld draft document "discuss[es] . . . proposed agency . . . positions[] and actions" with respect to EO 14019, *Reps. Comm. for Freedom of the Press*, 3 F.4th at 367, and "evaluat[es] . . . legal and policy considerations," *Miccosukee Tribe*, 516 F.3d at 1263-65. The individuals who composed the draft answers found in the withheld document were "responsible for providing preliminary advice to DOJ leadership offices on potential eventual answers to provide to the White House Counsel's Office" regarding implementation of EO 14019. Ex. A ¶ 40. In this way, the draft document played a role in DOJ's decisionmaking "about the scope and focus of the Agency's preparation of a strategic plan in response to [EO] 14019." *Id.* The draft document's contents are therefore deliberative.

Disclosure of the draft document or any portion thereof would result in foreseeable harm, because it would chill agency drafting processes, which would

undermine the agency decision-making process. *Id.* That is particularly true on issues that tend to be sensitive, such as voting rights issues, where the reluctance to speak freely is heightened if the speaker is aware his or her early thoughts, impressions and recommendations were to be made public. *See id.* This chilling effect would "degrade the quality of agency decisions by depriving the decision-makers of fully-explored options developed from robust debate." *Id.* DOJ therefore properly withheld the draft document in full under Exemption 5.

ii. Deliberative discussions

DOJ properly withheld the portions of internal email communications among DOJ employees regarding DOJ's development of its Strategic Plan. *See* Ex. C ¶¶ 27-28; *see also* Ex. B at 4, 9 (entries 17 & 51). In *Reporters Committee for Freedom of the Press v. FBI*, the D.C. Circuit held that emails "discuss[ing] the content of a new policy and alternative paths for its effective implementation . . . f[e]ll squarely within the deliberative process privilege." 3 F.4th at 368; *see id.* (holding that the agency's "declaration, in combination with produced portions of the redacted emails, adequately demonstrate that the documents constituted candid advice about whether and how FBI policies should or should not change."); *see also Miccosukee Tribe*, 516 F.3d at 1260-61, 1263, 1265 (recognizing as exempt from disclosure under the deliberative process privilege documents "which reflect[ed] the back-and-forth discussions and mental impressions" of agency staff and "contained or incorporated comparisons, analyses, and evaluations of legal and policy considerations" regarding

potential agency decisions). Courts have also recognized as protected under the deliberative process privilege email chains that "documented ongoing internal debates and deliberations" about an issue and "contain[ed] the type of back-and-forth exchange of ideas, constructive feedback, and internal debate . . . that sits at the heart of the deliberative process privilege." *Reporters Comm.*, 3 F.4th at 364. Here, the withheld portions of the emails document the "back-and-forth exchange of ideas" and deliberations on research into resources on voting rights, including what resources to rely upon in formulating the Strategic Plan and comments on the research intended to help reach consensus about potential options for future actions. Ex. C ¶ 26. The emails also "contain recommendations relevant to other components within DOJ." *Id.* The withheld portions of these emails are predecisional because they occurred months before the Strategic Plan was submitted and involve collaboration on what to include in the formulation of that Plan and because they do not reflect any final decision on the matters being discussed in the email chain. *See id.* ¶ 27. The withheld portions of the emails are deliberative because they "share and assess potentially relevant research and resources, present and consider ideas, issue-spot, and offer preliminary thoughts, concerns and alternatives in the context of [DOJ's] planning with respect to [implementation of EO 14019]." *Id.* ¶ 28. Any release of the withheld portions of these emails would damage the quality of future agency decision-making, particularly in the sensitive area of voting rights, by making DOJ employees "much more cautious" in their sharing of candid ideas with each other prior to arriving at a decision. *Id.* ¶¶ 31-32. Such a disclosure would also foster public confusion by

"inaccurately suggest[ing] that these non-finalized discussions and thoughts, which [we]re still undergoing internal review, debate, and editing, actually reflect the government's final positions or that the government relied on this information in formulating final decisions." *Id.* ¶ 33. DOJ therefore appropriately withheld the contested portions of the emails under Exemption 5.

iii. Agency employee notes on take-aways to inform internal deliberations

DOJ properly withheld the substantive portions of a DOJ employee's notes from a listening session on voting rights, where the notes were designed to inform Executive Branch deliberations on compliance with EO 14019. *See* Ex. A ¶ 41; Ex. B at 9-10 (entries 53 & 71). Exemption 5 protects material that represents "the selection or organization of facts [as] part of an agency's deliberative process," which occurs where, for example, facts are culled from a larger universe of facts and the culling of those facts "reflect[s] an exercise of judgment as to what issues are most relevant" to the agency's decisionmaking process. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (citation omitted); *see also Elec. Priv. Info. Ctr. v. Dep't of Just.*, 320 F. Supp. 3d 110, 119 (D.D.C. 2018) (holding that "the selection or organization of facts can be part of an agency's deliberative process and so exempt from FOIA," particularly where that selection was "prepared to influence the [agency's] decisions") (citation omitted). Here, the DOJ employee who took the notes, Ms. Carrie Pagnucco, was assigned to oversee DOJ's strategic planning process under EO 14019 with respect to CRT and to work with leadership offices in developing

DOJ's Strategic Plan. Ex. A ¶ 41. Ms. Pagnucco was the only DOJ attendee at the listening session, which was organized by the Domestic Policy Counsel and involved presentations by voting rights stakeholders. *Id.* Ms. Pagnucco's role at the meeting was to gather information that might be relevant to DOJ's efforts to implement EO 14019 in order to share that information with DOJ colleagues, including those in CRT's Front Office, the Office of the Associate Attorney General, and the Office of the Deputy Attorney General. *Id.* The substantive portion of her notes, therefore, represents her "selective memorialization of aspects [of the listening session] she considered important" to DOJ's ongoing deliberations regarding implementation of EO 14019. *Id.* These notes are predecisional because they were "prepared to influence the [agency's] decisions" regarding implementation of EO 14019, *Elec. Priv. Info. Ctr.*, 320 F. Supp. at 119 (citation omitted), and deliberative because the very "selection . . . of facts" reflected in the notes "reflect[s] an exercise of judgment as to what issues [we]re most relevant" to the agency's then-ongoing decisionmaking process. *Ancient Coin Collectors Guild*, 641 F.3d at 513; *see* Ex. A ¶ 41. Disclosure of the substantive portion of these notes would create foreseeable harm by undermining the willingness of DOJ employees to take substantive notes at future listening sessions, particularly at sessions involving voting rights issues, given the often sensitive nature of that topic. Ex. A ¶ 41. Any impediment to such note-taking would, in turn, "severely undermine the quality of agency decision-making, since it would be less benefitted by the input from . . . stakeholders at listening sessions." *Id.* The withholdings are therefore appropriate under Exemption 5.

iv. Meeting agenda

DOJ properly withheld an agenda for a consultation meeting on Native American voting rights, with embedded talking points. *See* Ex. A ¶ 42; Ex. B at 20-21 (entry 132). Courts have recognized meeting agendas as covered by the deliberative process privilege. For example, one district court recently determined that "[a] meeting agenda prepared before the meeting is necessarily predecisional and inherently deliberative in that staff are suggesting the topics to be discussed at the meeting." *Ctr. for Pub. Integrity v. Fed. Election Comm'n*, 332 F. Supp. 3d 174, 180 (D.D.C. 2018). Circuit courts have recognized that the context of a meeting agenda also informs whether it is properly exempt from disclosure under the deliberative process privilege. *See Rein v. U.S. Pat. & Trademark Off.*, 553 F.3d 353, 375 (4th Cir. 2009) (recognizing as exempt from disclosure under the deliberative process privilege "meeting agenda topics" because, in "the context of the document as part of the agency's overall decision-making process," disclosure of that factual information "would reveal the very predecisional and deliberative material Exemption 5 protects") (citation omitted); *Mo. Coal. for Env't Found. v. U.S. Army Corps of Engr's*, 542 F.3d 1204, 1211 (8th Cir. 2008) (holding that "agendas and meeting minutes . . . could reveal the deliberative process of" the entity holding the meetings and could therefore be exempt from disclosure under FOIA Exemption 5). Here, the withheld meeting agenda pre-dates the meeting, describes topics to potentially be discussed at the meeting, and includes embedded talking points and options for participants that were not necessarily implemented at the meeting. Ex. A ¶ 42. Disclosure of the meeting agenda would

reveal what information White House staff were *considering* seeking in their consultation with Native American leaders—information which was intended, in turn, to inform the deliberations of federal agencies in attendance of the meeting on how to implement EO 14019. *See id.* Thus, in context, the meeting agenda is predecisional and deliberative, and its disclosure would chill the development of future proposed meeting agendas and memorialization of suggested talking points between the White House and federal agencies in advance of meetings with stakeholders, particularly for meetings involving sensitive topics, such as voting rights issues. *See id.* For these reasons, DOJ properly withheld the meeting agenda under Exemption 5.

v. DOJ's Strategic Plan

As discussed above, DOJ properly withheld in full DOJ's Strategic Plan, which was solicited by and sent to the White House, based on the presidential communications privilege. It was alternatively appropriate for DOJ to withhold the Strategic Plan based on the deliberative process privilege. Ex. C ¶ 23.

DOJ's Strategic Plan, as sent to the White House, is predecisional because it was "prepared in order to assist . . . agency decisionmaker[s] in arriving at [their] decision[s]" regarding implementation of EO 14019. *Renegotiation Bd.*, 421 U.S. at 184. For example, the Strategic Plan includes "proposed plans for non-enforcement policy actions by various components within DOJ," "deliberations as to possibilities for future plans of action, based on ongoing research and considerations within DOJ," information regarding "ongoing deliberations with other agencies" about how DOJ

could be of assistance to those agencies, and "anticipated timelines for completion of specific initiatives." Ex. C ¶ 24. DOJ's Strategic Plan is deliberative because "it reflects the ongoing consultative process that was occurring both within the Department and between the Department and the White House." *Id.* In other words, the Plan was "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters" upon which the agency was still deliberating. *Miccosukee Tribe*, 516 F.3d at 1263 (citation omitted).

Disclosure of the Strategic Plan would cause foreseeable harm. The potential for public confusion is high because the Strategic Plan "contains goals and contemplated future actions that *may* be taken by DOJ pursuant to the Executive Order," but release of the Plan or portions thereof could cause "these propositions to be inaccurately construed by the public as future commitments, past actions, or provisions already in place." Ex. C ¶ 33. Disclosure would also cause a significant chilling effect on agency employees' willingness to be candid about potential policy decisions in correspondence with the White House in the future, thus undermining "the integrity of the decision-making process itself," both at DOJ and within the White House. *Russell*, 682 F.2d at 1048; *see* Ex. C ¶¶ 30-33. The chilling effect would be particularly strong in the context of voting access issues, which are especially controversial. *See* Ex. C ¶¶ 31-32. DOJ therefore properly withheld the Strategic Plan under the deliberative process privilege prong of FOIA Exemption 5.

vi. DOJ properly segregated and released non-exempt information.

Consistent with its obligations under the FOIA, DOJ released all reasonably segregable, non-exempt information to FGA for the documents over which it asserted only the deliberative process privilege. Ex. A ¶ 43; Ex. C ¶ 34; *see In re Sealed Case*, 121 F.3d at 745 (noting that the presidential communications privilege "applies to documents in their *entirety*") (emphasis added). The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Accordingly, "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). "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). Further, a court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. U.S. Dep't of Just.*, 518 F.3d 54, 61 (D.C. Cir. 2008) (citation omitted).

Here, DOJ released all information in responsive documents that was not directly protected by the deliberative process or presidential communications privileges after multiple attorneys conducted careful, line-by-line review. Ex. A ¶ 43; Ex. C ¶ 34. DOJ is therefore entitled to the "presumption that [it] complied with the obligation to disclose reasonably segregable material." *Sussman*, 494 F.3d at 1117.

CONCLUSION

For the foregoing reasons, this Court should uphold the adequacy of CRT's search, uphold DOJ's assertion of Exemption 5 over the challenged withholdings and grant DOJ's motion for summary judgment.

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CERTIFICATE OF SERVICE

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