IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR PUBLIC INTEGRITY, Plaintiff, v. U.S. DEPARTMENT OF DEFENSE, and OFFICE OF MANAGEMENT AND BUDGET, Defendants.	Civil Action No. 1:19-cv-03265 (CKK)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, Defendants the U.S. Department of Defense and the Office of Management and Budget hereby move the Court to enter summary judgment in their favor. Attached in support of this motion are: a memorandum of points and authorities; a statement of material facts as to which there is no genuine issue; the Declaration of David V. Trulio; the Declaration of Colonel Henry Dolberry, Jr. and exhibits thereto, including Defendants' *Vaughn* Index; the Declaration of Heather V. Walsh and exhibits thereto, including Defendants' *Vaughn* Index; and a proposed order.

Dated: January 31, 2020

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Center for Public Integrity challenges the decisions of Defendants the U.S. Department of Defense ("DoD") and the Office of Management and Budget ("OMB") to withhold information pursuant to statutory exemptions under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. Plaintiff submitted FOIA requests seeking communications both within DoD and between DoD and OMB about the Ukraine Security Assistance Initiative ("USAI"). Pursuant to this Court's Order issued November 25, 2019, ECF No. 16, Defendants produced all responsive, non-exempt information in an interim production on December 12, 2019, and a final production on December 20, 2019. Accordingly, Defendants are now entitled to summary judgment because they have fully complied with their obligations under FOIA. Defendants conducted a reasonable search for responsive records and appropriately withheld from production only information logically or plausibly subject to one or more of the following FOIA exemptions: (1) information properly deemed classified (Exemption 1); (2) information prohibited from disclosure by another statute (Exemption 3); (3) information protected by one or more legal privileges (Exemption 5); or (4) information protected from disclosure to preserve the personal privacy interests of individual employees at the defendant agencies (Exemption 6). Defendants thus have produced all reasonably segregable, non-exempt information that is responsive to Plaintiff's FOIA requests. Accordingly, Defendants now respectfully move for summary judgment on all claims. Fed. R. Civ. P. 56(a); L.Cv.R. 7(h).

BACKGROUND

I. OMB's Apportionment Function

OMB "is an office in the Executive Office of the President," 31 U.S.C. § 501, and generally assists the President in carrying out his constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, Sec. 3; Declaration of Heather V. Walsh ("Walsh

Decl.") ¶ 19. One way in which OMB carries out this general function is by ensuring that Federal agencies spend appropriated funds in an efficient and effective manner that is consistent with the purpose for which the funds were appropriated. Walsh Decl. ¶ 19. Congressional appropriations specify the purpose, time period, and amount of funding authorized. *Id.* Congress has authorized OMB to apportion funds appropriated for a definite period to ensure that they last for the entirety of the period for which they were apportioned by Congress, and to apportion funds appropriated for an indefinite period "to achieve the most effective and economical use." 31 U.S.C. §§ 1512, 1513; Walsh Decl. ¶ 19. This authority allows OMB to apportion funds for any time period or purpose authorized by the appropriation. 31 U.S.C. § 1512; Walsh Decl. ¶ 19.

In carrying out its apportionment function, OMB relies upon close collaboration with the relevant Federal agencies. Walsh Decl. ¶ 20. The decisionmaking process with respect to apportionments requires extensive back-and-forth discussion with agencies to gather information, evaluate and analyze data, and develop policy recommendations. Walsh Decl. ¶ 25. During this process, OMB routinely relies upon expertise at the agencies for detailed information about their respective programs and operations. Walsh Decl. ¶¶ 20-26. Ultimately, OMB staff use the information and recommendations gathered from the agencies during this process to make recommendations to the President concerning apportionments. Walsh Decl. ¶¶ 20-26.

Beginning around mid-June and continuing over the course of the summer of 2019, OMB engaged in precisely this collaborative process with DoD over the apportionment of approximately $214 million in DoD appropriations authorized for the USAI during fiscal year 2019. Walsh Decl. ¶ 21. The funds were authorized "to provide assistance, including training; equipment; lethal assistance; logistics support, supplies and services; sustainment; and intelligence support to the military and national security forces of Ukraine." *See* Department of

Defense Appropriations Act, 2019, Pub. L. No. 115-245, div. A, title IX, § 9013, 132 Stat. 2981, 3044 (Sept. 28, 2018). OMB officials, including Associate Director for National Security Programs Michael Duffey, engaged in an ongoing dialogue with officials at DoD, particularly DoD Acting Comptroller Elaine McCusker, to gather information and analysis with respect to the USAI for the purpose of providing advice and recommendations to the President concerning the apportionment of USAI funds. Walsh Decl. ¶ 21. These discussions between OMB and DoD informed a series of decisions made over the course of the summer about the apportionment of USAI funds. Walsh Decl. ¶¶ 17-26. Specifically, on July 25, 2019, OMB placed a footnote in the apportionment for the account that includes the USAI funds that stated:

> Amounts apportioned, but not yet obligated as of the date of this reapportionment, for the Ukraine Security Assistance Initiative (Initiative) are not available for obligation until August 5, 2019, to allow for an interagency process to determine the best use of such funds. Based on OMB's communication with DoD on July 25, 2019, OMB understands from the Department that this brief pause in obligations will not preclude DOD's timely execution of the final policy direction. DOD may continue its planning and casework for the Initiative during this period.

Walsh Decl. ¶ 22; *Vaughn* Index Document Number ("Doc. No.") 3. In a series of decisions, OMB issued apportionment footnotes extending this pause in the availability of appropriated funds for obligation (often referred to alternatively as a "hold") for a limited period of time. Walsh Decl. ¶ 23; *Vaughn* Index Doc. Nos. 1-5. OMB issued these apportionment footnotes, or variations on them, on August 6, 15, 20, 27, and 31; and on September 5, 6, and 10, 2019. *Id.* OMB removed the footnote to the apportionment for USAI funds on September 12, 2019, thereby lifting the pause on the availability of USAI funds for obligation. Walsh Decl. ¶ 23; *Vaughn* Index Doc. No. 4.

II. Plaintiff's FOIA Requests

This case concerns substantially similar and overlapping FOIA requests submitted by Plaintiff to DoD and OMB for communications about the USAI. Dolberry Decl. ¶ 3 & Exhibit 1; Walsh Decl. ¶ 5 & Exhibit 1.

On September 25, 2019, Plaintiff submitted a FOIA request to DoD seeking records of communications between the DoD Comptroller's office and OMB concerning USAI. Dolberry Decl. ¶ 3 & Exhibit 1. Specifically, the request seeks:

> All records reflecting any communication between Defense Department acting comptroller Elaine McCusker or other officials within the comptroller's office and employees or officials of the Office of Management and Budget concerning the Ukraine Security Assistance Initiative . . . dated between April 2019 and the date you process this request . . . **These should include any and all communications pertinent to apportionment requests related to the funds for this initiative during this period.**

Dolberry Decl. ¶ 3 & Exhibit 1 at 1 (emphasis in original). Additionally, the request seeks internal DoD communications, specifically asking for similar "records reflecting communication between Defense Department acting comptroller Elaine McCusker or other officials within the comptroller's office and Secretary of Defense Mark Esper or Deputy Secretary of Defense David Norquist." Dolberry Decl. ¶ 3 & Exhibit 1 at 1. On September 27, 2019, DoD sent a letter acknowledging receipt and denying expedited processing of Plaintiff's FOIA request. Dolberry Decl. ¶ 4 & Exhibit 2.

Meanwhile, on September 30, 2019, Plaintiff submitted a mirror-image FOIA request to OMB seeking the same communications between the DoD comptroller's office and OMB concerning USAI for the same time period. Walsh Decl. ¶ 5 & Exhibit 1 at 1. Specifically, the request to OMB seeks:

> [A]ll records reflecting any communication between officials and employees of the [Office of Management and Budget] and the office of Defense Department acting comptroller Elaine McCusker or other officials within the comptroller's

> [office] concerning the Ukraine Security Assistance Initiative . . . dated between April 2019 and the date [you process] this request . . . [**These] should include any and all communications pertinent to apportionment requests related to the funds for this initiative during this period.**

Id. (emphasis in original). The following day, October 1, 2019, OMB acknowledged receipt of Plaintiff's FOIA request. Walsh Decl. ¶ 6 & Exhibit 2.

III. Plaintiff's Motion for Preliminary Injunction

On October 30, 2019, Plaintiff filed its Complaint for Declaratory and Injunctive Relief, initiating this proceeding. ECF No. 1. On October 31, 2019, just one day after filing the complaint, Plaintiff filed a motion for preliminary injunction, seeking an order that would require DoD and OMB to process Plaintiff's FOIA requests and produce all non-exempt, responsive portions of records responsive to Plaintiff's FOIA requests by December 12, 2019. *See* Pl. Mot. for a Prelim. Inj., ECF No. 4 ("Pl. Mot."); Mem. in Supp. of Pl.'s Mot. for a Prelim. Inj., ECF No. 4 ("Pl. Mem."); Proposed Order, ECF No. 4-1 ("Pl. Proposed Order"). Defendants filed their response opposing the motion on November 12, 2019. *See* Defs.' Opp'n to Pl.'s Mot. for a Prelim. Inj., ECF No. 10 ("Def. Opp. to PI").

At the time that the parties were litigating Plaintiff's preliminary injunction motion, DoD already had completed its search and was in the process of reviewing search results. Def. Opp. to PI at 6; Dolberry Decl. ¶¶ 5, 6. Indeed, on October 3, 2019, the DoD General Counsel had issued a memorandum requesting cooperation from DoD components in identifying, preserving, and collecting documents and other records regarding the USAI and in responding to anticipated requests for such materials. Dolberry Decl. ¶¶ 5, 6; Def. Opp. to PI at 6. Accordingly, DoD had compiled a set of records from relevant custodians, from which focused searches could be conducted. Dolberry Decl. ¶¶ 5, 6; Def. Opp. to PI at 6. That set included the two DoD offices from which Plaintiff requested records. Dolberry Decl. ¶¶ 5, 6; Def. Opp. to PI at 6.

OMB similarly collected documents from an electronic search in October 2019, that was designed to ensure the broadest collection of records potentially responsive to the myriad Ukraine-related FOIA requests submitted to OMB. Walsh Decl. ¶ 11. However, because DoD was so much farther along in processing and because Plaintiff's request to OMB sought the same information Plaintiff requested from DoD, Defendants jointly determined to rely upon a single search conducted by DoD. Def. Opp. to PI at 10 ("Because the FOIA requests seek communications between DoD and OMB, DoD's responsive records will be the same as OMB's. . . . Given this fact, OMB proposes to rely upon DoD's search . . . rather than divert OMB's limited resources to a redundant search and review of its records for the same communications."). *See also, e.g.*, Declaration of Heather V. Walsh, ECF No. 10-2 (Nov. 12, 2019), *attached to* Def. Opp. to PI, ¶¶ 22-26. Accordingly, OMB proposed "having the Department of Defense continue expeditiously processing the records in its possession and allowing the Department to fulfill Plaintiff's overlapping FOIA requests on behalf of both agencies." *Id.* ¶ 24. Acknowledging the "possibility that this approach could result in a slightly over-inclusive or under-inclusive production that would only be revealed through separate searches by each agency," OMB nonetheless concluded that "the likelihood of such disparity is remote." *Id.* ¶ 25.

On November 19, 2019, the parties filed a Joint Status Report, ECF No. 12, in response to the Court's Minute Order (November 15, 2019) seeking additional information to assist the Court in determining "a reasonable timeline for processing the responsive documents, exclusive of duplicates, and releasing the non-exempt information." In that Joint Status Report, Defendants reiterated that OMB would be relying upon DoD's search in order to complete production by December 20, as Defendants proposed in that filing. Joint Status Report ¶ 3, ECF No. 12

(November 19, 2019) ("As stated in the Declaration of Heather Walsh (ECF No. 10-2), Defendant Office of Management and Budget ("OMB") proposes to rely upon the search conducted by Defendant Department of Defense ("DoD"), *rather than conduct a separate and duplicative search*. This approach will allow OMB to focus more efficiently upon reviewing a single set of documents.") (emphasis added). That same day, the Court held a teleconference to discuss scheduling relating to the processing and release of non-exempt, responsive documents. After that call, the Court issued a Minute Order requiring the parties to "to file a notice by noon on November 22, 2019, updating the Court as to the number of documents responsive to Plaintiff's FOIA requests, exclusive of duplicates." Pursuant to the Court's order, Defendants filed a Notice on November 22, 2019, informing the Court and Plaintiff that "the Department of Defense ('DoD') has reduced the number of documents to be processed to approximately 211 pages." Notice 2, ECF No. 13.

On November 25, 2019, the Court issued a Memorandum Opinion, ECF No. 17, and Order, ECF No. 16, granting the preliminary injunction and requiring Defendants to process half the 211 pages of responsive search results and produce responsive, non-exempt portions of those pages by December 12, 2019. Order, ECF No. 16. The Court further ordered that Defendant process the remaining half of the pages of search results and produce any non-exempt, responsive information by December 20, 2019. *Id.*

IV. Defendants' Production

After engaging in consultative review of the responsive search results, Defendants jointly made an interim production of 146 responsive pages on December 12, 2019, followed by a final production of the remaining 146 responsive pages on December 20, 2019. Dolberry Decl. ¶ 7; Walsh Decl. ¶ 8. Along with the final production on December 20, Defendants also re-released

15 pages from the interim production after determining to release additional information from those records. *Id.* Although Defendants initially had estimated that the total production would be approximately 211 pages, the actual production consisted of 292 pages. Dolberry Decl. ¶ 7; Walsh Decl. ¶ 8.

The day after Defendants' interim production, Plaintiffs filed a Motion to Enforce Preliminary Injunction, ECF No. 19, in which they argued that Defendants' interim production failed to comply with the Preliminary Injunction Order by improperly withholding information not subject to any statutory exemption. In an Order, ECF No. 20, issued that same day, December 13, 2019, the Court denied Plaintiff's Motion, finding that the Preliminary Injunction Order "required the production of only non-exempt information" and that "Defendants have complied with the Court's Order." The Court went on to "recognize[] that the issue of disputed exemptions will have to be litigated" and thus ordered the parties to submit a proposed schedule for submitting the *Vaughn* Index and conducting summary judgment briefing or cross-briefing. *Id*. The parties filed their respective proposals in a Joint Status Report on December 17, 2019, ECF No. 21, and the Court issued the current briefing schedule, Minute Order (Dec. 18, 2019).

On January 22, 2020, the parties conferred about narrowing of the matters at issue on summary judgment. Plaintiff indicated on January 23 that Plaintiff does not object to the Exemption 6 redactions of email addresses, phone numbers, and other similar contact information where the name of the person appears in the produced documents.

Concurrent with this filing, Defendants are releasing additional information from two pages previously produced to Plaintiff in the final production on December 20, 2019. Walsh Decl. ¶ 8. Defendants are making this additional release to be consistent with information already released on duplicate pages on December 20, 2019. *Id.*

In accordance with the Court's Order, Defendants now file this Motion for Summary Judgment, along with the *Vaughn* Index and supporting declarations, as well as a statement of material facts as to which there is no genuine issue. Fed. R. Civ. P. 56(a); L.Cv.R. 7(h).

LEGAL STANDARD

Summary judgment is appropriate whenever the moving party demonstrates 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). "When the court is presented with cross-motions for summary judgment, it analyzes the underlying facts and inferences in each party's motion in the light most favorable to the non-moving party." *James Madison Project v. CIA*, 344 F. Supp. 3d 380, 386 (D.D.C. 2018). However, "[a] dispute is 'genuine' only if a reasonable fact-finder could find for the non-moving party; a fact is 'material' only if it is capable of affecting the outcome of the litigation." *Id.*

Most FOIA cases are appropriately resolved on motions for summary judgment. *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011) (observing that "the vast majority of FOIA cases can be resolved on summary judgment."). To be entitled to summary judgment, "[t]he defendant in a FOIA case must show that its search for responsive records was adequate, that any exemptions claimed actually apply, and that any reasonably segregable non-exempt parts of records have been disclosed after redaction of exempt information." *Light v. Dep't of Justice*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013). Defendants bear the burden of justifying the withholding of material responsive to Plaintiff's request, and this Court reviews Defendants' response to that request *de novo*. *See* 5 U.S.C. § 552(a)(4)(B). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible" to the court. *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 941 (D.C. Cir. 2013) (per curiam) (citation omitted).

The Court may award summary judgment in a FOIA action solely on the basis of information provided by the agency through declarations that describe "the documents and the justifications for nondisclosure with reasonably specific detail," that "demonstrate that the information withheld logically falls within the claimed exemption[s]," and that are "not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey,* 656 F.2d 724, 738 (D.C. Cir. 1981) (footnote omitted).

ARGUMENT

Defendants are entitled to summary judgment because they have conducted an adequate search for responsive records and produced all non-exempt, records or portions of records responsive to Plaintiff's FOIA requests. Defendants appropriately withheld information logically or plausibly subject to one or more exemptions under the FOIA based upon the fact that such information is: (1) properly deemed classified (Exemption 1); (2) prohibited from disclosure by another statute (Exemption 3); (3) privileged (Exemption 5); or (4) protected from disclosure to preserve the personal privacy interests of individual employees at the defendant agencies (Exemption 6). Finally, Defendants carefully reviewed the responsive documents and have produced any reasonably segregable, non-exempt parts of those documents after redaction of the exempt information. Accordingly, Defendants are entitled to summary judgment on all claims. Fed. R. Civ. P. 56(a); L.Cv.R. 7(h).

I. DEFENDANTS CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS

An agency is entitled to summary judgment in a FOIA case with respect to the adequacy of its search if the agency shows "that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army,* 920 F.2d 57, 68 (D.C. Cir. 1990), *superseded by statute on other grounds by* Electronic FOIA Amendments Act of 1996, Pub. L. No. 104-231,

110 Stat. 3048 (Oct. 2, 1996). "The adequacy of an agency's search for records in response to a FOIA request is measured by a standard of reasonableness and depends on the individual circumstances of each case." *Agolli v. Office of Inspector Gen., U.S. Dep't of Justice*, 125 F. Supp. 3d 274, 282 (D.D.C. 2015) (Kollar-Kotelly, J.), *aff'd*, No. 15-5273, 2016 WL 6238495 (D.C. Cir. Sept. 22, 2016). "[T]he 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*." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). An agency can establish the reasonableness of its search by "reasonably detailed, nonconclusory affidavits describing its efforts." *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). "Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

Applying these principles, Defendants have conducted an adequate search for responsive records. At the time that the parties were litigating Plaintiff's motion for a preliminary injunction, DoD had already begun processing documents potentially responsive to Plaintiff's requests. Dolberry Decl. ¶¶ 5, 6; Def. Opp. to PI at 6. In a memorandum dated October 3, 2019, the DoD General Counsel requested cooperation from DoD components in identifying, preserving, and collecting documents and other records regarding the USAI in anticipation of requests for such materials. Dolberry Decl. ¶ 5; Def. Opp. to PI at 6. The DoD Office of Information Counsel ("OIC"), the component of DoD's Office of General Counsel that oversees FOIA operations, identified relevant custodians in each pertinent office and requested that the information technology specialists conduct a search of the email folders and folders of electronically stored information on the custodians' individual drives at all classification levels.

Dolberry Decl. ¶ 5. The search terms used for this initial collection were: ""USAI" OR (("Ukraine" or "Ukrainian") AND ("security" OR "1250" OR ("FMF" OR "Foreign Military Financing") OR "impound" OR "obligation"))." Dolberry Decl. ¶ 5. The timeframe for the search was between May 1, 2019, and September 30, 2019. Dolberry Decl. ¶ 5. The resulting set of records was placed into e-discovery software. Dolberry Decl. ¶ 5. To respond to Plaintiff's FOIA requests, this set of records was searched for any electronic communications between the Acting Comptroller Ms. Elaine McCusker and any members in her Office and 1) the Secretary of Defense, the Deputy Secretary of Defense, and members of their immediate senior staff, and 2) all electronic communications between Ms. McCusker or her members of her staff with individuals whose email addresses exhibited the email domain used by personnel at OMB. Dolberry Decl. ¶ 6.

OMB had initiated a search of its files in October 2019, using broad search parameters intended to capture all records potentially responsive to the multiple Ukraine-related FOIA requests OMB had received. Def. Opp. to PI at 8; Walsh Decl. ¶ 11. But given the extremely short amount of time Plaintiff was demanding for a final response to its request, the overlap between the requests sent to DoD and OMB, and DoD's being further along in its processing, OMB determined that it made much more sense for DoD to continue expeditiously processing the communications between DoD and OMB in its possession and have DoD fulfill Plaintiff's overlapping FOIA requests on behalf of both agencies. As OMB explained to the Court in making this proposal, allowing OMB to proceed in this manner "will expedite the processing timeline by freeing up OMB's limited resources to focus on reviewing a single set of documents rather than independently collecting and reviewing the same documents twice and duplicating

the consultation process in the reverse direction as the Department [of Defense]." Declaration of Heather V. Walsh ¶ 24, ECF No. 10-2.

OMB's reliance on DoD's search was reasonable, particularly in the circumstances of this case. *Larson v. Dep't of State,* 565 F.3d 857, 869 (D.C. Cir. 2009) (quoting *Meeropol v. Meese,* 790 F.2d 942, 956 (D.C. Cir. 1986)) ("In determining whether the agency has discharged its FOIA responsibilities, the issue [the Court] must resolve is whether the search for documents was adequate, 'and adequacy is measured by the reasonableness of the effort in light of the specific request.'"). As the Court acknowledged on page 6 of its Memorandum Opinion explaining the basis for the preliminary injunction order, "preliminary injunctions are ordinarily not awarded in FOIA cases," adding that "[h]owever, this is not an ordinary FOIA case." Mem. Op. 6, ECF No. 17. The fact that Plaintiff requested from OMB only communications between OMB and DoD made it entirely reasonable for Defendants to conclude that DoD's search for those communications would yield any results which a separate but identical search of OMB's files would be likely to yield. Moreover, Plaintiff's demand for production by December 12 effectively required extraordinary prioritization beyond even "expedited" processing; this exigency made it reasonable for Defendants to place good-faith reliance upon the presumed redundancy between the two agencies' records of their communications. *Oglesby*, 920 F.2d at 68 ("There is no requirement that an agency search every record system.").

Significantly, at no point did Plaintiff object to Defendants' reliance on DoD's search, despite Defendants consistently making clear to Plaintiff and the Court that that was what they intended to do. *See, e.g.*, Declaration of Heather V. Walsh ¶¶ 20-26, ECF No. 10-2; Joint Status Report ¶ 3, ECF No. 12 (November 19, 2019), ("As stated in the Declaration of Heather Walsh (ECF No. 10-2), Defendant Office of Management and Budget ("OMB") proposes to rely upon

the search conducted by Defendant Department of Defense ("DoD"), *rather than conduct a separate and duplicative search*. This approach will allow OMB to focus more efficiently upon reviewing a single set of documents.") (emphasis added); Def. Opp. to PI at 10 ("Because the FOIA requests seek communications between DoD and OMB, DoD's responsive records will be the same as OMB's. . . . Given this fact, OMB proposes to rely upon DoD's search . . . rather than divert OMB's limited resources to a redundant search and review of its records for the same communications."). Given the emergency timeframes, the thoroughness of DoD's search, and the likelihood that a duplicative search at OMB would not identify unique results, Defendants exercised reasonable judgment in determining under the circumstances to rely upon DoD's search. *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 662 (D.C. Cir. 2003) ("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 courts should attempt to micro manage the executive branch.") (quoting *Johnson v. Executive Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002)). As all parties recognized at the time, this compromise made it possible for Defendants to meet Plaintiff's demand for production on an emergency timeframe. And the order to process and produce all responsive records by December 20 was predicated upon Defendants' representations and Defendants' estimate of the volume of responsive records based upon the search of DoD's files. *See* Order (November 25, 2019), ECF No. 16.

Having made a final production of all responsive, non-exempt records or portions of records after conducting a reasonable search, Defendants are not required to go back and perform additional searches to locate any additional records that Plaintiff might speculate exist. *Weisberg*, 745 F.2d at 1485; *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (agency need not demonstrate that all responsive documents were found and that no other relevant documents

could possibly exist). Nor is there any distinction between the agencies' production at the preliminary injunction stage and the summary judgment stage. In granting the preliminary injunction, again based on Defendants' representations about the search, the Court ordered Defendants to produce all non-exempt responsive records by December 20 and did not order additional searches and processing after that deadline. Furthermore, in proposing a summary judgment briefing schedule, Defendants made clear that they would be concentrating their resources post-production on preparing their *Vaughn* index and declarations and summary judgment submission. *See* Joint Status Report 2-3, ECF No. 21.[1]

Defendants have conducted in good faith a search they believe was reasonably calculated to uncover all responsive records. This is all that FOIA requires. Defendants were not required to conduct redundant searches for duplicative records in order to satisfy the standard of reasonableness. Having conducted a search that was "reasonably calculated to uncover all relevant documents," *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983), Defendants are entitled to summary judgment with respect to the adequacy of the search.

II. DEFENDANTS PROPERLY WITHHELD EXEMPT INFORMATION PURSUANT TO WELL-ESTABLISHED FOIA EXEMPTIONS

Although FOIA generally calls for "broad disclosure of Government records," the statute also recognizes that "public disclosure is not always in the public interest and thus provide[s] that agency records may be withheld from disclosure under any of the nine exemptions defined

[1] OMB notes that it recently conducted a search within its general Ukraine-related search results, collected in October 2019, for purposes of producing records in another FOIA case, *American Oversight v. OMB*, No. 19-cv-3213 (JEB) (D.D.C.). Walsh Decl. ¶ 11. For that production, made on January 21, 2020, OMB searched for sent emails of two OMB officials, Deputy/Acting Director Russell Vought and Associate Director for National Security Programs Michael Duffey. Walsh Decl. ¶ 12. In the course of making that production, OMB did not identify any new records responsive to the Plaintiff's request in this case that were not already produced in December 2019. Walsh Decl. ¶ 12. The fact that OMB did not identify any additional responsive records as a result of this search supports the reasonableness of OMB's reliance upon DoD's search of its files in this case, as this demonstrates that a redundant search at OMB would be unlikely to reveal additional responsive records.

in 5 U.S.C. § 552(b)." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). As noted above, Defendants' "justification for invoking a FOIA exemption is sufficient if it appears logical or plausible" to the court. *Judicial Watch*, 715 F.3d at 941 (per curiam) (citation omitted). In their production of responsive records, Defendants properly withheld information pursuant to FOIA Exemptions 1, 3, 5, and 6. Declaration of David V. Trulio ("Trulio Decl.") ¶ 11; Dolberry Decl. ¶¶ 12-26; Walsh Decl. ¶ 13. Defendants are entitled to summary judgment because they have withheld only information which one or more statutory exemptions logically and plausibly protects from disclosure.

A. Defendants Properly Withheld Information Pursuant to FOIA's Exemption 1

Exemption 1 under the FOIA protects from disclosure information that is classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "in fact properly classified pursuant to such Executive order." 5 U.S.C. §552(b)(1). The courts "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [e]ffects might occur as a result of a particular classified record." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009) (quoting *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003)); *Judicial Watch*, 715 F. 3d at 940-41. "If an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise, as is the case here, the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Larson*, 565 F.3d at 865.

As explained in detail in the Trulio Declaration, Defendants have appropriately withheld under Exemption 1 information that has been properly classified in the interest of national security, pursuant to Classified National Security Information, Executive Order ("E.O.") No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). Trulio Decl. ¶ 11. To establish that information has been properly withheld under Exemption 1, an agency must demonstrate that the information meets the four classification requirements set forth in section 1.1(a) of E.O. 13526: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage. Trulio Decl. ¶ 7; E.O. 13526 § 1.1(a). As relevant here, section 1.4(c) permits classification of information pertaining to, reflecting, or constituting "intelligence activities (including covert action), intelligence sources or methods, or cryptology;" 1.4(d) permits classification of information pertaining to "foreign relations or foreign activities of the United States;" and 1.4(g) permits classification of "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security." Trulio Decl. ¶ 7.

In this case, DoD has concluded that the information withheld under Exemption 1 satisfies these classification criteria under E.O. 13526. Trulio Decl. ¶¶ 9-11. Mr. Trulio is authorized to exercise classification authority. Trulio Decl. ¶¶ 1, 8. Mr. Trulio has determined that the information withheld under Exemption 1 is currently and properly classified at the Secret

level, Trulio Decl. ¶¶ 10, 11, and attests that this determination has not been made for an unlawful or inappropriate purpose. Trulio Decl. ¶ 9.

Pursuant to Exemption 1, Defendants have withheld information from three documents. Trulio Decl. ¶ 11; *Vaughn* Index Doc. Nos. 108, 109, & 110. Document Nos. 108 and 109 contain briefing material and talking points produced by the Under Secretary of Defense for Policy to prepare the Secretary of Defense for a meeting to relay DoD's opinions and recommendations on the obligation of the USAI funds, and Document No. 110 is an email communication from the Under Secretary of Defense for Policy to the Secretary of Defense relaying the discussion that occurred at an interagency meeting on July 26 regarding Ukraine and the USAI funding. Trulio Decl. ¶ 11. Portions of all three documents are currently and properly classified at the Secret level pursuant to section 1.4(d) of E.O. 13526, because the information reflects foreign relations or foreign activities of the United States. Trulio Decl. ¶ 11. Specifically, the information withheld details how support to Ukraine might impact global competition and future economic opportunities of the United States, as well as the ramifications of such support on the relative geo-political strengths and weaknesses of both partners and competitors of the United States. Trulio Decl. ¶ 11. Information contained in document 110 also contains information regarding intelligence sources and methods, and is properly withheld pursuant to section 1.4(c) of E.O. 13526. Trulio Decl. ¶ 11.

As explained in the Trulio Declaration, disclosure of this information could reasonably be expected to damage national security interests. Trulio Decl. ¶¶ 12-13. Releasing this information could harm national security in several ways, including by undermining the confidence of allies, which is essential to continued cooperation on matters of mutual interest. *Id.* DoD has thus

determined that avoiding the disclosure of such information is essential to the Government's ability to pursue the geo-political, economic, and national security goals of the United States. *Id.*

The information withheld under Exemption 1 also contains intelligence information, including reference to intelligence sources and methods such as foreign liaison relationships. *Id.* DoD has determined that disclosure of such information could seriously jeopardize its use and diminish its value. *Id.*

Defendants therefore have properly withheld information pursuant to Exemption 1.

B. Defendants Properly Withheld Information Pursuant to FOIA's Exemption 3

Exemption 3 allows for the withholding of information "specifically exempted from disclosure by statute," provided that such statute either "(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). "To invoke Exemption 3, the government 'need only show . . . that the withheld material falls within' a statute meeting the exemption's conditions." *DiBacco v. Dep't of the Army*, 926 F.3d 827, 835 (D.C. Cir. 2019) (quoting *Larson*, 565 F.3d at 865). Here, Defendants relied upon 10 U.S.C. § 130c, which provides that DoD "may withhold from public disclosure otherwise required by law sensitive information of foreign governments in accordance with this section." 10 U.S.C. § 130c(a). Dolberry Decl. ¶¶ 24, 25; *Vaughn* Index Doc. Nos. 8, 19, 26, 39, 80, and 81.

Courts have found that 10 U.S.C. § 130c meets the requirements of Exemption 3. *See Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 404 F. Supp. 2d 325 (D.D.C. 2005) (plaintiff conceded that 10 U.S.C. § 130c satisfies the requirements of Exemption 3), *aff'd on other grounds*, 512 F.3d 677 (D.C. Cir. 2008); *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 554

(S.D.N.Y. 2005) (holding that "the statute does not provide that the promulgation of regulations is a necessary precondition to the statute's effectiveness," and thus rejecting argument that 10 U.S.C. § 130c does not apply on the basis that DoD has not promulgated regulations supporting the Secretary's determination). The statute plainly meets the requirements of 5 U.S.C. § 552(b)(3) by establishing particular criteria for withholding sensitive information of foreign governments. Pursuant to the statute, "information is sensitive information of a foreign government only if the national security official concerned," here the Secretary of Defense according to subsection (h), makes three required determinations with respect to the information, as prescribed in subsection (b). 10 U.S.C. § 130c(b). Specifically, to withhold as sensitive information of foreign governments under 10 U.S.C. §130c, Secretary of Defense must find:

> (1) That the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government or international organization.
>
> (2) That the foreign government or international organization is withholding the information from public disclosure (relying for that determination on the written representation of the foreign government or international organization to that effect).
>
> (3) That any of the following conditions are met:
>
> (A) The foreign government or international organization requests, in writing, that the information be withheld.
>
> (B) The information was provided or made available to the United States Government on the condition that it not be released to the public.
>
> (C) The information is an item of information, or is in a category of information, that the national security official concerned has specified in regulations prescribed under subsection (g) as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future.

Id. Thus, this statute clearly satisfies the requirements of 5 U.S.C. § 552(b)(3). *Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 165 (D.C. Cir. 2012) (because the

withholding statute "plainly sets forth a 'particular type[ ] of matter[ ] to be withheld,' 5 U.S.C. § 552(b)(3)(A)(ii), [the relevant statute] readily qualifies as an Exemption 3 statute."). Although "[t]o qualify as an Exemption 3 statute, a statute enacted after the OPEN FOIA Act of 2009 must also specifically cite to the relevant paragraph of FOIA," 5 U.S.C. § 552(b)(3)(B), "[t]hat requirement is not at issue here because . . . [the statute] was enacted well before 2009." *Id*. at 165. Here, the statute permitting the withholding of sensitive information of foreign governments was adopted in 2000, Pub. L. 106-398, 114 Stat. 1654 (Oct. 30, 2000); thus the statute need not expressly refer to FOIA to qualify as a withholding statute under Exemption 3. Accordingly, there can be no doubt that 10 U.S.C. § 130c meets the requirements of FOIA Exemption 3.

Having clearly established that the statute meets the conditions of Exemption 3, DoD need only show that the information withheld in this case falls within the ambit of 10 U.S.C. § 130c. As the Dolberry Declaration explains, DoD withheld pursuant to Exemption 3 specific, sensitive information about the military equipment that Ukraine needed to fulfill its national security needs, the specification of the equipment, and their associated costs. Dolberry Decl. ¶ 25. This information is based upon extensive cooperation between the United States and Ukraine regarding what military aid best supports the national security interests of both countries. *Id.* Given the sensitivities of the information, which could reveal both Ukraine's capabilities and potential vulnerabilities, the Ukrainian government has informed the United States that Ukraine does not publicize such information and requested, in writing, that such information not be produced under the FOIA. *Id.* The Department has agreed to comply with that request from a foreign government, and accordingly withheld such information pursuant to 10 U.S.C. § 130c. Dolberry Decl. ¶ 25; *Vaughn* Index Doc. Nos. 8, 19, 26, 39, 80, & 81.

Accordingly, Defendants are entitled to summary judgment with respect to the withholding of information pursuant to Exemption 3.

C. Defendants Properly Withheld Information Pursuant to FOIA's Exemption 5

FOIA Exemption 5 generally exempts from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption "encompass[es] the protections traditionally afforded certain documents pursuant to evidentiary privileges in the civil discovery context," including the attorney-client, deliberative process, and presidential communications privileges. *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001) (quoting *Formaldehyde Inst. v. U.S. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989)); *see also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004). Accordingly, Defendants have withheld under Exemption 5 information protected by one or more of these privileges. Dolberry Decl. ¶ 13; Walsh Decl. ¶ 14.

1. Attorney-client privilege

The attorney-client privilege protects "a confidential communication between attorney and client if the communication was made for the purpose of obtaining or providing legal advice." *Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc*., 892 F.3d 1264, 1267 (D.C. Cir. 2018). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). "The privilege covers both (i) those communications in which an attorney gives legal advice; and (ii) those communications in which the client informs the attorney of facts that the attorney needs to understand the problem and provide legal advice." *Boehringer Ingelheim Pharm., Inc*., 892 F.3d at 1267. To invoke the attorney-client privilege, a party must demonstrate that the information it

seeks to withhold: (1) involves "confidential communications between an attorney and his client"; and (2) relates to "a legal matter for which the client has sought professional advice." *Mead Data Ctr., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). A court may infer confidentiality when the communications suggest that "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). The attorney-client privilege reflects the Supreme Court's finding "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Defendants appropriately withheld pursuant to the attorney-client privilege, information in confidential communications involving attorneys in DoD or OMB's Office of General Counsel and relating to legal matters for which DoD or OMB sought legal advice. Dolberry Decl. ¶¶ 13-19; Walsh Decl. ¶¶ 27-29; *Vaughn* Index Doc. Nos. 20, 21, 24, 31, 33, 34, 38, 40, 41, 42, 45, 46, 47, 51, 52, 54, 65, 66, 69, 70, 71, 73, 74, 75, 76, 77, 94, 95, 96 & 98. Over the course of the decisionmaking process, officials at DoD and OMB sought advice and analysis from agency attorneys concerning various legal issues, such as the technical drafting of apportionment footnotes and talking points, as well as the legal implications of extensions of the apportionment footnote pausing the availability of USAI funds for obligation. *Id.* Officials at DoD and OMB also discussed and shared with each other the legal advice that each had received from their respective agency attorneys. Walsh Decl. ¶ 28.

Much of the information withheld under the attorney-client privilege consists of communications from DoD Acting Comptroller Elaine McCusker to DoD General Counsel Paul Ney conveying confidential information and analysis to keep the General Counsel fully informed

so that he could provide sound legal advice and advocacy. *See Boehringer Ingelheim Pharm., Inc.*, 892 F.3d at 1267 (attorney-client privilege covers "those communications in which the client informs the attorney of facts that the attorney needs to understand the problem and provide legal advice."). For example, emails dated September 5, 2019, from Ms. McCusker to Mr. Ney provide a "level of detail," in anticipation of another apportionment footnote from OMB, for the purpose of obtaining informed legal advice, particularly in the context of the ongoing decisionmaking process among senior DoD officials about how to engage with OMB concerning the pause on the availability of USAI funds. Dolberry Decl. ¶¶ 18, 19; Walsh Decl. ¶¶ 28, 29; *Vaughn* Index Doc. Nos. 38, 95, & 96. Similarly, an email dated August 21, 2019, from Ms. McCusker to Mr. Ney and other DoD leaders provides an update on the latest USAI apportionment footnote from OMB; the information withheld from this email reflects confidential communications with the General Counsel that were sent for the express purpose of making sure he was kept "in the loop on the latest" so that he could provide sound legal advice in this situation. Dolberry Decl. ¶¶ 18, 19; *Vaughn* Index Doc. No. 40. These communications also helped inform the requested legal analysis of issues such as the legal implications of the ongoing pause on the availability of USAI funds. Dolberry Decl. ¶ 19; Walsh Decl. ¶¶ 28, 29. Such communications must be protected to avoid a chilling effect on agency personnel's continued provision of necessary information to agency attorneys for the purpose of keeping them fully informed and thus in position to provide sound legal advice and advocacy. Dolberry Decl. ¶¶ 14-19; Walsh Decl. ¶¶ 28, 29.

Defendants also have withheld pursuant to attorney-client privilege, back-and-forth discussions involving agency attorneys concerning a variety of legal questions. As noted above, these communications concerned the legal issues involved in the technical drafting of documents

such as the apportionment footnotes and talking points for responding to inquiries about the apportionment footnotes, determining the duration of the pause on the availability of appropriated USAI funds for obligation, and the potential consequences associated with the pause on the availability of USAI funds for obligation. Dolberry Decl. ¶¶ 13, 16-19; Walsh Decl. ¶¶ 27-29. For instance, Documents 20 and 21 include legal questions about draft talking points and discussion of responsive legal analysis provided by DoD and OMB attorneys. Dolberry Decl. ¶¶ 16, 17. Attorney-client privilege also applies to communications with agency attorneys involving questions and information relevant to the analysis of fiscal law issues with respect to the continuation of the pause on obligation of USAI funds. Dolberry Decl. ¶ 19; Walsh Decl. ¶¶ 28, 29; *Vaughn* Index Doc. Nos. 38, 40, 65, 75, 76, 94, 95, 96, 97, 98, & 111. Disclosure of such legal consultations likewise would undermine the ability of agency officials at OMB and DoD to obtain sound, candid legal advice to inform their decisionmaking.

Defendants also have withheld under attorney-client privilege confidential communications in which agency officials are discussing their understanding of the legal advice provided by attorneys in the OMB and DoD Offices of General Counsel. Walsh Decl. ¶ 28. During the course of the decisionmaking process with respect to the series of apportionment footnotes, officials at OMB and DoD discussed and shared the legal advice that each received from their respective legal offices. Walsh Decl. ¶ 28. Such communications must be protected to avoid disclosing the confidential legal advice of agency attorneys, so that agency officials can continue to receive candid advice from agency attorneys. Walsh Decl. ¶ 29.

Agency officials and attorneys must be able to communicate freely with each other in seeking and conveying legal advice concerning issues like the USAI apportionment. Application of the attorney-client privilege in this context upholds the public purpose of allowing agencies to

obtain sound legal advice through free and candid communication. Defendants thus have properly applied Exemption 5 to withhold information protected by the attorney-client privilege.

2. Deliberative process privilege

The deliberative process privilege is a "long-recognized privilege" intended to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151, 152–53 (1975). The privilege is intended to "encourage the frank discussion of legal and policy issues within the government." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991) (quoting *Wolfe v. U.S. Dep't of Health and Human Servs*., 839 F.2d 768, 773 (D.C. Cir. 1988) (*en banc*)) (internal quotation marks omitted). It also "protects the public from confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon" and ensures the "integrity of the decision-making process" by allowing agency officials to be judged for their final decisions, "not for matters they considered before making up their minds." *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

The deliberative process privilege "protects materials that are both predecisional and deliberative." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). The factors to be considered in finding that a record is predecisional include the decisionmaking authority of the person or office issuing the record, and whether the document has been generated as part of a continuing process of agency decisionmaking. *Bureau of Nat. Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984) ("views submitted by one agency to a second agency that has final decisional authority are predecisional materials exempt from disclosure under FOIA") (citing *Renegotiation Board v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168,

187-88 (1975)). "To establish that a document is predecisional, the agency need not point to an agency final decision, but merely establish what deliberative process is involved, and the role that the documents at issue played in that process." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1223 (D.C. Cir. 1989)). Accordingly, "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-Tr. Action Comm., Inc. v. Bd. of Gov'rs*, 762 F. Supp. 2d 123, 135–36 (D.D.C. 2011) (citation omitted). A deliberative record is one that "reflects the give-and-take of the consultative process." *Coastal States Gas*, 617 F.2d at 866.

The deliberative process privilege typically covers documents such as "drafts, recommendations, proposals, and suggestions that reflect the personal opinions of the author rather than the policy of the agency[.]" *Bloomberg, L.P. v. SEC*, 357 F. Supp. 2d 156, 168 (D.D.C. 2004). Deliberative process privilege covers briefing materials intended to advise and inform senior agency officials. *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196-97 (D.C. Cir. 1991). The privilege does not protect "purely factual . . . material," but it does cover factual material that would disclose "the inner workings of the deliberative process itself" or "is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 13 (D.C. Cir. 2014) (citations and internal quotation marks omitted).

In this case, Defendants properly applied the deliberative process privilege to a total of 81 documents. Walsh Decl. ¶ 16; Doc. Nos. 1, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 28, 30, 31, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 49, 51, 52, 53, 54, 56, 57, 60,

62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 82, 83, 86, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110 & 111. As a threshold matter, all of these documents involve intra- or inter-agency communications. *Id.* In fact, Plaintiff's FOIA requests in this case specifically call for precisely such communications, making it entirely reasonable and foreseeable that a significant percentage of responsive records would contain information protected by the deliberative process privilege. *See, e.g.,* Def. Opp. to PI at 18 (anticipating that a large number of responsive records would contain communications protected by the deliberative process privilege). Many of these documents are emails exchanged between DoD and OMB officials, including DoD Acting Comptroller Elaine McCusker and OMB Principal Associate Director for National Security Programs Michael Duffey, as part of OMB's decisionmaking process in issuing a series of apportionment footnotes making USAI funds unavailable for obligation. Walsh Decl. ¶¶ 17-26. As explained above, OMB's process for gathering relevant information, making decisions, and providing advice and recommendations concerning such apportionments relies heavily upon ongoing and extensive consultation with the subject Federal agency, as it did here. Walsh Decl. ¶¶ 15-26. In general, Defendants have applied the deliberative process privilege to withhold discussions forming part of the creative review and development of draft documents; internal DoD discussions providing advice and recommendations to senior agency officials about various issues involving these decisions; strategic discussions about how to respond to inquiries from Congress and others; and discussions back and forth between DoD and OMB meant to inform the series of decisions involving the apportionment of funds appropriated for USAI. Dolberry Decl. ¶¶ 13-23; Walsh Decl. ¶¶ 15-26.

More specifically, Defendants have appropriately withheld under the deliberative process privilege internal DoD discussions in which DoD Acting Comptroller McCusker shares with senior DoD officials her analysis and recommendations concerning the timing required and logistical next steps needed to obligate the USAI funds by the end of the fiscal year on September 30, 2019. Dolberry Decl. ¶ 14. Such discussions are properly withheld under Exemption 5 because they reflect recommendations and advice being sent up to senior DoD officials as part of an ongoing deliberation within DoD about the agency's strategy for engaging with OMB concerning the series of apportionment footnotes issued by OMB to pause the availability of appropriated USAI funds for obligation. *Access Reports*, 926 F.2d at 1196-97 (memo properly withheld under Exemption 5 because it contributed to the decisionmaking process concerning "how to shepherd the FOIA bill through Congress"); *Worldnetdaily.com, Inc. v. U.S. Dep't of Justice*, 215 F. Supp. 3d 81 (D.D.C. 2016) (memo from AUSAs to supervisors conveying recommendation not to prosecute properly withheld under Exemption 5). These internal DoD discussions include advice and recommendations on whether and when to send a particular letter to OMB. Dolberry Decl. ¶ 14; *Vaughn* Index Doc. Nos. 6, 33, 34, 35, 36, 46, and 69. Draft versions of the letter, which was never signed, were also withheld under the deliberative process privilege. Dolberry Decl. ¶ 14; *Vaughn* Index Doc. Nos. 36 and 49. The D.C. Circuit has long recognized that the deliberative process privilege under Exemption 5 protects this type of creative discussion involved in developing such draft documents. *See, e.g., Russell*, 682 F. 2d at 1048 (recognizing the need for "creative debate and candid consideration of the alternatives," and finding that "[f]ailure to apply the protections of Exemption (b)(5) to the [agency's] editorial review process would effectively make such discussion impossible."); *Elec. Privacy Info. Cntr. v. DHS*, 928 F. Supp. 2d 139, 151-52 (D.D.C. 2013); *ViroPharma Inc. v.*

HHS, 839 F. Supp. 2d 184, 193 (D.D.C. 2012). To determine how to communicate with other Federal agencies in order to most effectively represent DoD's interests, senior DoD officials must be able to rely upon frank and candid internal advice, the release of which could chill DoD personnel from providing such advice in future deliberations. Dolberry Decl. ¶ 14.

Defendants have withheld information from document number 81 that reflects a DoD employee's analysis and estimated calculations with respect to the form and value of military support provided to Ukraine from other NATO countries. Dolberry Decl. ¶ 23. The release of the estimations calculated by a DoD employee, which were not confirmed by the foreign nations, could confuse the public by appearing to be established facts. *Id.*

Defendants also have withheld discussions involving the review of draft apportionment footnotes exchanged between agencies. *See, e.g.*, Walsh Decl. ¶ 16; *Vaughn* Index Doc. Nos. 9 & 30. Disclosing such information not only risks confusing the public about the agency's actual final decisions, but also could have a chilling effect on such discussions in the future if agency officials apprehend that their review of drafts in development will be exposed to public scrutiny. Walsh Decl. ¶¶ 24-26.

The deliberative process privilege also covers deliberative exchanges and talking points regarding how to respond to inquiries from the public, the press, or Congress because "[r]evealing their contents would expose the process by which agency officials crafted a strategy for responding to the press and to Congress." *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 320 F. Supp. 3d 162, 177 (D.D.C. 2018) (explaining that "these sorts of documents reflect deliberation about the decision of how to respond to the press—or, as relevant in this case, to members of Congress."). Defendants have properly withheld under the deliberative process privilege information reflecting advice and recommendations about how to respond to requests

for information from Congress or the media, including the development of talking points. Dolberry Decl. ¶ 15; Walsh Decl. ¶¶ 15-26; *Vaughn* Index Doc. Nos. 1, 6, 17, 20, 21, 28, 47, 62, 71, 95, 108, and 109. These discussions are predecisional because they involve the development of agency strategy regarding such responses and contain advice meant to inform the decisionmaking process. *Id.* These discussions are also deliberative because they involve the provision of advice and recommendations to decisionmakers. *Id.* Withholding of this information is essential to ensure that agency employees can continue to engage in the honest and free exchange of such analysis and recommendations, and to avoid public confusion regarding the agency's official position. Dolberry Decl. ¶ 15; Walsh Decl. ¶¶ 15-26. Accordingly, this information reflecting internal deliberations about how to respond to congressional and other inquiries has been properly withheld under the deliberative process privilege.

In addition, Defendants properly withheld under the deliberative process privilege discussions regarding the effects of continuing the pause on the availability of USAI funds for obligation. Dolberry Decl. ¶ 18; Walsh Decl. ¶¶ 15-26. Particularly in mid- to late August and early September, DoD Acting Comptroller McCusker and other senior DoD officials exchanged emails discussing how to respond to OMB's continuing issuance of apportionment footnotes pausing obligation of USAI funds and the potential effects of the continued pause on the timing and logistics of execution of the funding. Dolberry Decl. ¶ 18; Walsh Decl. ¶¶ 15-26; *Vaughn* Index Doc. Nos. 38, 40, 65, 75, 76, 94, 95, 96, 97, 98, and 111. These discussions were predecisional because they were intended to inform the ongoing decisionmaking process of senior DoD officials deliberating how to engage with OMB concerning the series of decisions at OMB about whether to extend the pause on the obligation of USAI funds by issuing another apportionment footnote. Dolberry Decl. ¶ 18; Walsh Decl. ¶¶ 15-26. These discussions were

deliberative because they involve Ms. McCusker's providing her analysis of the implications of the continuing pause for the purpose of providing advice about the potential ramifications if the pause were extended. Dolberry Decl. ¶ 18; Walsh Decl. ¶¶ 15-26. Protecting the confidentiality of these communications is essential to avoid chilling future provision of such candid advice to senior agency leaders on sensitive matters. Dolberry Decl. ¶ 18; Walsh Decl. ¶¶ 15-26.

Defendants also withheld deliberative information from weekly updates from the Comptroller to the Deputy Secretary of Defense. Dolberry Decl. ¶ 20. Six documents (*Vaughn* Index Doc. Nos. 100-105) contain weekly reports from Ms. McCusker to the Deputy Secretary of Defense that provide overviews of funding and related issues for military programs in progress, including information on items unrelated to USAI. Dolberry Decl. ¶ 20. These reports reflect Ms. McCusker's analysis of issues requiring attention and decisionmaking from senior DoD officials, including her advice and recommendations on issues to be prioritized. Dolberry Decl. ¶ 20. The withheld information from these reports includes such advice and recommendations with respect to the pause in obligation of USAI funds. Dolberry Decl. ¶ 20. The withheld information also includes entries unrelated to USAI, the disclosure of which could chill candid reporting to senior officials in the future. Dolberry Decl. ¶ 20; *see Elec. Frontier Found.*, 739 F.3d at 13 (allowing withholding of factual material if release would harm the deliberative process); *Quarles v. Dep't of the Navy*, 893 F.2d 390, 392-93 (D.C. Cir. 1990) (deliberative process privilege allows withholding of factual material on the grounds that disclosure would expose agency's decisionmaking process and chill future deliberations). Accordingly, information from the weekly reports has been properly withheld under the deliberative process privilege.

Similarly, Defendants properly withheld information conveying advice and recommendations in internal briefing materials intended to prepare the Secretary of Defense for a high-level meeting concerning USAI funds. Dolberry Decl. ¶ 21; *Vaughn* Index Doc. Nos. 108 & 109. These documents contain briefing material and talking points from the Under Secretary of Defense for Policy to advise the Secretary of Defense in preparation for a meeting to relay DoD's opinions and recommendations on the obligation of the USAI funds. *Id.* The withheld information contains advice and recommendations to the Secretary about points to emphasize and thus ultimately reflect the advice and recommendations of the Department in a wider interagency Executive Branch deliberation. *Id.* The release of such information could chill future candid deliberations on important Executive Branch decisionmaking. *Id.* Accordingly, Defendants have properly withheld under the deliberative process privilege such advice and recommendations in briefing materials provided to the Secretary of Defense. *Id.*; *see Access Reports*, 926 F.2d at 1196-97 (briefing materials to prepare senior agency officials protected under deliberative process privilege).

Along the same lines, Defendants withheld information from an email from the Under Secretary of Defense for Policy for the Secretary of Defense, relaying the discussion that occurred at an interagency meeting on July 26 regarding Ukraine and the USAI funding. Dolberry Decl. ¶ 22; *Vaughn* Index Doc. No. 110. This "readout" memorializes the advice and recommendations of both DoD and other Executive Branch agencies, advice on how best to proceed, and requests for additional analysis from the relevant agencies. *Id.* The release of this information could similarly chill frank and candid deliberations on vital Executive Branch decisionmaking. *Id.* Defendants thus properly withheld this information pursuant to the deliberative process privilege. *Id.*

A number of the withholdings contain interagency discussions that formed part of OMB's investigation and analysis of the USAI program to inform OMB's recommendations and decisionmaking with respect to a series of apportionment footnotes affecting the obligation of funds appropriated for USAI. Walsh Declaration ¶¶ 15-26; *Vaughn* Index Doc. Nos. 1, 8, 9, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 30, 31, 41, 42, 43, 51, 52, 53, 66, 67, 68, 74, and 106. Beginning sometime around mid-June 2019 and continuing throughout the summer of 2019, OMB reached out to DoD for information and analysis concerning the USAI. Walsh Decl. ¶ 21. These policy discussions remained ongoing and aimed to inform OMB's advice and recommendations concerning a series of apportionment actions. *Id.* These discussions are predecisional because they reflect the advice and recommendations of DoD personnel to decisionmakers at OMB, the agency with authority under 31 U.S.C. § 1512 to issue apportionment decisions. *Bureau of Nat'l Affairs*, 742 F.2d at 1497 (EPA budget recommendations to OMB properly withheld under Exemption 5 because "the President, not the EPA, makes the final decision" concerning budget requests to Congress). These discussions reflect the weighing of options, opinions, and arguments as part of the confidential discussions and deliberations that informed the Executive Branch's internal process of formulating policy regarding the use of USAI funds. Walsh Decl. ¶ 18. As explained in the Walsh Declaration, the discussions and information-gathering reflected in these documents are representative of the kinds of deliberations in which OMB routinely engages agencies across the Executive Branch of the Federal government. Walsh Decl. ¶¶ 24-26. OMB relies upon precisely this type of free-flowing, candid analysis from agency experts to understand affected Federal programs and thus carry out its apportionment duties pursuant to 31 U.S.C. §§ 1512 & 1513. Walsh Decl. ¶ 26. "Disclosure of that analysis could 'actually inhibit candor in the decision-making process if

made available to the public.' *Worldnetdaily.com*, 215 F. Supp. 3d at 85 (quoting *Army Times Pub. Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993)). Maintaining the confidentiality of such discussions is essential to ensure that agency experts share fully with OMB their honest personal assessments. Walsh Decl. ¶¶ 24-26. Because such discussions are crucial to OMB's ability to perform its core responsibilities with respect to apportionment of appropriated funds, disclosing such confidential discussions here could be reasonably anticipated to undermine OMB's ability to carry out such crucial deliberations with respect to other Federal programs across the Executive Branch. Walsh Decl. ¶¶ 24-26. OMB therefore has appropriately applied the deliberative process privilege to maintain the confidentiality of back-and-forth discussions between OMB and DoD concerning the USAI. *Id.*

3. Presidential communications privilege

Exemption 5 also includes the presidential communications privilege, which protects communications among the President and his advisors. *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004). The presidential communications privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). The privilege is intended to allow the "President and those who assist him" 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." *Id.* "The President's need for complete candor and objectivity from advisers calls for great deference from the courts." *Id.* at 706.

The presidential communications privilege is broader than the deliberative process privilege. *See In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). It "applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones." *Id.*

It also applies to "communications made by presidential advisers in the course of preparing advice for the President," including "when these communications are not made directly to the President." *Id.* at 752. In order "to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves." *Id.* Although the privilege does not independently extend to executive branch agencies, it does encompass communications "solicited and received" by White House advisers and their staff "investigating and formulating the advice to be given the President." *Id.* "[E]ven if the legal analysis in the memorandum was not communicated to the President," solicitation by a presidential advisor "leading up to" a presidential decision will suffice to show "that the document was created for the purpose of advising the President on that decision." *Protect Democracy Project*, 320 F. Supp. 3d at 174.

Here, Defendants properly invoked the presidential communications privilege with respect to 24 documents. Walsh Decl. ¶ 31; *Vaughn* Index Doc. Nos. 12, 13, 20, 28, 33, 34, 35, 37, 44, 46, 56, 57, 63, 64, 66, 78, 82, 83, 92, 95, 99, 107, 108 & 109. Although the presidential communication privilege allows for a document to be withheld in full, Defendants have not withheld in full any documents involving protected presidential communications. Walsh Decl. ¶ 31. The determination to withhold information under the presidential communications privilege was made in consultation with the White House Counsel's Office. Walsh Decl. ¶ 32.

As the Walsh Declaration explains, the documents from which information has been withheld under the presidential communications privilege are emails that reflect communications by the President, the Vice President, or the President's immediate advisors regarding Presidential decisionmaking about the scope, duration, and purpose of the hold on USAI funds. Walsh Decl.

¶ 31. The information withheld under this privilege consists of either the status of an ongoing decisionmaking process involving the President, information that was solicited and received by the President as part of his official duties, or information that was solicited and received by the President's immediate advisors, including Robert Blair, who is an Assistant to the President and Senior Advisor to the White House Chief of Staff. Walsh Decl. ¶ 32. Mr. Blair's official duties and responsibilities include national security issues. Walsh Decl. ¶ 32. As the withheld information was solicited and received by the President or Mr. Blair, disclosure of such communications would foreseeably harm the quality of information and advice available to the President. Walsh Decl. ¶¶ 30-32.

D. Defendants Properly Withheld Personal Information of Agency Employees Pursuant to FOIA's Exemption 6

Exemption 6 "protects information about individuals in 'personnel and medical files and similar files' when its disclosure 'would constitute a clearly unwarranted invasion of personal privacy.'" *Shapiro v. Dep't of Justice*, 153 F. Supp. 3d 253, 257 (D.D.C. 2016) (quoting 5 U.S.C. § 552(b)(6)). Congress intended the term "similar files" to be interpreted broadly. *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599-603 (1982) (citing H.R. Rep. No. 89-1497, at 11 (1966); S. Rep. No. 89-813, at 9 (1965); S. Rep. No. 88-1219, at 14 (1964)). "The Supreme Court has read Exemption 6 broadly, concluding the propriety of an agency's decision to withhold information does not 'turn upon the label of the file which contains the damaging information.'" *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006) (quoting *Wash. Post*, 456 U.S. at 601).

The D.C. Circuit has explained that Exemption 6 can embrace "bits of personal information, such as names," *Judicial Watch*, 449 F.3d at 152, but the mere fact that an agency file or record contains personal, identifying information is not enough—the information must

also be "of such a nature that its disclosure would constitute a clearly unwarranted privacy invasion," *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002). To make that determination, the agency weighs "'the private interest involved (namely the individual's right of privacy) against the public interest (namely, the basic purpose of [FOIA], which is to open agency action to the light of public scrutiny).'" *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 304 (D.D.C. 2007) (quoting *Judicial Watch*, 449 F.3d at 153). The privacy interest at issue belongs to the individual, not the agency holding information pertaining to the individual. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763-65 (1989).

In this case, Defendants properly withheld under Exemption 6 personal information of individual employees at the Defendant agencies, including the names of line-level employees at DoD as well as the email addresses and phone numbers of all agency employees. Dolberry Decl. ¶¶ 9-12; Walsh Decl. ¶ 33. Protection of such information avoids the risk that these employees will suffer harassment. *Id.* By contrast, disclosure of this information would not shed any light on agency decisionmaking processes. *Id.*

Particularly in a high-profile case such as this, line-level employees at DoD have a strong individual privacy interest in avoiding the disclosure of their names in connection with such a highly public matter. *See, e.g., Long v. U.S. Office of Pers. Mgmt.*, 692 F.3d 185, 192 (2d Cir. 2012) ("It is not uncommon for courts to recognize a privacy interest in a federal employee's work status (as opposed to some more intimate detail) if the occupation alone could subject the employee to harassment or attack."); *Fed. Labor Relations Auth. v. U.S. Dep't of Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1453 (D.C. Cir. 1989) (holding that "federal employees have privacy interests in their names and home addresses that must be protected and that the relevant

public interest in disclosure, though not nothing, is outweighed"); *Ctr. for Pub. Integrity v. U.S. Office of Pers. Mgmt.*, No. 04-1274 GK, 2006 WL 3498089, at *6 (D.D.C. Dec. 4, 2006) ("Accordingly, because the privacy interest of the federal employees at issue in this case in the nondisclosure of their names and duty stations outweighs the minimal FOIA-related public interest in disclosure, the Court concludes that disclosure would constitute a 'clearly unwarranted invasion of personal privacy.'").

In this case, DoD has followed its general practice of withholding the names of individual employees who are at the military rank of Colonel or below and at the civilian federal pay level of GS-15 or below. Dolberry Decl. ¶ 9. Moreover, neither the Plaintiff nor the general public has any need to know the names of individual, line-level employees included in various communications. Disclosing the names of these employees would not serve FOIA's purpose of shedding light on governmental decisionmaking. Dolberry Decl. ¶ 10. The majority of DoD personnel involved in the discussions contained in the responsive records are senior officials, and Defendants have not withheld the names of such senior DoD officials. Dolberry Decl. ¶ 11. Accordingly, there is no reason why the privacy interest of individual, line-level employees in the non-disclosure of their names should be disturbed and these employees subjected to the unwarranted risk of harassment.

Similarly, Defendants have properly withheld the personal contact information of individual agency employees. Dolberry Decl. ¶¶ 9-12; Walsh Decl. ¶ 33; *Pinson v. Dep't of Justice*, 313 F. Supp. 3d 88, 112 (D.D.C. 2018) (observing that courts have come to differing conclusions regarding protection of work telephone numbers and email addresses of federal employees, and holding that such information is withholdable). As the requested records consist primarily of emails, the responsive documents contain throughout in the headings and signature

lines personal contact information such as email addresses, phone numbers, and office numbers of individual employees. Dolberry Decl. ¶ 11; Walsh Decl. ¶ 33. This information has been withheld throughout under 5 U.S.C. § 552(b)(6) to protect the privacy interests of these employees against the undue risk of harassment. Dolberry Decl. ¶¶ 11, 12; Walsh Decl. ¶ 33. The individuals involved have a strong privacy interest in avoiding the disclosure of their direct contact information, as such disclosure could lead to harassment. *Id.* Moreover, the Plaintiff and the general public can have little interest in the email addresses and phone numbers of the individuals involved. *Id.*

Disclosing the personal contact information of agency employees would not serve FOIA's purpose of shedding light on governmental decisionmaking. *Id.* Indeed, Plaintiff generally does not challenge the withholding of email addresses and phone numbers. When the parties conferred on January 22 & 23 about potentially narrowing the scope of issues to be litigated at summary judgment, Plaintiff agreed to the withholding under Exemption 6 of email addresses, phone numbers, and other similar contact information where the name of the person appears in the produced documents. Accordingly, this information has been properly withheld to avoid undue risk of harassment of agency employees.

Thus, Defendants have logically and plausibly applied Exemption 6 to protect agency employees from unwarranted harassment that could result from the disclosure of their personal information. Defendants therefore are entitled to summary judgment with respect to their withholding of private information pursuant to Exemption 6.

III. DEFENDANTS HAVE NOT WAIVED THE APPLICATION OF ANY OF THESE EXEMPTIONS

As shown above, Defendants have properly withheld information only where statutory exemptions logically and plausibly apply. A plaintiff seeking nonetheless to compel the

disclosure of such properly withheld information must bear the burden of showing that the agency has waived the applicable statutory exemption by publicly disclosing that information through an official acknowledgment. *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013). To establish that the agency has officially acknowledged the information, a plaintiff must demonstrate that such information: (1) is as specific as the information previously released; (2) matches the information previously disclosed; and (3) already has been made public through an official and documented disclosure. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765-66 (D.C. Cir. 1990)).

Even a purposeful disclosure of documents would not constitute a waiver of an applicable FOIA exemption if the disclosure was unauthorized. *See, e.g.*, *Medina-Hincapie v. Dep't of State*, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (agency's unauthorized disclosure of documents it seeks to withhold did not waive FOIA exemption); *Safeway Stores Inc. v. FTC*, 428 F. Supp. 346, 347 (D.D.C. 1977) ("In any event, an unauthorized 'leak' does not constitute a waiver of the (b)(5) exemption."). Defendants are not obligated to confirm or acknowledge information as a result of reports of unofficial disclosure through unidentified source(s). *Washington Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991). Nor would even a possible disclosure by one government agency constitute an official acknowledgement by another. *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) ("we do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought").

Plaintiff cannot meet its burden to show that Defendants have waived the right to withhold information by relying on news reports that are purportedly based upon review of unredacted versions of some of the responsive documents. On January 2, 2020, Just Security published an online report vaguely claiming the author "has viewed unredacted copies of these

emails." *See* Kate Brannen, *Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns*, Just Security (Jan. 2, 2020), https://www.justsecurity.org/67863/exclusive-unredacted-ukraine-documents-reveal-extent-of-pentagons-legal-concerns/. However, the article does not allege that either DoD or OMB has made an official acknowledgement of any of the emails the author reports to have seen. Defendants have not made an official disclosure of these emails and maintain their legal prerogative to withhold the information pursuant to the applicable statutory exemptions. *See, e.g.*, *Edmonds v. FBI*, 272 F. Supp. 2d 35, 49 (D.D.C. 2003) (because "the statements in the press were made by anonymous sources, even documents containing identical information may properly be withheld because 'release would amount to official confirmation or acknowledgment of their accuracy.'") (quoting *Washington Post*, 766 F. Supp. at 9). Accordingly, Defendants have not waived their right to withhold information pursuant to statutory exemptions, and Defendants are entitled to summary judgment on all claims.

IV. DEFENDANTS HAVE PROCESSED AND RELEASED ALL REASONABLY SEGREGABLE INFORMATION

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 under this subsection." 5 U.S.C. § 552(b)(9). "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). And a reviewing 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. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008).

Here, the agencies have conducted a careful review of each responsive document and withheld only such portions which are exempt under 5 U.S.C. § 552(b). Dolberry Decl. ¶ 28; Walsh Decl. ¶ 34. Defendants have not withheld in full any responsive documents. *Id.* Accordingly, there can be no genuine dispute that Defendants have complied with their obligation to produce all reasonably segregable information and now are entitled to summary judgment on this issue.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their motion for summary judgment with respect to all claims and accordingly dismiss the present action.

Dated: January 31, 2020

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