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. 19-3265 (CKK)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff, the Center for Public Integrity, moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 and opposes Defendants' Motion for Summary Judgment. Plaintiff's Memorandum of Points and Authorities, Statement of Material Facts as to Which There Is No Genuine Issue and a proposed Order accompany this motion.

Undersigned counsel certifies that the accompanying exhibits containing Documents 1 through 31 and 32 through 111 are accurate copies of the documents produced by Defendants to Plaintiff during this lawsuit. Where Defendants have re-released pages with fewer redactions (on Dec. 20, 2019 and Jan. 31, 2020), the later-released pages have been substituted. Optical character recognition has been performed (but has not altered the appearance of the documents), in order to make the documents partially searchable.

Respectfully submitted,

/S/

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For fiscal year 2019, Congress appropriated $250 million for the Ukraine Security Assistance Initiative. Although the Department of Defense ("DoD") had determined that Ukraine met all conditions for receiving aid from this program, in July 2019 the Office of Management and Budget ("OMB") placed a hold on these funds, at the direction of President Trump. OMB released these funds in September 2019, after the hold became the subject of public and political controversy.

In December 2019, the House of Representatives impeached President Trump, finding that the president abused his power by withholding the military aid in order to pressure the government of Ukraine to open an investigation into a political opponent of the president in order to gain an electoral advantage. H. Res. 755, Dec. 18, 2019. In January 2020, the Government Accountability Office determined that OMB's hold on the funds violated the Impound Control Act of 1974. *See* https://www.gao.gov/assets/710/703909.pdf.

On September 25, 2019, Plaintiff submitted a FOIA request to two offices within DoD, requesting all records of communications concerning the Ukraine Security Assistance Initiative, between the DoD's comptroller's office and OMB or between the comptroller's office and DoD's secretary or deputy secretary. On September 30, 2019, Plaintiff submitted a similar request to OMB, for all records of communications concerning the Ukraine Security Assistance Initiative, between OMB and the DoD's comptroller's office. Each request asked for expedited processing.

Plaintiff sought a preliminary injunction, which the Court granted. Pursuant to that injunction, Defendants produced 146 pages of responsive records to Plaintiff on Dec. 12, 2019, and 146 pages on Dec. 20, 2019, all with substantial redactions.

On Dec. 13, 2019, Plaintiff filed a Motion to Enforce Preliminary Injunction, arguing that Defendants' interim production contained voluminous redactions not plausibly supported by the statutory exemptions. The Court denied the motion, deferring resolution of the FOIA exemptions' application until summary judgment. Concurrent with the Dec. 20 production, Defendants re-released 15 pages from the Dec. 12 production, with fewer redactions. This re-release addressed some of the objections Plaintiff raised in its Dec. 13 motion; the other objections are raised again in this motion for summary judgment.

The stakes for this motion could not be higher. Because the president has refused to comply with congressional subpoenas seeking documents relating to conduct by the administration that has been deemed unlawful, FOIA requests like the one here are the most expeditious — and perhaps only — means by which the public may learn about who was involved in blocking congressionally authorized aid to Ukraine, why it happened and how it transpired. Consistent with the administration's approach to dealing with Congress, Defendants are attempting to shield from public view critical facts central to the administration's actions by redacting vast portions of responsive documents, many of which plainly fall outside the exemptions claimed by the government. Defendants are inappropriately citing exemptions to FOIA disclosure requirements that cannot be used to shield illegal or embarrassing actions from public knowledge. Plaintiff respectfully requests that this Court remove the unwarranted veil of secrecy over these materials so the public can obtain information to which it is entitled before the upcoming presidential election.

ARGUMENT

Plaintiff contests the adequacy of Defendants' search for responsive records and continues to contest the redactions Defendants have made in the records produced. Defendants' overuse of statutory exemptions, especially FOIA Exemption 5, is an abuse of the FOIA statute and the American people's right to be informed of what their government officials are doing and why they are doing it.

I. DEFENDANTS' SEARCH WAS INADEQUATE

Although Defendants claim they made a complete and careful examination of their records, a document that should have been provided to Plaintiff was not. Plaintiff requested all communications between the office of the DoD's comptroller and OMB that pertained to the Ukraine Security Assistance Initiative. On January 22, 2020, Defendants released to American Oversight, a Washington-based group, an email dated August 26, 2019, from OMB's general counsel Mark Paoletta to Edwin Castle, an official in the Pentagon's general counsel's office, that was copied to Elaine McCusker, the Pentagon's comptroller. The document's subject header was listed as "Ukraine Security Assistance Initiative," and it clearly qualified for disclosure to Plaintiff in December yet was not turned over. Its contents were redacted when it was produced to American Oversight, but on February, 11, 2020, the website Just Security published details of the document's contents based on a copy it obtained independently. Just Security noted that the document embarrassingly appears to contradict a public statement made by Paoletta about what OMB knew and when it knew it regarding the legality of the aid halt ordered by President Trump.

The apparent omission of this document is significant and suggests that Defendants may have failed to conduct their search with appropriate diligence and good faith.

II. EXEMPTION 5

Exemption 5 of the Freedom of Information Act protects "inter-agency or intra-agency memorandums or letters which 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). Defendants have asserted deliberative process privilege, attorney-client privilege and presidential communications privilege as justifications for their redactions under Exemption 5, none of which are merited.

A. Deliberative Process Privilege

Material withheld under Exemption 5 and the deliberative process privilege must be "both predecisonal and deliberative." *Wolfe v. Dep't of Health & Human Services*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc) (citing *EPA v. Mink*, 410 U.S. 73 (1973)). "Manifestly, the ultimate purpose of [the deliberative process] privilege is to prevent injury to the quality of agency decisions." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

The deliberative process privilege is "the most used privilege and the source of the most concern regarding overuse." FOIA Oversight and Implementation Act of 2015, H.R. Rep. No. 114-391, at 10. To satisfy the privilege, the withheld material must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Purely factual material is not covered by the exemption. *See Mead Data Ctr. Inc. v. U.S. Dep't of the Air Force*, 556 F.2d 242, 256 (D.C. Cir. 1977). "A document that does no more than explain an existing policy cannot be considered deliberative." *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 876 (D.C. Cir.

2010). *See also Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (holding that material is only pre-decisional if it is intended "to assist an agency decision maker in arriving at his decision, rather than support a decision already made").

Defendants' redactions fly in the face of the legal standard for withholding material under the deliberative process exemption. Virtually every document Defendants have redacted under this privilege relates to a decision to withhold Congressionally approved aid to Ukraine made by the President of the United States days, weeks or months *before* those documents were prepared. According to a report from the Government Accountability Office, President Trump directed that a hold be placed on security assistance funding for Ukraine on or about July 12, 2019. https://www.gao.gov/assets/710/703909.pdf, at 1-2, citing 2 U.S.C. § 684. In fact, there is evidence that the decision to withhold aid had occurred as early as June 19, 2019. *See* Eric Lipton, Maggie Haberman & Mark Mazzetti, *Behind the Ukraine Aid Freeze: 84 Days of Conflict and Confusion*, N.Y Times (Jan. 16, 2020).

Of the documents containing redactions, only 10 preceded the July 12 order described by the GAO, with the remaining documents having been created after the decision was made. If the June 19 decision date is used as the demarcation, no documents identified by the government in response to Plaintiff's FOIA request preceded that date.

As a result, the vast majority of the documents withheld by the government are not predecisional but necessarily reflect only the agencies' efforts to explain, manage and execute a decision that had already been made and which they knew was problematic due to its conflict with congressional will. The documents in question were not created to provide advice or assist in the decision-making process for withholding aid to Ukraine, because that key decision had already been made. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C.

Cir. 1980) (holding that documents were not subject to the exemption because they did not constitute "advice to a superior").The documents at issue here are precisely the type of pre-decisional materials that the Supreme Court has recognized as falling outside the scope of the deliberative process privilege. *See Sears*, 421 U.S. at 151-52 (approvingly noting that "the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged, … and communications made after the decision and designed to explain it, which are not.").

Although Defendants argue that some of the documents pertain to pending decisions by senior officials regarding the implementation of the aid halt, it is undisputed that no substantive, relevant decisions regarding the flow of aid were actually taken by any of these officials in the aftermath of the president's decision to order the aid stopped. It is uncontested that the halt remained in place, in compliance with informational statements by OMB to the Pentagon and others implementing the president's order, and as delineated in a continuous series of footnotes to financial disbursement documents. These continued until the start of a congressional inquiry in September provoked the president to allow the aid's resumption. In the interim, key responsible officials watched and waited and raised informational concerns related to compliance with the law, but took no dispositive actions themselves. The absence of any material decisions by agency officials during the period at issue undercuts Defendants' contention that the redacted materials were intended to facilitate or assist development of the agency's final position as opposed to being purely factual in nature.

In many instances, Defendants have withheld information that is plainly not deliberative. For instance, several documents refer, in their unredacted sections, to "information" that Defendants have blacked out. See, e.g., Doc. 8, Bates 96-101 (described by Doc. 7, Bates 95, as

"attached info on the process/timeline for USAI execution"; Doc. 12, Bates 106-08 (described by the *Vaughn* index as "information … shared with OMB to inform its apportionment analysis" and "regarding possible continuation of the apportionment footnote and the potential impacts of such a pause"). Exemption 5 does not allow "the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion." *Mink*, 410 U.S. at 91. Likewise, the government claims that DoD Comptroller Elaine McCusker's weekly updates (documents 100-105) provided to the deputy secretary of defense "giving an overview of funding and related issues" pertaining to Ukraine security assistance are deliberative, even though such documents are, on their face, informational in nature. Because most of the documents in question are merely emails, it is unlikely that the heavy redactions on those materials by Defendants reflect the type of deliberations potentially protected by Exemption 5, as opposed to mere exchanges of information more typically found in informal communications of the type at issue here.

B. Attorney-Client Privilege

"The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. The privilege also protects communications from attorneys to their clients if the communications rest on confidential information obtained from the client." *Tax Analysts v. I.R.S.*, 117 F.3d 607, 618 (D.C. Cir. 1997) (citations and internal quotation marks omitted). The burden is on the government to prove, through "detailed and specific information," that the privilege is applicable to the material withheld. *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

To successfully invoke the attorney-client privilege, Defendants must satisfy the following five elements:

> (1) [T]he holder of the privilege is, or sought to be, a client; (2) the person to whom the communication is made is a member of the bar or his subordinate and, in connection with the communication at issue, is acting in his or her capacity as a lawyer; (3) the communication relates to a fact of which the attorney was informed by his client, outside the presence of strangers, for the purpose of securing legal advice; and (4) the privilege has been claimed by the client. Additionally, [(5)], a "fundamental prerequisite to the assertion of the privilege" is "confidentiality both at the time of the communication and maintained since."

Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 841 F. Supp. 2d 142, 153-54 (D.D.C. 2012) (citing *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).

Critically, Defendants must establish that obtaining legal advice was a "primary purpose" of the agency's communication. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759-60 (D.C. Cir. 2014). The inclusion of a lawyer in a communication does not, in and of itself, satisfy the standard for invoking the privilege. *See Mead Data Cent.*, 566 F.2d at 253. Finally, the privilege does not apply to a "government attorney's 'advice on political, strategic, or policy issues, valuable as it may [be].'" *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121, 144-45 (D.D.C. 2014) *(quoting In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Circ. 1998)).

According to Defendants, "[m]uch 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 he could provide sound legal advice and advocacy." Br. At 23-24. Essentially, Defendants are withholding these purely factual materials — none of which apparently even seek legal advice — on the grounds that the General Counsel was included on the communication and was being "kept in the loop." Br. At 24.

This argument utterly fails to satisfy the standard for invoking the attorney-client privilege. As noted above, the privilege standard is not met unless securing legal advice was a "primary purpose" of the communication. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d at 759-60. Providing information to keep someone "in the loop" falls far short of establishing, as Defendants must, that the communication's "primary purpose" was to secure legal advice. In fact, Defendants acknowledge that the DoD's General Counsel was often among "other DoD leaders" receiving the same communications, thereby making clear that Defendants are merely attempting to bootstrap the attorney-client privilege onto non-legal communications on the grounds that a lawyer was part of the email chain. If the bar for invoking the attorney-client privilege were that low, the government could literally keep every communication under wraps by including a lawyer on the grounds that the information, theoretically, could one day be used by him or her to provide legal advice.

In addition, although Defendants claim that these documents were sent for the purpose of obtaining legal advice, they have produced no evidence whatsoever that this is the case. For example, there is no overt indication on any of the communications that the General Counsel was informed that he was receiving the emails for the purpose of one day securing legal advice, nor that he used them to provide such advice.

Defendants have withheld other documents under the attorney-client privilege on the grounds that there are "back-and-forth discussions involving agency attorneys concerning a variety of legal questions." Br. At 24. But much of what Defendants describe as the content of these communications do not, on their face, involve legal issues, e.g., "talking points" about 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." Br. At 25. These communications do not appear to seek or provide legal advice, but rather at most involve a "government attorney's advice on political, strategic or policy issues," which courts have found insufficient to invoke the privilege. *Judicial Watch, Inc.*, 926 F. Supp. 2d at 144-45.

Finally, Defendants have withheld communications "in which agency officials are discussing their understanding of the legal advice provided by attorneys in OMB and DoD Offices of General Counsel." Br. At 25. However, "FOIA exemption 5 and the attorney-client privilege may not be used to protect [statements] of agency law from disclosure to the public." *Id.*, at 619.

Defendants have inappropriately withheld statements of how their attorneys interpreted applicable law. For instance, in Document 31, at Bates 143, Duffey wrote to McCusker, "Elaine — closing the loop on this, OMB OGC determined [redacted, (b)(5)]." This is not a communication between attorney and client, but rather between a client at OMB and a third party at DoD. In addition, the redacted material is less than one line long, making it highly unlikely that it contains confidential information obtained from the client. It would appear to be simply a secondhand statement of agency law.

It is the agency's burden to demonstrate that every element of the attorney-client privilege is present. *Cause of Action Inst. v. United States Dep't of Justice*, 330 F. Supp. 3d 336, 347 (D.D.C. 2018). Defendants' affidavits and *Vaughn* index have not done so.

C. Presidential Communications Privilege

"At core, the presidential communications privilege is rooted in the President's need for confidentiality in the communications of his office in order to effectively and faithfully carry

out his Article II duties and to protect the effectiveness of the executive decision-making process." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (citations and internal quotation marks omitted). In that case, the D.C. Circuit refused to expand this privilege, maintaining it as limited to "documents solicited and received by the President or his immediate White House advisers who have broad and significant responsibility for investigating and formulating the advice to be given the President." *Id.*, at 1114.

"[T]he presidential communications privilege should be construed narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected." *See Judicial Watch*, 365 F.3d at 1116. The privilege can be invoked "only if there is an actual advisory relationship between the President and the staffer as to that specific document." *Ctr. For Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 26-27, 29 (D.D.C. 2013). The privilege "should never serve as a means of shielding information regarding government operations that do not call ultimately for direct decisionmaking by the President." *Am. Ctr. For Law & Justice v. U.S. Dep't of State*, 330 F. Supp. 3d 293, 308 (D.D.C. 2018) (quoting *In re Sealed Case*, 121 F.3d at 752).

Defendants have not met their burden of showing that this privilege applies. Defendants have asserted the privilege with respect to 24 documents. Declaration of Heather V. Walsh, at ¶ 31. The only description Ms. Walsh's Declaration provides is that "[a]s reflected in the *Vaughn* Index, the withheld information consists of either the status of an ongoing decision-making 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 …." *Id.*, at ¶ 31.

Although Ms. Walsh claims that all of these documents were "part of an on-going decision-making process involving the President," the undisputed timeline of events surrounding the halt of Ukrainian aid belies that assertion. Walsh Decl. at ¶ 32. Specifically, all but five of the 24 documents withheld under the privilege were created *after* the last possible date the president made his decision to withhold Congressionally authorized Ukrainian aid, i.e., July 12, 2019. As a result, those 19 documents are necessarily post-decisional and cannot have been "part of an on-going decision-making process involving the President[,]" but rather consist of communications relating to how the president's order was to be carried out.

There is no evidence suggesting any ongoing decision-making process involving the president was underway following July 12, as the president did not change his mind about the policy until a Congressional probe began on September 10, 2020. None of the documents sought by Plaintiff are relevant to his decision-making between the time the probe began and the date — one day later — when he agreed to let the aid resume, because he made no new decisions during this time.

In addition, the purported basis for the vast majority of the documents withheld by Defendants under the presidential communications privilege is deficient on its face. Defendants' *Vaughn* index asserts that each redaction includes "references to communications involving the President or his immediate advisors." See, e.g., *Vaughn* index, Doc. Nos. 12, 13, and 20.

But citing mere "references to communications involving the President or his immediate advisors" is insufficient to invoke the privilege. This bare bones description does not establish that the discussions involved any decision-making by the president or his advisors about Ukrainian aid. As discussed above, not all communications involving the president or his aides make the grade for invoking the privilege, and it is Defendants' burden to provide sufficient

evidence that each communication withheld under the privilege constitutes the type of communication that falls under this narrow privilege. Defendants have not provided any detail that would allow Plaintiff or the Court to assess whether any particular email contains privileged information.

Finally, the privilege applies "only if there is an actual advisory relationship between the President and the staffer as to that specific document." *Ctr. for Effective Gov't*, 7 F. Supp. 3d at 26-27, 29. And it does not cover "every person who plays a role in the development of presidential advice, no matter how remote and removed from the President." *Judicial Watch*, 365 F.3d at 1116.

Here, Mr. Blair fails to qualify as an advisor close or immediate enough to the president to warrant invocation of the privilege. There is no evidence that Mr. Blair's role included making recommendations to the president about Ukrainian aid. *See In re Sealed Case*, 121 F.3d at 752 (indicating that an immediate advisor must have "broad and significant responsibility" for advising the president). To the contrary, there is every indication that Mr. Blair, in particular, was merely a messenger, rather than an advisor, in this matter. Based on available information (*see, e.g.*, Deposition of Laura Katherine Cooper, https://docs.house.gov/-meetings/IG/IG00/CPRT-116-IG00-D012.pdf at 33-35 (Oct. 23, 2019)), he conveyed to OMB what the president had ordered, and possibly relayed to the president or others in the White House purely factual information from the Pentagon about the amount of aid that had been spent and the names of the vendors that participated in the program. In fact, none of the documents in question have been depicted as containing any actual advice from Mr. Blair to the president or anyone else for that matter. Although Mr. Blair may have carried the vague title of "assistant to the president," Defendants have failed to establish that, in reality, he was a

sufficiently "immediate advisor" to the president on Ukrainian aid to warrant the application of the privilege. Even if Mr. Blair were close enough to the president to theoretically invoke the privilege, Defendants must establish that he had an actual advisory relationship with the president regarding each of the communications as to which he was involved. See Ctr. *for Effective Gov't,* 7 F. Supp. 3d at 26-27, 29. Here, Ms. Walsh merely contends that Mr. Blair's "official duties and responsibilities include national security issues." Walsh Decl. ¶ 32. This description fails to establish that he was advising the president involving decisions about Ukrainian aid, or that the communications at issue relate to the provision of any such advice. As a result, there simply is no basis to apply the privilege to those communications involving Mr. Blair.

III. THE GOVERNMENT MISCONDUCT EXCEPTION OVERCOMES EXEMPTION 5 PRIVILEGES

None of the Exemption 5 privileges are absolute, and they must yield to the need for disclosure of government misconduct. The Supreme Court has affirmed that the basic purpose of the FOIA is to realize "the citizens' right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989) (internal quotation marks and citations omitted). It is especially in cases of government misconduct that the right to information takes precedence over privileges to maintain secrecy.

Numerous court decisions in this District recognize that "the government-misconduct exception may be invoked to overcome the deliberative-process privilege in a FOIA suit." *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 903 F. Supp. 2d 59, 67 (D.D.C. 2012);

see also, e.g., *Reinhard v. Dep't of Homeland Sec.*, 2019 WL 3037827, at *11 (D.D.C. July 11, 2019) (in a FOIA lawsuit, a showing of "extreme government wrongdoing" could overcome the deliberative process privilege); *Bartko v. U.S. DOJ*, 2018 WL 4608239, at *5 (D.D.C. Sept. 25, 2018) (the government misconduct exception applies "in cases of extreme government wrongdoing"); *Wisdom v. United States Trustee Program*, 266 F. Supp. 3d 93, 107 (D.D.C. 2017) (suggesting that "nefarious or extreme government wrongdoing" could overcome the deliberative-process privilege); *Neighborhood Assistance Corp. of Am. v. U.S. Dep't of Hous. & Urban Dev.*, 19 F. Supp. 3d 1, 14 (D.D.C. 2013) (holding that misconduct "severe enough to qualify as nefarious or extreme government wrongdoing" can overcome the privilege); *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 131 and 133 (D.D.C. 2012) (suggesting that the deliberative process privilege "disappears altogether" when agency engages in "nefarious" conduct); *Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 15 (D.D.C. 2000) (suggesting that the government-misconduct exception applies in a FOIA lawsuit upon "the requisite showing of improper behavior"); *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C.1999) ("hold[ing] that the deliberative process privilege does not apply if there is a discrete factual basis for the belief that 'the deliberative information sought may shed light on government misconduct'"); *Tax Reform Research Grp. v. Internal Revenue Serv.*, 419 F. Supp. 415, 426 (D.D.C. 1976) (rejecting the government's assertion of the deliberative process privilege and ordering disclosure of documents under FOIA where there was evidence of attempted discriminatory use of the agency against the president's political enemies and the documents "simply cannot be construed as being part of any proper governmental process").

In *Clark v. United States*, the Supreme Court recognized a similar exception to the attorney-client privilege: "There is a privilege protecting communications between attorney and

client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." 289 U.S. 1, 15 (1933). Where the client is a government agency, misconduct is the equivalent of fraud.

Likewise, from the outset, the Supreme Court has placed clear limits on the presidential communications privilege that prevent it from becoming a tool to block the disclosure of unlawful conduct. *See United States v. Nixon*, 418 U.S. 683 (1974). "The generalized assertion of [presidential] privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.*, at 713. In the context of the FOIA, among other factors "a court must also assess the 'public interests at stake in determining whether the privilege should yield in a particular case ….'" *Lardner v. U.S. Dep't of Justice*, No. CIV.A.03-0180(JDB), 2005 WL 758267 (D.D.C. Mar. 31, 2005) (quoting *In re Sealed Case*, 121 F.3d 729, 753 (D.C.Cir.1997)).

In the present case, the accusations of government misconduct do not rest upon mere speculation or allegation. As this litigation has proceeded, government bodies independent of the administration have issued official findings that actions discussed in the responsive emails were illegal and improper.

In January 2020, the Government Accountability Office determined that OMB had violated the Impoundment Control Act. GAO noted, "In the summer of 2019, OMB withheld from obligation approximately $214 million appropriated to DOD for security assistance to Ukraine" and concluded "that OMB withheld the funds from obligation for an unauthorized reason in violation of the ICA." https://www.gao.gov/assets/710/703909.pdf, at 1-2, citing 2 U.S.C. § 684. As the GAO stated, "The President is not vested with the power to ignore or

amend any … duly enacted law." *Id.*, at 5. And OMB's assertions that its actions were not subject to the ICA "have no basis in law." *Id.*, at 7.

In December 2019, the House of Representatives impeached President Trump. Included in the Articles of Impeachment was the charge that

> (2) With … corrupt motives, President Trump — acting both directly and through his agents within and outside the United States Government — conditioned two official acts on the public announcements that he had requested [from the Government of Ukraine] — [including]
>
> > (A) the release of $391 million of United States taxpayer funds that Congress had appropriated on a bipartisan basis for the purpose of providing vital military and security assistance to Ukraine to oppose Russian aggression and which President Trump had ordered suspended ….

H. Res. 755, Dec. 18, 2019. According to the case made by the House of Representatives, the suspension of military aid to Ukraine was a central element of the president's efforts to obtain political favors from Ukraine's government.

Although the Senate acquitted President Trump, the explanations senators have given for their votes suggest that one of the most persuasive arguments made on the president's behalf — perhaps the winning argument for acquittal — was that the voters, not the Senate, should judge whether the president committed an offense and that they should express their judgment in the November 2020 presidential election.[1] Therefore it is imperative that the citizenry have information that will shed light on the president's clear violation of law, including the execution of his illegal directive and efforts by government agencies to justify and explain it. In these

[1] *E.g.*, the President's counsel Alan Dershowitz: "[T]his trial should result in an acquittal, regardless of whether the conduct is regarded as OK by you or by me or by voters. That's an issue for the voters." (ABC News, https://abcnews.go.com/Politics/dems-push-witnesses-senate-trial-alan-dershowitz-slams/story?id=68355025, Jan. 19, 2020); and Sen. Lamar Alexander: "The question then is not whether the president did it, but whether the United States Senate or the American people should decide what to do about what he did. I believe that the Constitution provides that the people should make that decision in the presidential election that begins in Iowa on Monday." (https://www.alexander.senate.gov/public/index.cfm/2020/1/alexander-statement-on-impeachment-witness-vote, Jan. 30, 2020).

circumstances, the public's right to know about misconduct at the highest levels of government outweighs any privilege that might otherwise exist.

IV. FOIA IMPROVEMENT ACT

Under the FOIA Improvement Act of 2016, where (as under Exemption 5) an agency has discretion to release exempt information, the agency cannot withhold such information unless "the agency reasonably foresees that disclosure would harm an interest protected by an exemption …." 5 U.S.C. § 552(a)(8)(A)(i)(I). The harm must be specifically identified.

The main subject of the communications requested by Plaintiff is whether the president's decision to halt the flow of aid to Ukraine was legal. Heather Walsh's Declaration, at ¶ 18, states that the redactions were needed "to protect internal Executive Branch discussions and deliberations from being chilled by the effects of public scrutiny of the deliberative process." But there is, in fact, evidence that no such thing would occur.

First, on October 17, 2019, OMB director Mick Mulvaney disclosed the overall tenor and substance of this internal conversation. "There was a report," Mulvaney told reporters at a press conference, "that if we didn't pay out the money it would be illegal, it would be unlawful." He said it was "one of those things that has a little shred of truth in it, that makes it look a lot worse than it really is" because what he regarded as the deadline for spending the money did not fall until the end of September — two and a half months after Trump's initial order. Mulvaney's public revelation of the administration's views about the potential illegality of the Ukraine aid halt undermines Defendants' contention that disclosure of internal communications on the same subject would somehow chill future deliberations.

Second, on Jan. 2, the website *Just Security* published, at https://www.justsecurity.org/-67863/exclusive-unredacted-ukraine-documents-reveal-extent-of-pentagons-legal-concerns/, what it said were excerpts from unredacted versions of the emails provided to the Center for Public Integrity, specifically those dated June 19, 25, July 25, 26, Aug. 6, 9, 12, 17, 21, 26, 27, 28, 29, 30, Sept. 7, 9, and 11.[2] Yet there has been no indication — and no claim from the government — that this disclosure has impinged on or inhibited OMB's operations and its continued stewardship of the federal budget.

In a recent case, *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 101 (D.D.C. 2019), the court observed that "[t]he question is not whether disclosure could chill speech, but rather if it is reasonably foreseeable that it will chill speech and, if so, what is the link between this harm and the specific information contained in the material withheld."

A court in the Southern District of New York has likewise held that "generic, across-the-board articulations of harm … as to a broad range of document types [do] not sufficiently explain how a particular Exemption 5 withholding would harm the agency's deliberative process." *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, No. 17-CV-5928 (JMF), 2019 WL 3338266, at *1 (S.D.N.Y. July 25, 2019)

Defendants have not made any particularized showing of the likelihood of harm, nor could they. The circumstances of the hold on congressionally authorized aid to Ukraine are wholly unique and thus the disclosure of agency communications relating to it would not realistically cause any "chilling effect" on future discussions. OMB official Mark Sandy, for example, testified before the House impeachment hearings that during his 12 years at the

[2] No government official has contested the authenticity of the documents obtained by Just Security or the accuracy of the excerpts it published. If the Court determines that the accuracy of the quotes is material to its decision, it can of course order an examination of the emails *in camera*.

agency, he could not recall any other time when a hold had been placed on security assistance after Congress had been told the spending was about to commence. House Intelligence Committee et al., Deposition of Mark Sandy, https://intelligence.house.gov/uploadedfiles/-sandy_final_redacted.pdf at 87-88, Nov. 16, 2019. He further testified that the "apportionment" footnotes used to block the funding — which are the primary topic of many of the emails at issue here — were unusual and that he could "not recall another event like it." *Id.*

Given the uniqueness of these circumstances, it is wholly unpersuasive for Defendants to contend that disclosure of agency communications about the implementation of the president's decision would have a "chilling effect" on future deliberations. Indeed, this is the type of purely speculative harm that Congress sought to eliminate as a basis for redaction when it enacted the FOIA Improvement Act. It appears that, in reality, Defendants merely wish to withhold the documents on grounds that Congress and the courts have consistently rejected — namely, "because public officials might be embarrassed by disclosure, because errors and failures might be revealed," (Sen. Charles Grassley, Report 114-4, on the FOIA Improvement Act (Feb. 23, 2015), at 8, quoting with approval President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009)) or to protect the personal interests of government officials — including the president — at the expense of those they are supposed to serve.

V. EXEMPTION 1

Exemption 1 protects information that is properly classified. Asserting Exemption 1 (as well as Exemption 5), Defendants have redacted the entire substance of three documents, Nos. 108, 109, and 110 (Bates 137-38, 139-40, and 141-43).

In their brief, Defendants contend that documents 108 and 109 are properly redacted because "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." Br. At 18. However, Defendants only claimed harm from the release of the redacted information in these documents is the purported "undermining [of[the confidence of allies, which is essential to continued cooperation on matters of mutual interest." Br. At 18. But Defendants fail to explain why — or in what conceivable manner — our allies' confidence would be damaged by the disclosure of how support for Ukraine would impact "global competition[,]" "future economic opportunities[,]" or "the relative geo-political strengths and weaknesses" of countries around the world. Such a cursory and facially implausible grounds for redaction should be rejected or, at the very least, carefully scrutinized upon an *in camera* inspection by the Court.

With respect to document 110, Defendants claim that the document was properly withheld because it purportedly contains intelligence sources and methods. Br. At 18. However, FOIA requires that agencies "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(II); *see also* 5 U.S.C. § 552(b). Assuming there are intelligence sources and methods in this document as Defendants claim, it is unlikely that every word constitutes such classified information. There is no indication that Defendants made any effort to parse document 110 (or documents 108 and 109 for that matter) to disclose non-classified passages as required. The Declaration of David V. Trulio, at ¶ 14, merely recites that "no further segregation of meaningful information in the redacted documents can be made," but provides no information that would allow Plaintiff or the Court to assess that claim. The

Vaughn index is no more helpful, stating for each document (108-110) only that it contains "classified information regarding national security interests related to Ukraine."

VI. EXEMPTION 3

Exemption 3, as the Defendants note, permits the withholding of information that is "specifically exempted from disclosure by statute." They say that such information exists in documents 8, 19, 26, 39, 80, and 81, and that Ukraine has asked, in writing that such information not be produced. They cite 10 U.S.C. § 130c as the grounds for redacting the contents of those documents, nearly in their entirety.

This exemption applies, however, only to sensitive information specifically provided by or produced in cooperation with a foreign government. *See* 10 U.S.C. § 130c. As a result, this exemption has been inappropriately applied to most if not all of the documents cited above.

Document No. 8, for example, consists of a list of contracts for security assistance to Ukraine that involve U.S. vendors. This is the type of document typically prepared by the Pentagon in consultation with the State Department, not by a foreign government or as part of a joint endeavor with a foreign government. Moreover, government contracts of this sort are not secret, but accessible to the public in published databases, making it unlikely that this list qualifies for protection of sensitive information. Document No. 19 is listed specifically as "Vendor Information" and these vendors are not secret. Document No. 26 is a list of specific aid for Ukraine that was provided to Congress, but this was not listed by the Defendants as one of the classified documents, and should therefore be presumed not to be sensitive. Document No. 80 is listed as unclassified "Vendor Information" and thus also falls outside the statute. And Document 81 appears at least in part, according to the Defendants, to be a simple informational

account of "U.S. Industry Benefits" from the assistance program for Ukraine, rather than an account by Ukraine of its sensitive security needs.

At best, Defendants have failed to adequately parse these documents for releaseable information, and at worst, they have inappropriately applied a broad-brush exemption to them without providing necessary evidence that they qualify.

VII. EXEMPTION 6

Exemption 6 applies when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C § 552(b)(6) (emphasis added). The District of Columbia Circuit has declared that, consistent with the "clearly unwarranted" standard, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the [Freedom of Information] Act." *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (1982).

As Plaintiff informed Defendants before they submitted their motion for summary judgment, Plaintiff does not object to the redactions of email addresses, phone numbers, and other similar contact information where the name of the person appears in the produced documents.

However, Plaintiff contests the redaction, in two documents, of the name of an official who is said to have approved an apportionment. Doc. 3, at Bates 46, Doc. 87, Bates 99 (each including in a subject line: "Apportionment sent to Agency after Approval from [redacted (b)(6)]"). Defendants have provided no justification in their affidavits, nor in their *Vaughn* index, for these redactions. Obviously, the name of an official with authority to approve the apportionment is not a junior employee the redaction of whose name might be justified. Moreover, the identity of that official is plainly important to the public's understanding of the circumstances surrounding the implementation of the hold on Ukrainian aid.

VIII. *IN CAMERA* REVIEW

Plaintiff has, in the arguments above, exposed numerous instances in which Defendants have redacted documents without any basis in law or have failed to segregate nonexempt material from exempt information. "[A]n agency cannot exempt an entire document from disclosure simply because part of the document meets the requirements of an exemption." *Elec. Privacy Info. Ctr. v. Transp Sec. Admin.*, 2004 U.S. Dist LEXIS 29433, at *26 (D.D.C. Aug. 2, 2004).

The Court may order *in camera* review when "the agency response is vague, its claims too sweeping, or there is a reason to suspect bad faith." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 262 (D.C. Cir. 1977). It is a matter within the judge's discretion. *See Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (per curiam). Given the extreme level of redactions and entirely conclusory segregability analysis in Defendants' affidavits (Dolberry Dec. at ¶ 28; Walsh Decl. at ¶ 34), there is ample basis in this case to justify *in camera* review. Given the relatively small set of documents involved, *in camera* review is particularly appropriate and realistic in this instance. *Hall v. CIA*, 881 F. Supp. 2d 38, 74 (D.D.C. 2012) (holding that "*in camera*" inspection may be particularly appropriate . . . when the number of withheld documents is relatively small").

Finally, the extraordinary historical importance of the documents at issue further merit *in camera* review in this case. The administration has stonewalled Congress' efforts to obtain these and other critical documents that would shed light on the circumstances surrounding the order to withhold Congressionally authorized aid to Ukraine. If any of the documents are improperly shielded from public view, the American people may never fully understand what

occurred, who was involved and why it happened. Given the upcoming presidential election, it is particularly important the Court take all appropriate measures to ensure the public is provided this critical information to which it is entitled under the law.

CONCLUSION

For the foregoing reasons, Public Integrity asks the Court to deny Defendants' Motion for Summary Judgment, to grant Plaintiff's Cross-Motion for Summary Judgment, and to order Defendants to produce the information they have wrongfully withheld.

Respectfully submitted,

/S/

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