UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER, *Appellant*, v. U.S. DEPARTMENT OF JUSTICE, *Appellee*.	Case No. 18-5307

APPELLANT'S OPPOSITION TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

The Motion for Summary Affirmance by the Department of Justice ("DOJ") must be denied because this case presents "issues of first impression for the Court" concerning the invocation of the Presidential Communications Privilege in a Freedom of Information Act ("FOIA") case. *Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 914 (D.C. Cir. 1996). This Court made clear in *Judicial Watch, Inc. v. DOJ* that "the issue of whether a President must personally invoke the privilege remains an open question." 365 F.3d 1108, 1114 (D.C. Cir. 2004).

The motion should also be denied because the lower court did not apply the correct test to evaluate the DOJ's privilege claim. Under *In re*

Sealed Case, the Presidential Communications Privilege only extends to records "solicited and received" by White House staff who are shown to personally exercise "broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." 121 F.3d 729, 752 (D.C. Cir. 1997). Moreover, the privilege is limited to records "generated in the course of advising the President in the exercise" of a "quintessential and nondelegable Presidential power." *Id.*

Finally, the motion should be denied because the lower court misapplied the deliberative process privilege to factual material, *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 238–39 (D.C. Cir. 2008), and failed to hold the DOJ to its burdens of proof concerning segregability, *Morley v. CIA*, 508 F.3d 1108, 1126–27 (D.C. Cir. 2007), and the consultant corollary, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11–13 (2001).

I. This case presents issues of first impression, and the decision below cannot be summarily affirmed.

Summary affirmance must be denied where the "merits of the parties' positions are not so clear as to warrant summary action." *Figueroa v. Pompeo*, ___ F. App'x ___ (D.C. Cir. 2018) (per curiam) (denying motion for summary affirmance). It is the "party seeking summary disposition" that

"bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987). In reviewing such a motion, the Court is "obligated to view the record and the inferences to be drawn therefrom 'in the light most favorable to'" the non-moving party. *Id*. (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Because EPIC has raised important legal questions of first impression, the DOJ cannot carry its heavy burden or prevail on the motion.

This Court explicitly instructs that "[p]arties should avoid requesting summary disposition of issues of first impression for the Court." *D.C. Circuit Handbook of Practice and Internal Procedures* 36 (2018); *accord Am. Petroleum Inst.*, 72 F.3d at 914. Both the DOJ and the lower court recognize that the question of which government officials may invoke the Presidential Communications Privilege in a FOIA case is an issue of first impression in this Court. Appellee's Mot. 8; Mem. Op. 6–7. As the lower court acknowledged, this Court in *Judicial Watch* "expressly declined to decide what limits apply in the FOIA context" on who can invoke the privilege. Mem. Op. 6. Even the DOJ concedes that "this Court has not directly addressed the issue." Appellee Mot. 8. The DOJ has thus failed to follow the Court's explicit instructions, and the motion should be denied on

that basis alone. *See Am. Petroleum Inst.*, 72 F.3d at 914 (holding that an appeal was "not appropriate for summary disposition" because the issue presented "was one of first impression").

There is also a second, related issue of first impression presented by this case. Even if this Court were to hold—in the first instance—that an agency official can unilaterally assert the Presidential Communications Privilege without consulting the President or any immediate presidential adviser, the Court would still have to determine whether an agency official in the *current* administration can use the Presidential Communications Privilege to withhold records generated under a *former* President. *See* Mem. Op. 6–7. Again, the Court would be drawing on a blank slate: the D.C. Circuit has not yet addressed how the Presidential Communications Privilege can be invoked with respect to a former President's records.

Moreover, the statutory rules regarding the operation of the Presidential Communications Privilege have changed significantly in recent years. The Presidential Records Act ("PRA"), 44 U.S.C. §§ 2201 *et seq*., which sets out procedures for evaluating privilege claims by former and incumbent presidents, was substantially modified by Congress in 2014. Presidential and Federal Records Amendments Act of 2014, Pub. L. 113-187, 128 Stat. 2003 (2014) (codified at 44 U.S.C. § 2208). This Court has

not had occasion to interpret the amended PRA or to determine how it affects an agency official's claim of privilege as to records generated under a former President. Summary disposition is not the proper setting to resolve these complex issues. *See Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 230 (D.C. Cir. 2013) (noting the "difficult," "serious," and "awkward" issues posed by the Presidential Communications Privilege). Indeed, neither of the issues of first impression presented in this case should be decided by summary disposition.

II. The lower court failed to apply the test articulated by this Court in *In re Sealed Case*.

Even setting aside the issues of first impression concerning the proper invocation of the Presidential Communications Privilege, this Court should not affirm the decision below because the lower court failed to apply the correct test for the privilege. As this Court explained in *In re Sealed Case*, the Presidential Communications Privilege only applies to documents sent to the President or to documents "solicited and received" by the President's "immediate advisors" and their "staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 749, 752. This Court was emphatic that any extension of the privilege beyond the President,

> unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected.

Id. at 752 (footnote omitted). The Court also made clear that the privilege "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President." *Id*. That is why the Court also evaluated whether "the documents in question were generated in the course of advising the President in the exercise" of a "quintessential and nondelegable Presidential power." *Id*. Importantly, the Court did not hold that the privilege would extend to communications concerning "presidential powers and responsibilities" that "can be exercised without the President's direct involvement." *Id*. at 752–53.

The lower court failed to apply the *In re Sealed Case* test when it determined that the Presidential Communications Privilege applied to the Predictive Analytics Report. Instead, the court quoted one part of the test out of context and sidestepped the full analysis. Mem. Op. 8. It is true, as the lower court noted, that the Presidential Communications Privilege can "apply to communications involving 'members of an immediate White

House adviser's staff.'" *Id.* (quoting *In re Sealed Case*, 121 F.3d at 752). But the court misunderstood the rule for determining *which* senior staff members and records qualify for the privilege. Contra the lower court, the privilege does not attach to the Predictive Analytics Report merely because it was sent to an associate White House Counsel. *Id*. That is not the test.

Rather, the lower court's analysis was incomplete because it failed to address whether the particular White House staff member who received the Predictive Analytics Report had "broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 752. The court did not discuss—and the DOJ did not explain—what responsibilities the receiving staff member had, or what role (if any) that individual played in formulating advice for the President. In *In re Sealed Case*, this Court reached the fact-specific conclusion—after "a review of the documents"—that two *particular* associate White House Counsel "exercised broad and significant responsibility" in advising the President on the use of his non-delegable appointment and removal powers. *In re Sealed Case*, 121 F.3d at 758. Thus, the documents received by those two associate White House Counsel in their specific advisory role were protected under the Presidential Communications Privilege. *Id*. The Court certainly did not hold

that the privilege extends to records received by any person with the job title of "associate White House Counsel." The lower court was wrong to conclude otherwise.

Moreover, the court did not address the purpose of the Report or explain how the Report could possibly have been "generated in the course of advising the President in the exercise" of a "quintessential and nondelegable Presidential power." *Id*. Indeed, it seems obvious that the Report—which compiled research on "the use of predictive analytics in law enforcement," ECF No. 23–1 ¶ 12—was not used for such a purpose. In contrast to this case, the D.C. Circuit cases cited by the DOJ and the lower court pertain to documents used to advise the President on the exercise of his nondelegable powers: appointment and removal (*In re Sealed Case*) and pardons (*Judicial Watch* and *Loving v. Department of Defense*, 550 F.3d 32 (D.C. Cir. 2008)).

The core question presented in this appeal is not, as the DOJ states, whether Exemption 5 is a "categorical rule." Appellee Mot. 8. The question is whether the Predictive Analytics Report falls within the category of records exempt from disclosure under the Presidential Communications Privilege. As the lower court failed to apply the test required to evaluate the application of that privilege to the Report, there is an additional reason to deny the DOJ's summary affirmance motion.

III. This case involves fact-specific analysis that requires this Court's full, de novo review.

This case is also inappropriate for summary disposition because it presents complex and fact-intensive questions about the applicability of the deliberative process privilege, the segregability of non-exempt information, and the classification of research prepared by third-party consultants as "intra-agency" records.

First, the lower court wrongly determined that the DOJ's final report, research, and related briefing materials were covered by the deliberative process privilege, even though these records consist solely of factual material. ECF No. 23 at 10, 13. Factual content is presumptively "not privileged under the deliberative process privilege," *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1184 (D.C. Cir. 1987). The DOJ failed to carry its burden of showing that the facts at issue here are "so inextricably intertwined with the deliberative sections of documents that [their] disclosure would inevitably reveal the government's deliberations." *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 13 (D.C. Cir. 2014); *see also Am. Radio Relay League, Inc.*, 524 F.3d at 238 (quoting *Bristol–Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970)) ("Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to

protect only those internal working papers in which opinions are expressed and policies formulated and recommended.").

Second and relatedly, the lower court incorrectly determined that the DOJ complied with its obligation to disclose reasonably segregable material, Mem. Op. 14—a burden that cannot be met "by sweeping, generalized claims of exemption[.]" *Nat'l Ass'n of Criminal Def. Lawyers v. Dep't of Justice Exec. Office for United States Attorneys*, 844 F.3d 246, 257 (D.C. Cir. 2016) (quoting *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). It is not plausible that the DOJ is unable to segregate a single fact in hundreds of pages of documents because every fact would purportedly "reveal the Department's pre-decisional decision-making process[.]" ECF No. 23-1 ¶ 46. The agency has categorically shielded factual material without showing that it constitutes a deliberative link in a decisional chain. And where an agency fails to "provide 'specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA,'" the agency has not satisfied its statutory duty to disclose reasonably segregable material. *Morley*, 508 F.3d at 1127 (quoting *Mead Data Cent.*, 566 F.2d at 258).

Third, the lower court erred in holding that the DOJ had carried its burden of demonstrating that communications with outside consultants were

"intra-agency" records. Mem. Op. 13–14. The "consultant corollary" to Exemption 5 only applies where an agency proves that "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 336 (D.C. Cir. 2011) (quoting *Klamath Water Users Protective Ass'n*, 532 U.S. at 11). Otherwise, records exchanged between an agency and outside consultants fail to meet the "intra-agency" threshold of Exemption 5. 5 U.S.C. § 552(b). But the "skeletal record" and "bald assertions" put forward by the DOJ below do not meet this test. *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 133 (D.D.C.), *modified,* 185 F. Supp. 3d 26 (D.D.C. 2016); *see also COMPTEL v. FCC*, 910 F. Supp. 2d 100, 119 (D.D.C. 2012) ("The Court doubts, and the FCC has provided no evidence to the contrary, that communications with SBC could meet the requirements for consultant corollary outlined by Klamath and other relevant cases."). The lower court incorrectly allowed the DOJ to invoke the consultant corollary based on a conclusory statement about the consultants' interests and wrongly placed the burden on EPIC to rebut the agency's extraordinarily generic claims. Mem. Op. 13.

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Summary disposition is only appropriate where the merits of the claims are "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision." *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793–94 (D.C. Cir. 1985). The DOJ has failed to satisfy that exacting standard in this case, and the Court should deny the DOJ's motion for summary affirmance.

Respectfully Submitted,

Dated: December 13, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 27(d)(2)(A) and D.C. Circuit Rule 27(a)(2), because it contains 2,429 words.

/s/ John L. Davisson
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CERTIFICATE OF SERVICE

I, John Davisson, hereby certify that on December 13, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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