

In support of this motion, Defendant respectfully submits the attached memorandum of points and authorities, statement of material facts not in genuine dispute, proposed order and declaration.

Respectfully submitted,

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for the District of Columbia

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Civil Chief

By: /s/
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 1:17-cv-0410 (TNM)
)	
U.S. DEPARTMENT OF JUSTICE,)	
Defendant.)	

**DEFENDANT’S STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Rule 7.1(h), Defendant hereby submits the following Statement of Material Facts as to Which There is No Genuine Dispute. The attached Declaration of Vanessa Brinkmann, Senior Counsel in the Office of Information Policy (“OIP”), United States Department of Justice (“DOJ” or “Department”), supports this statement.

1. By letter dated June 15, 2016, Electronic Privacy Information Center (“EPIC” or “Plaintiff”) submitted a FOIA request to DOJ seeking records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. Brinkmann Decl. ¶ 3.
2. By letter dated August 9, 2016, OIP acknowledged receipt of plaintiff’s FOIA request on behalf of the Offices of the Attorney General (“OAG”) and Legal Policy (“OLP”), and provided administrative tracking numbers DOJ-2016-003626 (“AG”) and DOJ-2016-003627 (“OLP”). *Id.* ¶ 5.
3. On March 7, 2017, plaintiff filed suit in connection with the above-referenced FOIA request. *Id.* ¶ 6.

4. By letter dated August 16, 2017, OIP provided an interim response to plaintiff's FOIA request. *Id.* ¶ 7. OIP informed plaintiff that searches had been conducted in OAG and OLP pertaining to Parts (4) and (5) of plaintiff's request, and that no responsive records were located as a result of those searches. *Id.* OIP further informed plaintiff that it was continuing to review and process material that was responsive to Parts (1), (2), and (3) of plaintiff's request and would respond only after consulting with the other entities who had equities in the responsive material. *Id.*
5. By letter dated October 31, 2017, OIP provided its final response to plaintiff's FOIA request. *Id.* ¶ 8. Pursuant to this response, OIP provided 359 pages of material to plaintiff, some with excisions made pursuant to Exemptions 5 and 6 of the FOIA. *Id.* Furthermore, OIP withheld 2,367 pages in full pursuant to Exemption 5 of the FOIA. *Id.*

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II. STANDARD OF REVIEW FOR MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In determining whether a genuine issue of material fact exists, the trier of fact must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party must show that the dispute is genuine and material to the case. A “genuine issue” is one whose factual dispute is capable of affecting the substantive outcome of the case and is supported by admissible evidence that a reasonable trier of fact could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The burden on the moving party may be discharged by

¹ OIP has provided a Vaughn index describing the nature of these withholdings.

showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Summary Judgment in FOIA Cases

FOIA cases are typically and appropriately decided on motions for summary judgment. *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 130 (D.D.C. 2011). In a FOIA action, an agency that moves for summary judgment "bears the burden of showing that there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester." *Weisberg v. U.S. Dep't of Justice*, 705 F. 2d 1344, 1350 (D.C. Cir. 1983). An agency can meet its burden by submitting declarations or affidavits. Fed. R. Civ. P. 56(c)(1)(A). Summary judgment is justified in a FOIA lawsuit once the agency demonstrates that no material facts are in dispute and, if applicable, that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dep't. of State*, 257 F.3d 828, 833 (D.C. Cir. 2001).

III. ARGUMENT

A. The DOJ's Search for Responsive Documents to Plaintiff's FOIA Request was Adequate.

As stated in the parties' December 14, 2017 Joint Status Report and Motion to Adopt a Schedule for Further Proceedings, Plaintiff is not challenging the adequacy of OIP's record searches. Brinkmann Decl. ¶ 9. *See also* ECF No. 20. As such, OIP's records searches are not addressed herein.

B. OIP Did Not Violate FOIA Because It Properly Released All Non-Exempt Responsive Documents to Plaintiff and Validly Withheld Exempt Documents.

FOIA requires federal agencies to release all records responsive to a request for production unless a specific exemption is applicable. 5 U.S.C. § 552(a)(3)(A), (4)(B) and 5 U.S.C. § 552(b).

It allows agencies to withhold only those documents that fall under one of nine specific exemptions. *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010).

FOIA recognizes that the release of certain information “may harm legitimate governmental or private interests.” *Summers v. Dep’t of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). Therefore, the statute contains nine exemptions that permit an agency to withhold responsive information. 5 U.S.C. § 552(b)(1)-(9). When an agency makes a withholding pursuant to a FOIA exemption, the agency must explain the exemption(s) claimed and the applicability of the exemption(s). *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 753 (1989). An agency can explain the exemption(s) through supporting materials, often referred to as *Vaughn* indices. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Ultimately, if an agency’s justifications for invoking a FOIA exemption are logical or plausible, then the agency is entitled to summary judgment. *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

OIP released all non-exempt, responsive records to Plaintiff, as detailed in Vanessa Brinkmann’s declaration, filed contemporaneously. Brinkmann Decl. ¶ 8. The remaining records were protected, either in part or in full, pursuant to certain, applicable FOIA exemptions. *Id.* The reasons for OIP’s determination that some of the documents were exempt from disclosure is given below.

1. OIP properly withheld records pursuant to FOIA Exemption 5.

As discussed in detail below, the information protected by OIP is protected in full or in part pursuant to the deliberative process privilege of FOIA Exemption 5. Brinkmann Decl. ¶ 16. Moreover, thirty-nine pages are protected in full, and two pages in part, pursuant to the presidential communications privilege, in addition to the deliberative process privilege of

Exemption 5. *Id.*

i. OIP properly withheld documents pursuant to the deliberative process privilege of Exemption 5.

Exemption 5 of FOIA allows the withholding of inter- or intra-agency records that would not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C. § 552(b)(5). “[A]gency” is defined in the statute to mean “each authority of the Government,” 5 U.S.C. § 551(1). It includes entities such as Executive Branch departments, military departments, government corporations, government-controlled corporations, and independent regulatory agencies. 5 U.S.C. § 552(f).

Here, the majority of the information withheld from plaintiff pursuant to Exemption 5 consists of internal Department communications and internal Department of Justice briefing material, research, and drafts relating to predictive analytics in law enforcement, and Department of Justice communications with White House advisors regarding a matter of presidential concern – i.e., the White House’s solicitation and receipt of a Department of Justice report presenting the results of the Department’s review on the use of data analytics in law enforcement. Brinkmann Decl. ¶ 18. All of these records were generated by, exchanged within, and internal to the Executive Branch. *Id.* As such, they are “inter-/intra-agency” records and satisfy the threshold of Exemption 5 of the FOIA.

This court has extended the protection of Exemption 5 to documents prepared for an agency by outside consultants. “In such cases, the records submitted by outside consultants played essentially the same part in an agency's deliberative process as documents prepared by agency personnel.” *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001). Courts have allowed agencies to protect advice generated by a wide range of outside experts, regardless of whether these experts provided their

assistance pursuant to a contract, on a volunteer basis, or in some other capacity, creating what courts frequently refer to as the "consultant corollary" to the Exemption 5 threshold. *See Klamath*, 532 U.S. at 11; *see also Nat'l Inst. of Military Justice v. DOD*, 512 F.3d 677, 682 (D.C. Cir. 2008). Courts have emphasized that the agencies sought this outside advice, and that in providing their expertise, the consultants effectively functioned as agency employees, providing the agencies with advice similar to what it might have received from an employee. *See Nat'l Inst. of Military Justice v. DOD*, 404 F. Supp. 2d 325, 345 (D.D.C. 2005).

Here, the records included in the category "*Predictive Analytics Report Research—Consultant*," which were withheld pursuant to Exemption 5, consist of communications and attachments sent between outside expert consultants and the Department.. Brinkmann Decl. ¶ 19. The Exemption 5 threshold expands when an agency requests and receives documents or advice from a party external to the Government, who then functions as though they are an agency employee for the specific purpose of advising the Government. *Id.* In this case, during the course of conducting the Department's study on the use of predictive analytics, and in connection with drafting the Predictive Analytics Report, OLP staff reached out to academics with expertise and relevant research in the field. *Id.* These experts were not advocating for a government benefit at the expense of others; rather, they were simply responding to and cooperating with OLP's request for assistance. *Id.* The records protected in the "*Predictive Analytics Report Research—Consultant*" category consist of emails between OLP and these outside academic consultants, who in response to OLP's requests often provided comprehensive details on their academic works. *Id.* OLP then used the information culled from these subject-matter experts in its internal deliberations as it worked on the Predictive Analytics Report. *Id.* Because all of the "*Predictive Analytics Report Research—Consultant*" records were

generated by and exchanged between the Department of Justice and these expert consultants, they are, effectively, “inter-/intra-agency” records and satisfy the threshold of Exemption 5 of the FOIA. *Id.*

Pursuant to Exemption 5, the three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. *Berger v. IRS*, 487 F. Supp. 2d 482, 498-500 (D.N.J. 2007) (citing *Manna v. Dep’t of Justice*, 815 F. Supp. 798, 814 (D.N.J. 1993)). In order to come within the deliberative process privilege, an agency document must be both pre-decisional and deliberative. *Manna I*, 815 F. Supp. at 814. A document is pre-decisional when it is received by the decision maker on a specific matter prior to rendering a decision on that matter; and a document is deliberative when it reflects the give-and-take of the consultative process. *Id.*

Here, OIP has protected information within the following document categories pursuant to the deliberative process privilege: *Draft Predictive Analytics Report and Cover Letters; Predictive Analytics Report Research; Predictive Analytics Report Research—Consultant; Draft Speech; Briefing Material; Presidential Communications Documents; E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech; E-mails Discussing Predictive Analytics and the Draft Report; E-mails Discussing Research for Predictive Analytics Report; E-mails with the White House.* Brinkmann Decl. ¶ 21. Each document and its reasoning for being withheld under the deliberative process privilege will be discussed in turn.

a. Drafts

The drafts that were withheld in full are pre-decisional because they precede the finalization and transmission to the White House of the final Predictive Analytics Report and cover letter, and precede the delivered speech delivered by Mr. Holder. Brinkmann Decl. ¶ 25.

See Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987) (protecting draft document because disclosure of editorial process would “stifle the creative thinking and candid exchange of ideas necessary to produce good historical work”). These drafts are also deliberative inasmuch as they reflect successive versions of working drafts and show the internal development of the Department’s decisions. Brinkmann Decl. ¶ 25. . Disclosure of these drafts would undermine the ability of Department staff to freely engage in the candid “give and take” and forthright collaboration which is critical to the eventual development of well-reasoned and accurate final documents. *Id.*. DOJ deliberations on these working drafts cannot be effectively or reasonably segregated, because it is the content and evolution of the drafts themselves which reveal the authors’ deliberative process. *Id.* Accordingly, they are protected in full pursuant to the deliberative process privilege.

b. The Predictive Analytics Report Research

Records in OIP’s *Vaughn* index categorized as “*Predictive Analytics Report Research-Consultant*” consist of communications sent between DOJ and third-party consultants, reflecting advice solicited by OLP from these outside, expert consultants, and related research regarding the work of those consultants, as part of the drafting and research process for the Predictive Analytics Report. Brinkmann Decl. ¶ 27. A significant part of these communications is the inclusion by these outside consultants of their academic research, which is attached to and discussed in the experts consultants’ communications with OLP. *Id.* Records categorized as “*Predictive Analytics Report Research*” consist of internal OLP e-mails, bullet points, draft version of a source list, and research selected for and presented by and to OLP staff working on the draft Predictive Analytics Report. *Id.* This internal working research conducted on data

analytics in sentencing was prepared in order to inform the decision-making process attendant to the preliminary development of the Predictive Analytics Report for the WHCO. *Id.*

The research materials that were withheld in full are pre-decisional because they precede the finalization of the Predictive Analytics Report, the drafting of which this research directly informed, and the decision as to what source material was relevant to the Report. *Id.* ¶ 28.

These materials are also deliberative inasmuch as they reflect the thought processes and judgment of OLP staff as they canvass and cull from a spectrum of available source materials, analyze the material, and distill it down for other OLP staff working on the study and report and as such, show the internal development of the Department's decisions. *Id.* Disclosure of this working research would undermine the ability of Department staff to freely engage in the candid "give and take" and forthright collaboration which is critical to the eventual development of well-reasoned and accurate final documents. *Id.*

Working research materials such as those included in the "*Predictive Analytics Report Research*" and "*Predictive Analytics Report Research-Consultant*" categories, reflect Department staff's preliminary thoughts and ideas about what source information is relevant to and/or should be included in the final product of a future work. *Id.* ¶ 29. Department staff tasked with conducting this research do so in order to inform their understanding of the topic, to brief others who are also working on the matter, and ultimately, to draft recommendations and final documents. *Id.* Department employees rely on this research to ensure that their final work-product and decisions are well-informed, and take into account a variety of relevant sources and viewpoints. *Id.* Revealing the inner-workings and preliminary thoughts of Department staff as they engage in research meant to facilitate a robust and comprehensive drafting process would prevent Department employees from fully engaging in research that is necessary to complete

these critical tasks. *Id.* Therefore, these documents were protected in full pursuant to the deliberative process privilege.

d. Briefing Material

In the records categorized as “*Briefing Material*” in OIP’s Vaughn index, Departmental staff prepared materials in order to (1) brief and prepare former Attorney General Holder for an interview with the media; and (2) brief and prepare internal Departmental staff on the background of the White House Predictive Analytics Report. Brinkmann Decl. ¶ 32.

Specifically, these records consist of a briefing or “prep” paper prepared by Department staff to assist in the preparation of former Attorney General Holder for a media interview, and an internal briefing presentation prepared by Departmental employees to aid in briefing OLP staff on the predictive analytics review. *Id.*

The briefing materials withheld by OIP are pre-decisional inasmuch as they precede the events or actions for which Department leadership is being prepared and/or do not embody or reflect final agency decisions. *Id.* ¶ 33. Briefing materials such as those withheld by OIP reflect the drafter’s opinions and analyses on important newsworthy topics and focus on how best to convey and respond to questions on these topics from the Department’s perspective. *See Access Reports*, 926 F.2d. at 1196-97 (holding that memorandum written for purpose of preparing senior agency officials for Congressional testimony was protected under deliberative process privilege and noting, in dictum, that “talking points” memoranda are pre-decisional). Revealing such opinions and analyses would hinder Department staff’s ability to provide candid evaluations on the topics of the day for Department leadership and by extension, Department leadership’s ability to prepare for press events, and to provide informed and accurate representation of the

Department's interests. Brinkmann Decl. ¶ 34. Because the selection of facts and source material is itself a part of the deliberative process inherent to the preparation of briefing materials, which essentially amount to the drafter's own research into the topic or recommendations by the authors, the deliberations in these briefing materials cannot be effectively segregated. *Id.* ¶ 35. Therefore, these documents are protected in full pursuant to FOIA Exemption 5.

e. Emails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech; Emails Discussing Predictive Analytics and the Draft Report; Emails Discussing Research for Predictive Analytics Report; and Emails Discussing Research for Predictive Analytics Report, and Emails with the White House

The following documents in OIP's *Vaughn* index were released to plaintiff, in part:

Emails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech; Emails Discussing Predictive Analytics and the Draft Report; Emails Discussing Research for Predictive Analytics Report; Emails Discussing Research for Predictive Analytics Report; and Emails with the White House. Brinkmann Decl. ¶ 36. All of these e-mails are deliberative because they contain evaluative discussion and preliminary assessments by attorneys and other staff regarding drafts and other matters in which they analyze, make recommendations, give advice, and work toward formulating strategies for final agency action and response. *Id.* ¶ 38. Department officials routinely e-mail each other as they engage in such discussions and develop preliminary assessments about matters on which no final agency decision has been made. *Id.* All of the e-mails protected in part by OIP pursuant to the deliberative process privilege reflect this preliminary give-and-take of agency deliberations. *Id.*

Disclosure of the e-mails at issue would severely hamper the efficient day-to-day workings of the Department as individuals would no longer feel free to discuss their ideas, strategies, and advice in e-mail messages, and Department employees would be much more

circumspect in their discussions with each other and with other Executive Branch officials. *Id.* ¶ 39. All reasonably segregable, non-exempt information was released from within these emails, and only the portions protected by the deliberative process privilege were withheld from plaintiff. *Id.* Therefore, these documents are protected in part pursuant to FOIA Exemption 5.

ii. OIP properly withheld documents pursuant to the presidential communications privilege of Exemption 5.

Exemption 5 has been construed to incorporate the presidential communications privilege. *Judicial Watch, Inc. v. Dept. of Justice*, 365 F.3d 1108, 1113 (D.C. 2004)(citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n. 16 (1975)). Courts in this district have said that presidential conversations ‘are presumptively privileged.’ *In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997) (quoting *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)). Therefore, the presidential communications privilege “preserves the President’s ability to obtain candid and informed opinions from his advisors and to make decisions confidentially,” *Loving v. Dep’t of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (quoting *Judicial Watch, Inc.*, 365 F.3d at 1112), and “protects ‘communications directly involving and documents actually viewed by the President, as well as documents ‘solicited and received’ by the President or his ‘immediate White House advisers [with] ... broad and significant responsibility for investigating and formulating the advice to be given the President.’” *Id.* (alterations in original) (quoting *Judicial Watch, Inc.*, 365 F.3d at 1114). And, “[t]he privilege covers [those] documents reflecting ‘presidential decision making and deliberations,’ regardless of whether the documents are pre-decisional or not, and it covers the documents in their entirety.” *Id.* (quoting *In re Sealed Case*, 121 F.3d at 744–45); see also *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 81 (D.D.C. 2008).

The records protected by OIP pursuant to the presidential communications privilege in the record categories “*Presidential Communications Documents*” and “*E-mails with the White*

House” consist of White House senior advisor communications to the Attorney General soliciting a DOJ policy review and report on data analytics in law enforcement (i.e. the Predictive Analytics Report), the transmission of that report, and early outlines of it, to WHCO, and related communications between DOJ and WHCO about that report. Brinkmann Decl. ¶ 42. Specifically, these records consist of (1) a White House Chief of Staff memorandum to selected Cabinet members -- including the Attorney General -- following-up on the White House Big Data Report, and tasking selected Departments and agencies with further work on specific areas addressed in the Big Data report -- including solicitation of a DOJ review and reporting to WHCO on predictive analytics use in law enforcement; (2) a White House senior advisor’s memorandum to the Attorney General providing additional action steps for DOJ in further follow-up to specific areas addressed in the Big Data report; (3) preliminary, draft outlines of the Predictive Analytics Report drafted by DOJ at the direction of the White House, and transmitted to the WHCO by the Principal Deputy Assistant Attorney General (PDAAG) of OLP; (4) the Predictive Analytics Report and corresponding cover letter, drafted by DOJ at the direction of the White House, and transmitted to the WHCO by the PDAAG of OLP; and (5) e-mails between White House senior advisors and DOJ staff discussing particulars of and attaching the Predictive Analytics Report. *Id.*

The records withheld by OIP in the above-described records categories fall squarely within the presidential communications privilege. *Id.* ¶ 43. They are communications between senior White House staff and DOJ senior leadership (the Attorney General and AAG of OLP) and documents solicited and received by the White House from DOJ (the Predictive Analytics Report and draft outlines thereof). *Id.* As such they are protected in their entireties by the presidential communications privilege. *Id.*

2. Segregability

When an agency has validly withheld information, it must demonstrate that all reasonably segregable material has been released. 5 U.S.C. § 552(b). Courts are required to find expressly that the agency produced all reasonably segregable portions of a record. *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007). In making such a finding, courts recognize that “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).

Under FOIA, if a record contains information that is exempt from disclosure, any “reasonably segregable,” non-exempt information must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). However, non-exempt portions of records do not need to be disclosed if they are “inextricably intertwined with exempt portions.” *Mead Data Cent., Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show “with ‘reasonable specificity’” that the information it has withheld cannot be further segregated. *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996).

Here, OIP thoroughly reviewed each of the documents and withheld from disclosure only that information which would reveal the Department’s pre-decisional decision-making process and/or would reveal the nature of communications with the White House on matters of presidential concern. Brinkmann Decl. ¶ 46. OIP conducted a line-by-line review of the records and released any portions thereof that were not protected by an applicable FOIA exemption. *Id.* Therefore, all reasonably segregable, non-exempt information from these records has been disclosed to plaintiff.

IV. CONCLUSION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, DOJ hereby moves for summary judgment because there is no genuine issue as to any material fact and DOJ is entitled to judgment as a matter of law.

For the reasons set forth above, Defendant respectfully requests that this Court grant judgment in favor of DOJ.

Respectfully submitted,

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