IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant.

Civil Action No. 17-410 (TNM)

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Electronic Privacy Information Center respectfully opposes Defendant United States Department of Justice's Motion for Summary Judgment, and submits the following combined Opposition to Defendant's Motion and Cross-Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(a) for the reasons set forth in the accompanying Memorandum of Points and Authorities.

Dated: March 16, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF AUTHORITIES[1]

Cases

[1] Authorities on which counsel chiefly relies are denoted by an asterisk.

Statutes

Other Authorities

Regulations

PRELIMINARY STATEMENT

This case is about a Freedom of Information Act ("FOIA") request concerning "evidence-based tools" and "risk assessment" techniques in the criminal justice system. Despite the increasing reliance on these techniques in nearly every aspect of law enforcement, the Department of Justice ("DOJ") has refused to release a report concerning the agency's use and analysis of "predictive policing." This particular technique depends on secretive algorithms and raises fundamental Due Process questions that have drawn concern from the highest levels of government, including the White House. Though the DOJ report was submitted to the White House in 2014, the public was not made aware of its existence until the Electronic Privacy Information Center ("EPIC") obtained a series of internal DOJ communications about the report last year. To this day, the DOJ has refused to release even the factual research that underpins the report, contrary to its obligations under the FOIA. The disclosure of this information is necessary for the public to assess the merits of criminal justice algorithms, including their fairness and reliability, and to allow individuals the opportunity to challenge institutional decisions rendered against them. The Court should reject the DOJ's improper assertions of Exemption 5 and order the agency to release the records that EPIC requested. The public has a right to know how predictive policing tools are being deployed.

BACKGROUND

I. Evidence-Based Assessment Tools

"Evidence-based assessment tools," or "risk assessments," are techniques that "try to predict recidivism—repeat offending or breaking the rules of probation or parole—using statistical probabilities based on factors such as age, employment history and prior criminal record." Anna Maria Barry-Jester et al., *The New Science of Sentencing*, Marshall Project (Aug.

4, 2015).[2] Federal and state officials nationwide use evidence-based risk assessment tools to make decisions at all stages of criminal justice process. Nathan James, Cong. Res. Serv., R44087, *Risk and Needs Assessment in the Criminal Justice System* 4–5 (2015). These techniques are controversial: the reliability and fairness of "evidence-based" tools, as well as their constitutional legitimacy, are vigorously contested. *See, e.g.*, *State v. Loomis*, 371 Wis. 2d 235 (2016) (concerning a defendant's challenge under the Due Process Clause of the use of a risk assessment tool for sentencing). Nonetheless, risk assessments are increasingly used to make sentencing and other significant criminal justice decisions. Alyssa M. Carlson, *The Need for Transparency in the Age of Predictive Sentencing Algorithms*, 103 Iowa L. Rev. 303, 308–09 (2017). Given the significant impact risk assessments have on the lives of individuals in the criminal justice system, transparency is of the utmost importance and is necessary to secure fair outcomes, to preserve constitutional rights, and to maintain accountability.

Commercial risk assessment tools are already in use in criminal cases across the country. The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) and the Level of Service Inventory Revised (LSI-R) systems purport to assess individuals' risk levels and criminogenic needs based on a wide range of personal factors. *Id.* at 310–11. COMPAS, for example, considers factors such as "criminal and parole history, age, employment status, social life, education level, community ties, drug use and beliefs," while LSI-R uses a "wide set of factors, ranging from criminal history to personality patterns." *Id.* at 310, 329 n.44. The federal Post-Conviction Risk Assessment likewise uses information such as criminal history, education and employment, and social networks to reach a "final conclusion regarding risk level and

[2] https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing.

criminogenic needs." Admin. Office of the U.S. Courts, Office of Prob, and Pretrial Servs., *An Overview of the Federal Post Conviction Risk Assessment* 9–10 (2011).[3]

The DOJ, speaking through the National Institute of Corrections, has stated that the agency aims "to build a systemwide framework (arrest through final disposition and discharge)" of evidence based decision-making. *What Is EBDM?*, National Institute of Corrections: Evidence-Based Decision Making.[4] Nonetheless, the DOJ itself has expressed reservations and concern about the use of criminal justice algorithms. The DOJ Criminal Division called assessments based on sociological and personal information rather than prior bad acts "dangerous" and constitutionally suspect, citing the disparate impacts of risk assessments and the erosion of consistent sentencing. Letter from Jonathan J. Wroblewski, Dir., Office of Policy and Legislation, to Hon. Patti Saris, Chair, U.S. Sentencing Comm'n (July 29, 2014).[5] Former U.S. Attorney General Eric Holder stated that "basing sentencing decisions on static factors and immutable characteristics . . . may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society." Eric Holder, *Speech Presented at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference, Philadelphia, PA*, 27 Fed. Sent'g Rep. 252 (2015).

For these reasons, there is a significant public interest in the release of DOJ records relating to "evidence-based" practices in sentencing—including policies, guidelines, source codes, and validation studies. The disclosure of this information is necessary for the public to

[3] http://www.uscourts.gov/sites/default/files/pcra_sep_2011_0.pdf.
[4] http://info.nicic.gov/ebdm/ (last visited Mar. 16, 2018).
[5] https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final072814.pdf.

assess the merits of criminal justice algorithms, including their fairness and reliability, and to allow individuals the opportunity to challenge institutional decisions rendered against them.

II. EPIC's FOIA Request and Lawsuit

On June 15, 2016, EPIC submitted a FOIA Request to the DOJ's Office of Information Policy ("OIP"). Brinkmann Decl. ¶¶ 3–5. EPIC's FOIA Request sought records related to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. *Id.* ¶ 3. Specifically, EPIC sought:

1. All validation studies for risk assessment tools considered for use in sentencing, including but not limited to, COMPAS, LSI-R, and PCRA.
2. All documents pertaining to inquiries for the need of validation studies or general follow up regarding the predictive success of risk assessment tools.
3. All documents, including but not limited to, policies, guidelines, and memos pertaining to the use of evidence-based sentencing.
4. Purchase/sales contracts between risk-assessment tool companies, included but not limited to, LSI-R and the federal government.
5. Source codes for risk assessment tools used by the federal government in pre-trial, parole, and sentencing, from PCRA, COMPAS, LSI-R, and any other tools used.

Id. ¶ 4. In a letter dated August 9, 2016, OIP acknowledged receipt of EPIC's FOIA request on behalf of the DOJ's Office of the Attorney General ("OAG") and the Office of Legal Policy ("OLP"). *Id.* ¶ 5.

On March 7, 2017—265 days after the DOJ received EPIC's FOIA Request—EPIC filed the instant suit due to the DOJ's failure to make a determination regarding EPIC's Request within the time period required by 5 U.S.C. § 552(a)(6)(B). Compl., ECF No. 1; Brinkmann Decl. ¶ 6. EPIC stated two claims for relief: failure to comply with statutory deadlines and unlawful withholding of agency records. Compl. 6.

In a letter dated August 16, 2017, the DOJ informed EPIC that searches had been conducted of OAG and OLP pertaining to categories 4 and 5 of EPIC's request. Brinkmann Decl. ¶ 7. The

DOJ stated that no responsive records were located as a result. *Id.* In a letter dated October 31, 2017, the DOJ informed EPIC that it had completed final processing of EPIC's request. Brinkmann Decl. ¶ 8. The DOJ provided EPIC with 359 pages of documents, many of which were partially redacted. *Id.* DOJ also stated that it was withholding 2,367 pages in full under Exemption 5 of the FOIA. *Id.*

ARGUMENT

The FOIA was enacted "to facilitate public access to Government documents" and "was designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Citizens for Responsibility & Ethics in Washington v. DOJ*, 746 F.3d 1082, 1088 (D.C. Cir. 2014) (quoting *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). The purpose of the FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "In enacting FOIA, Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions—and did so across the length and breadth of the Federal Government." *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 n.5 (2011). As a result, the FOIA "mandates a strong presumption in favor of disclosure." *Citizens for Responsibility & Ethics in Washington v. DOJ*, 854 F.3d 675, 681 (D.C. Cir. 2017); *EPIC v. DOJ*, 511 F. Supp. 2d 56, 64 (D.D.C. 2007) (internal citations omitted).

The FOIA specifies that certain categories of information may be exempt from release, "[b]ut these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011) (quoting *Nat'l Ass'n of Home Builders v. Norton,* 309 F.3d 26, 32 (D.C. Cir. 2002)). Therefore, FOIA exemptions "must be narrowly construed." *Id*. "The statute's goal is broad disclosure, and the exemptions must be given a narrow compass." *Milner*, 562 U.S. at 563 (internal citations and

quotation marks omitted). Furthermore, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B); *see also EPIC v. DHS*, 384 F. Supp. 2d 100, 106 (D.D.C. 2005). Where the government has not carried this burden, summary judgment in favor of the Plaintiff is appropriate. *See, e.g.*, *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

I. STANDARD OF REVIEW

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact is one that would change the outcome of the litigation." *EPIC v. DHS*, 999 F. Supp. 2d 24, 28 (D.D.C. 2013) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). FOIA cases are typically decided on motions for summary judgment. *Id*.; *see also Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009). The court must "analyze all underlying facts and inferences in the light most favorable to the FOIA requester"; therefore, "summary judgment for an agency is only appropriate after the agency proves that it has 'fully discharged its [FOIA] obligations.'" *Dugan v. DOJ*, 82 F. Supp. 3d 485, 494 (D.D.C. 2012).

In some cases, the agency may carry its burden by submitting affidavits that "describe the documents and justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor evidence of agency bad faith." *Pinson v. DOJ*, 236 F. Supp. 3d 338, 353 (D.D.C. 2017). But an agency seeking to withhold documents must "provid[e] a sufficiently detailed description of the exemption, the portion(s) of documents to which it applies, and justification as to why the exemption is relevant, such that the district court

can conduct a *de novo* review of the agency's determination." *Shapiro v. DOJ*, No. 1:16-CV-01399 (TNM), 2018 WL 695376, at *6 (D.D.C. Feb. 1, 2018) (citing *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 786 (D.C. Cir. 1980)); *see also* 5 U.S.C. § 552(a)(4)(B).

II. EPIC IS ENTITLED TO SUMMARY JUDGMENT

The FOIA provides that every government agency shall, "upon any request which (i) reasonably describes such records and (ii) is made in accordance with published rules[,] . . . make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). In a FOIA case, the "agency bears the burden of establishing that an exemption applies." *PETA v. NIH*, 745 F.3d 535 (D.C. Cir. 2014). The agency may "meet this burden by filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed." *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987) (citing *Military Audit Project v. Casey*, 656 F.2d at 738; *Lesar v. DOJ*, 636 F.2d at 481; *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Ray v. Turner*, 587 F.2d at 1195). It is not sufficient for the agency to provide "vague, conclusory affidavits, or those that merely paraphrase the words of a statute." *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 787 (D.C. Cir. 1980) (per curiam). When an agency invokes an exemption, "it must submit affidavits that provide 'the kind of detailed, scrupulous description [of the withheld documents] that enables a District Court judge to perform a de novo review.'" *Brown v. FBI*, 873 F. Supp. 2d 388, 401 (D.D.C. 2012) (citing *Church of Scientology*, 662 F.2d at 786).

Exemption 5 permits the withholding of "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). To qualify for Exemption 5, responsive records must come from a government agency and must fall within a litigation privilege against discovery. *Dep't of Interior*

v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001). Two such privileges are the deliberative process privilege and the presidential communications privilege. *Abtew v. DHS*, 808 F.3d 895, 898 (D.C. Cir. 2015) (citing *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006)). As set forth below, the DOJ has improperly asserted both of these Exemption 5 privileges in order to withhold 371 pages in full and 2 pages in part.[6]

A. The DOJ has unlawfully withheld records on the erroneous view that they are protected by the deliberative process privilege.

The DOJ has unlawfully withheld two categories of records on the theory that the documents are shielded from disclosure by the deliberative process privilege. The deliberative process privilege "protects agency documents that are both predecisional and deliberative." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006); *see also Klamath*, 532 U.S. at 8 (privilege covers "documents reflecting advisory opinions, recommendations, and deliberations. comprising part of a process by which governmental decisions and policies are formulated"). Because the DOJ has not established that this material is privileged, the agency's withholding is therefore unlawful.

[6] EPIC is not challenging the withholding in full of:

- 1,934 pages containing "Draft Predictive Analytics Report and Cover Letters" Brinkmann Decl. ¶ 15; *see also* Vaughn Index 2;
- 45 pages containing a "Draft Speech," Brinkmann Decl. ¶ 15; *see also* Vaughn Index 4;
- 7 pages containing "Preliminary, draft outline[s] of the Predictive Analytics Report" submitted by the OLP to the White House Counsel's Office, Vaughn Index 8–9; *see also* Brinkmann Decl. ¶ 15; or
- 6 pages containing "White House Memorand[a]" to the Attorney General and other "heads of Departments and Agencies" by the White House Chief of Staff, Vaughn Index 9–10; *see also* Brinkmann Decl. ¶ 15.

With two exceptions set forth in Part II.A.2 *infra*, EPIC is not challenging the withholding of redacted portions of the 128 records disclosed in part to EPIC.

1. The DOJ improperly withheld the Final Predictive Policing Report.

The DOJ has unlawfully withheld 26 pages of the "Final Predictive Policing Report and Cover Letter" ("Final Report"), claiming that the records are "partially" protected from disclosure under the deliberative process privilege. Vaughn Index 10–11, ECF No. 23-1. Yet the DOJ failed to support this claim and can point to no valid reason why a final agency report should be shielded from public view.

The DOJ did not explain how a pre-decisional privilege could apply to a report that—by the DOJ's admission—is a final product. *See* Ex. A (email from DOJ to White House attorney Kate Heinzelman attaching Final Report under filename "Predictive Analytics - FINAL.pdf"); Ex. B (email between DOJ officials sharing "Final copy of the Predictive Analytics paper" under filename "Predictive Analytics - FINAL.pdf"). Because the DOJ "did not raise this argument in their original motion," any subsequent argument that the Final Report is pre-decisional must be "deemed waived and [should] not be considered." *David v. District of Columbia*, 436 F. Supp. 2d 83, 90 n.2 (D.D.C. 2006) (citing *Pub. Citizen Health Research Group v. NIH*, 209 F. Supp. 2d 37, 43–44 (D.D.C. 2002)); *see also New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (an argument not made in an opening brief "is therefore waived.").

Even if the DOJ had properly raised this argument, the report does not fall within the deliberative process privilege. First, as the DOJ has stated, the Report is *final*—not deliberative or pre-decisional. *See* Exs. A, B. That fact alone places the Final Report beyond the reach of the deliberative process privilege. *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014) (distinguishing, for the purposes of deliberative process privilege, between "drafts" and "final document[s]" that those drafts "evolve into"); *Wade v. Washington Metro. Area Transit Auth.*, No. CIV. 01-0334 (TFH), 2006 WL 890679, at *5 (D.D.C. Apr. 5, 2006) (holding that deliberative process privilege was "not properly asserted" where agency had "completed its

investigation" and document in question "purport[ed] to be 'final'"). Moreover, by the DOJ's own account, the Final Report is strictly "a DOJ policy review and report on data analytics in law enforcement[.]" Such a document "explaining the existing policy and current state of affairs" is precisely the type of record that the Court held unprotected by the deliberative process privilege in *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865 (D.C. Cir. 2010). As the Court explained in that case:

> [W]henever an agency seeks to change a policy, it logically starts by discussing the existing policy, and such discussions hardly render documents explaining the existing policy predecisional. Otherwise it would be hard to imagine any government policy document that would be sufficiently final to qualify as non-predecisional and thus subject to disclosure under FOIA.

Id. at 876. It would be equally hard to imagine a limiting principle to the deliberative process privilege were the Final Report in this case found pre-decisional.

The OIP declares that the Final Report is deliberative because it might "reveal potential benefits and concerns, tentative next steps, questions for consideration, and similar deliberations regarding the use of predictive analytics in law enforcement." Brinkmann Decl. ¶ 44. First, such an assertion is "conclusory and *ipsit dixit*. It is not enough to state that documents relate to a deliberative process, DOJ must identify the specific deliberative process at issue." *Hall v. DOJ*, 552 F. Supp. 2d 23, 29 (D.D.C. 2008). In fact, documents qualify as deliberative "only if they 'reflect[ ] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, [or] the personal opinions of the writer prior to the agency's adoption of a policy.'" *Pub. Citizen,* 598 F.3d at 876 (alterations in original) (emphasis added) (quoting *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981)).

The DOJ does not claim that the Final Report contains "advisory opinions" or "recommendations," and the Report—which was drafted, reviewed, and cleared by numerous

DOJ officials, Exs. C–G—certainly does not constitute the "personal opinions of [a] writer." *Id.* Nor can the DOJ carry its burden simply by reciting the word "deliberations," Brinkmann Decl. ¶ 44, without identifying what decision or policy was being formulated and which DOJ officials were involved in that deliberation. *Cf. Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257–58 (D.C. Cir. 1982) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)) ("Coastal States forecloses the Agency's argument that any document identified as a 'draft' is per se exempt. Even if a document is a 'draft of what will become a final document,' the court must also ascertain 'whether the document is deliberative in nature.'"). The conclusory assertions in the Brinkmann Declaration do not satisfy the agency's obligation to show "by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Senate of the Commonwealth of P.R. on Behalf of Judiciary Comm. v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987) (quoting *Mead Data Central, Inc. v. Dep't of the Air Force,* 566 F.2d 242, 258 (D.C.Cir.1977)). The DOJ has also not shown that the Final Report was a deliberative link in a pre-decisional chain. A record is not privileged simply because it identifies "benefits," "concerns," and "questions" relevant to an issue (here, predictive policing). And an agency report can be final (and therefore fall outside the privilege) even if it does not establish an official, definitive position on every issue it raises. Otherwise nearly "every factual report would be protected as a part of the deliberative process." *Playboy Enterprises, Inc. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982).

Second, the OIP's application of the deliberative process privilege fails because the DOJ has "provided no hint of [what] final agency policy its 'predecisional' material preceded." *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007). The Brinkmann Declaration simply alludes to a nebulous and unbounded "decision-making process in follow up to the Big Data

Report." Brinkmann Decl. ¶ 44. This falls far short of the DOJ's burden of "identify[ing] a '*definable* decisionmaking process' to which withheld documents contributed[.]" *Competitive Enter. Inst. v. EPA*, 12 F. Supp. 3d 100, 118 (D.D.C. 2014) (emphasis added) (quoting *Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991)). "[I]n order to carry its burden, the agency must describe not only the contents of the document but also enough about its context, *viz.* the agency's decisionmaking process, to establish that it is a pre-decisional part thereof." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1204 (D.C. Cir. 1991). "A mere recitation of the standard for protection under the deliberative process privilege is not sufficient. Rather, [the agency] must identify what prospective 'final policy' the documents predate." *Heartland All. for Human Needs & Human Rights v. DHS*, No. CV 16-211 (RMC), 2018 WL 647634, at *5 (D.D.C. Jan. 31, 2018). The agency cannot rest its claim of deliberative process privilege on a "vague and conclusory assertion[]" that the Final Report preceded a decision-making process of indeterminate time, scope, and legal foundation. *Hardy v. ATF,* 243 F. Supp. 3d 155, 174 (D.D.C. 2017). The FOIA demands more.

Finally, even if the Court were to accept the assertion that the deliberative process privilege applies to the Final Report, the OIP concedes that the Report would only be "partially protected." Brinkmann Decl. ¶ 44. This concession reflects the principle, established in *EPA v. Mink*, 410 U.S. 73, 93 (1973), "that the privilege applies only to the 'opinion' or 'recommendatory' portion of [a] report, not to factual information which is contained in the document." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980). To the extent that the Final Report "go[es] beyond describing and explaining the existing policy and current state of affairs, [the agency] may withhold only those portions that provide candid or evaluative commentary." *Pub. Citizen, Inc. v. OMB*, 598 F.3d at 876. It can be assumed that the

26-page report focused on "data analytics in law enforcement" contains a large volume of factual material falling indisputably outside of the deliberative process privilege. *See Badhwar v. U.S. Dep't of Air Force*, 615 F. Supp. 698, 705 (D.D.C. 1985) ("The defendants also claim a deliberative process privilege for the reports. The conclusory statements supporting this proposition do not reveal why non-deliberative statements cannot be segregated from the assertedly deliberative elements."), *aff'd*, 829 F.2d 182 (D.C. Cir. 1987). The DOJ is thus obligated to disclose this information—along with the rest of the Final Report—to EPIC.

2. The DOJ unlawfully withheld research and briefing materials related to the Final Predictive Policing Report.

The DOJ has also unlawfully withheld research and briefing materials that consist largely of aggregated factual material not subject to the deliberative process privilege. Contrary to the agency's assertion, disclosure of such factual material is required under the FOIA because facts are not deliberative and their disclosure would have no impact on the DOJ's ability to engage in candid deliberations.

Even the agency's own description of the records does not support the conclusion that they are deliberative. None of the 296 withheld pages of research materials or the 49 pages of withheld briefing materials can be withheld under Exemption 5. These records include—in the DOJ's own words—of "bullet points," "a source list," and "research." Def's. Mot. Summ. J. 10. The briefing materials consist of "facts," "issues," and "source materials." *Id.* at 13. This is clearly the type of "factual material" that the D.C. Circuit has repeatedly held to be "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); *see also McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 709 (D.C. Cir. 2014); *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

The rationale for the D.C. Circuit's rule is simple: "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." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 238 (D.C. Cir. 2008) (quoting *Bristol–Myers Co. v. FTC,* 424 F.2d 935, 939 (D.C. Cir. 1970)). Because the factual material in the research and briefing records represents no part of "the give-and-take of the consultative process," the material is neither deliberative nor privileged. *Judicial Watch, Inc. v. DOD*, 847 F.3d 735, 739 (D.C. Cir. 2017) (quoting *Pub. Citizen, Inc.*, 598 F.3d at 874).

The DOJ contends, in an attempt to stretch the deliberative process privilege beyond recognition, that the research and briefing materials are exempt in their entirety because they "reflect the thought processes and judgment" of DOJ staff or because such material "essentially amount[s] to the drafter's own research[.]" Def's. Mot. Summ. J. 11, 13. But the D.C. Circuit rejected the view that factual material is protected merely because it *might* reflect an agency employee's "thought processes":

> We are not persuaded by the Department's argument. Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.

Playboy Enterprises, Inc., 677 F.2d at 935. Here, as in *Playboy Enterprises*, the factual material in question was collected for inclusion in a DOJ Final Report, the contents of which "in turn would ma[d]e available" to a decision-maker outside of the agency. *Id.* at 937. The DOJ's simple act of aggregating facts and useful sources for the Final Report did not convert that material into deliberative, privileged documents.

The only scenario in which the deliberative process privilege may shield facts is when

that material is "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 13 (D.C. Cir. 2014); *see also Mink*, 410 U.S. at 93; *McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 709 (D.C. Cir. 2014); *Loving v. DOD,* 550 F.3d 32, 38 (D.C. Cir. 2008). But the DOJ offers no plausible explanation to support the application of this exception here. Instead, the agency merely recites the same arguments that doomed the DOJ's case in *Playboy Enterprises*. Def's. Mot. Summ. J. 11, 12–13. And even if some of the factual material contained in the withheld pages were inextricably intertwined with deliberative material, it beggars belief that *not one single fact* in 345 pages could be disentangled and properly disclosed to EPIC. This claim simply cannot be squared with the DOJ's obligation to "withhold only those portions [of records] that provide candid or evaluative commentary." *Pub. Citizen, Inc.*, 598 F.3d at 876.

The DOJ's partial redactions in the records released to EPIC underscore the dubiousness of its blanket withholding of other research and briefing materials. For example, in Document 0.7.11378.11258 the DOJ redacted an eight-line paragraph in an email from a DOJ Bureau of Justice Assistance (BJA) policy advisor to several other DOJ officials. Ex. H. The email appears to consist entirely of factual material, yet the DOJ withheld the final full-length paragraph on the grounds that the document is an "E-mail chain among DOJ staff containing deliberations about how to respond to a particular news article." Vaughn Index 29. Given that the BJA advisor described her message as consisting of "data points," it is unlikely that the redacted material constitutes deliberations about a news article. Ex. H. But even if the withheld paragraph is genuinely deliberative, the document demonstrates the ease with which the DOJ could segregate deliberative material from factual material in the 345 pages that the agency withheld in full. The

same is true of Document 0.7.11378.23749, in which the DOJ redacted the final two paragraphs and attachment of an email from a Justice Management Division employee to other DOJ officials. Ex. I. Though the email and attachment appear to consist entirely of a summary of "academics, their relevant articles, and what they say about their respective projects," the department erroneously withheld all but a small portion of the message on the grounds that it "reflect[s] advice and research[.]" Vaughn Index 32.

Moreover, many of the records in dispute do not even constitute intra-agency records at all (and thus do not meet the threshold test of Exemption 5). The DOJ alleges that 282 pages of withheld records constitute "[c]ommunications and attachments sent between DOJ and third-party consultants." Def.'s Mot. Summ. J. 8. The DOJ further argues—while offering no particular basis to conclude—that these records fit into the "consultant corollary" to 5 U.S.C. § 551(b)(5), even though they were exchanged between agency personnel and third parties. *Id.* But the consultant corollary test cannot be satisfied by the conclusory assertions that the DOJ makes here. As the court held in *Competitive Enterprise Institute* (*CEI*) *v. Office of Science & Technology Policy*, such a "skeletal record" is insufficient to invoke the corollary:

> Whether a person is self-interested in a particular situation is not a binary question. Rather, self-interest exists on a spectrum, with altruism at one end and greed or avarice on the other. The point at which selflessness passes into self-interest is not demarcated by a bright line. Here, OSTP offers little more than bald assertions to support Dr. Francis' purported lack of self-interest in commenting on the OSTP Letter.

161 F. Supp. 3d 120, 133–34 (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."); *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d 17, 26 (D.D.C. 2002)

("The Court cannot accept defendants' characterization of Chile as a non-adversarial consultant to USTR.").

Just like the agency *CEI*, the DOJ fails to provide adequate evidence justifying the application of the consultant corollary. In *CEI*, the OSTP "stated in conclusory terms" that its consultant "effectively functioned as an agency employee, providing advice to OSTP similar to what [the OSTP director] would have sought and received from an OSTP agency employee." *CEI*, 161 F. Supp. 3d at 133. The agency also asserted that the consultant "operated as a technical science expert solely on OSTP's behalf, not advancing her own interests or seeking government benefit." *Id*. Still, the court found this explanation insufficient and "reject[ed] Defendant's attempt to apply the consultant corollary." *Id.* at 135. The DOJ fares no better here, arguing only that its consultants "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." Brinkmann Decl. ¶ 19. And here, as in *CEI*, the DOJ's academic contacts have a strong "professional and reputational stake" in ensuring that their own personal views are reflected in a major federal report on predictive policing. *CEI*, 161 F. Supp. 3d at 134. Their interests are thus distinct from those of the agency. Because the DOJ has offered no sufficiently particularized evidence to demonstrate that its consultants' interests were aligned with its own, *CEI* dictates that the consultant corollary does not apply and that these 282 pages of external communications are subject to release.

In sum, the DOJ's assertion of Exemption 5 to withhold from EPIC—either in part or in full—the research and briefing materials compiled for the Final Report fails because the deliberative privilege does not apply to factual material and because many of the materials are not intra-agency communications. The Court should therefore order the agency to disclose these

records under the FOIA.

3. The DOJ has failed to disclose reasonably segregable material in the Final Report and the related research and briefing materials.

The FOIA's segregability requirement ensures that agencies release all portions of responsive documents that would not cause harm under one of the Exemptions, thus assuring that agencies comply with the statute in a precise and granular fashion. The D.C. Circuit has emphasized that the focus of the FOIA "is information, not documents." *Stolt-Nielson Transp. Group Ltd. v. United States*, 534 F.3d 728, 733-34 (D.C. Cir. 2008) (citing *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (1977)). As a result, the FOIA imposes an affirmative obligation to segregate and release all non-exempt materials; "an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Id*.; *see also* 5 U.S.C. § 552(b).

The discovery privileges incorporated by Exemption 5 do not override the segregability obligation, but instead "work in conjunction" to ensure that agencies satisfy their duty to produce non-exempt materials even when they appear in the same record as protected materials. *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 369 (D.C. Cir. 2005). In order to identify deliberative materials protected under Exemption 5, "the agency has the burden of establishing what deliberative process is involved." *Coastal States Gas Corp.*, 617 F.2d at 867. This burden "cannot be shifted to the courts by sweeping, generalized claims of exemption." *Mead Data Cent., Inc.*, 566 F.2d at 260. Instead, the agency must provide a "detailed justification" of its exemptions and identify those portions of the materials that are non-exempt. *Id*.

The agency's obligation to release segregable, non-exempt portions of responsive records is well established, and the burden is on the agency to prove that they have satisfied this requirement. The FOIA states:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made.

5 U.S.C. § 552(b). If the agency fails to "provide 'specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA,'" the agency has not met its statutory obligation. *Morley*, 508 F.3d at 1127 (citing *Mead Data Cent.*, 566 F.2d at 258).

But even a detailed description may not be enough in all cases. Courts can require *in camera* inspection of records in order to determine whether any segregable factual material exists if "an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure." *Quinon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996); *see also Meeropol v. Meese,* 790 F.2d 942, 958 (D.C. Cir. 1986) ("[A] finding of bad faith or contrary evidence is not a prerequisite to in camera review; a trial judge may order such an inspection 'on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination.'") (citing *Ray v. Turner,* 587 F.2d 1187, 1195 (D.C. Cir. 1978)).

The DOJ's Motion and supporting exhibits show that the agency has not met its segregability obligations as to the Final Report, research materials, and briefing materials. The agency contends that it conducted a "line-by-line review of the [responsive] records and released any portions thereof that were not protected by an applicable FOIA exemption." Def.'s Mot. Summ. J. 16. Yet the DOJ simultaneously argues that revealing even a *single* fact from the 345 pages of research and briefing materials and 26 pages of the Final Report would inappropriately "reveal the Department's pre-decisional decision-making process[.]" *Id.* This argument is simply not plausible. The DOJ either misunderstands what constitutes non-deliberative factual material or has not conducted the detailed review that it purports to have (or both). To ensure that all non-

exempt material is released to EPIC, the Court should—at a minimum—order the DOJ to conduct a more rigorous review of the documents withheld in full. Given the inadequacy of the agency's Declaration, the Court should also conduct *in camera* inspection of records to determine whether segregable factual material exists within the responsive records.

B. The DOJ has unlawfully withheld records on the erroneous view that they are protected by the presidential communications privilege.

DOJ also claims that the Final Report is protected by the presidential communications privilege. Yet the agency fails entirely to justify this claim, invoking a power it does not have to assert privilege that does not apply.

Exemption 5 of the FOIA "has been construed to incorporate the presidential communications privilege." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004). The privilege "applies to documents in their entirety" but protects only those 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 (quoting *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)). The extension of the privilege beyond the President himself is limited strictly to "top presidential advisers" such as the "White House Counsel, Deputy White House Counsel, Chief of Staff and Press Secretary." *Judicial Watch*, 365 F.3d at 1114. "[T]he presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected." *In re Sealed Case*, 121 F.3d at 752. The D.C. Circuit has expressly warned of "the dangers of expanding [the privilege] too far," *Judicial Watch*, 365 F.3d at 1115.

Yet what the DOJ argues for in this case would clearly be a dangerous expansion of the privilege. First, the agency argues that the Final Report is privileged without offering any

evidence that the current President, the former President, or any immediate presidential advisor who actually solicited or received the Final Report has invoked—or would even *consider* invoking—the presidential communications privilege as to this record. The agency simply proclaims that the Final Report "fall[s] squarely within" a privilege that, as it happens, has not been asserted by either the President or his close advisors. Brinkmann Decl. ¶ 43. Although "the issue of whether a President must personally invoke the privilege remains an open question" in this Circuit, *Judicial Watch, Inc.*, 365 F.3d at 1114, the DOJ cites no authority for the proposition that an agency can invoke the privilege totally independently from the small circle of people to whom it applies.

Indeed, in cases where the presidential communications privilege has been successfully asserted, such authorization has typically come—at a minimum—from the White House Counsel's Office. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 745 n.16 ("[I]n his affidavit former White House Counsel Abner J. Mikva stated 'the President . . . has specifically directed me to invoke formally the applicable privileges over those documents.'"); *Citizens for Responsibility & Ethics in Washington (CREW) v. DHS*, 514 F. Supp. 2d 36, 48 (D.D.C. 2007) (accepting an invocation of the privilege where it was asserted by the Deputy Assistant to the President for Homeland Security). In *Judicial Watch*, the D.C. Circuit expressed concern that even a "White House Counsel's declaration" might be insufficient to invoke the privilege because—unlike the declaration in *In re Sealed Case*—it did not specifically state that the White House Counsel was "authorized by the President to invoke the presidential communications privilege." *Judicial Watch*, 365 F.3d at 1114; *see also In re Sealed Case*, 121 F.3d at 745 (noting that *United States v. Reynolds*, 345 U.S. 1 (1953), "might suggest that the President must assert the presidential communications privilege personally"); *Ctr. on Corp. Responsibility, Inc. v. Shultz*, 368 F. Supp.

863, 872–73 (D.D.C. 1973) (White House Counsel's affidavit indicating that he was authorized to say that the White House was invoking executive privilege over tapes and documents in White House files was insufficient to invoke the privilege). Given that the "agency bears the burden of establishing that an exemption applies" in a FOIA case, the DOJ's failure to allege or provide any evidence that the presidential communications privilege was properly asserted here is fatal to its reliance on that privilege. *PETA*, 745 F.3d at 535.

Second, even if the DOJ could invoke the privilege on behalf of the President without any apparent White House involvement, it is not clear that the current President can (or would choose to) invoke the presidential communications privilege to protect a Final Report prepared during the tenure of a previous President. "It is apparently not settled whether an incumbent President may assert executive privilege with respect to the records of a former President if the latter does not." *United States v. Poindexter*, 727 F. Supp. 1501, 1511 (D.D.C. 1989). And even if President Obama were to intercede in this matter and assert that the Final Report is privileged, any refusal by President Trump "to mount a similar challenge" would then "weaken the force of the former President's claim." *Nixon v. Freeman*, 670 F.2d 346, 356 (D.C. Cir. 1982) (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977)). The DOJ's claim is a unilateral assertion of a presidential privilege without legal or factual foundation. That is not the "detailed, scrupulous" justification that the FOIA requires an agency to produce when it seeks to withhold agency records. *Church of Scientology*, 662 F.2d at 786.

Third, even if the DOJ were to overcome these considerable hurdles and properly assert the presidential communications privilege as to the Final Report, there is no evidence that the record was ever received by the President or any of his immediate White House advisers. That is a bedrock requirement for documents to fall within the privilege in the first place. *Judicial*

Watch, 365 F.3d at 1114. The evidence submitted by the DOJ shows only that the Final Report was submitted by the DOJ to Kate Heinzelman, a former Associate White House Counsel. Ex. A. Ms. Heinzelman's former position falls below the tier of "top presidential advisers" —such as the "White House Counsel, Deputy White House Counsel, Chief of Staff and Press Secretary"— to whom the privilege extends. *Judicial Watch*, 365 F.3d at 1114; *see also President Donald J. Trump Announces Key Additions to the Office of the White House Counsel*, The White House (Mar. 7, 2017)[7] (listing twelve new appointees to the position of Associate White House Counsel on the same day). The DOJ has therefore failed to demonstrate that the Final Report meets the threshold requirements of the presidential communications privilege.

Because the presidential communications privilege neither applies nor has been properly invoked, the DOJ's assertion of the privilege and of Exemption 5 fails. The Court should therefore order the Final Report disclosed to EPIC.

III. THE DOJ'S MOTION SHOULD BE DENIED

The FOIA requires that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). However, an agency may withhold information if it fits within nine narrowly construed exemptions. *See* 5 U.S.C. § 552(b). But the FOIA also requires that the agency release any "reasonably segregable portion" of the records requested. 5 U.S.C. § 552(b). The agency in a FOIA case bears the burden of establishing that at least one exemption applies for each record withheld. *See Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). The agency also bears the burden of proving that it has

[7] https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-key-additions-office-white-house-counsel/.

complied with the segregability requirement. *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002).

An agency seeking to justify its withholding of responsive records under the FOIA must satisfy five overarching requirements in addition to the particular standards of each FOIA exemption claimed:

> The government must "(1) [I]dentify the document, by type and location in the body of documents requested; (2) note that [a particular exemption] is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this material falls within one or more of the categories . . .; and [if the exemption requires a showing of harm] (5) explain how disclosure of the material in question would cause the requisite degree of harm.

Am. Immigration Council v. DHS, 950 F. Supp. 2d 221, 235 (D.D.C. 2013) (quoting *King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987)). To be granted summary judgment, the agency must establish that it has satisfied all the statutory requirements of the FOIA. *Harrison v. Fed. Bureau of Prisons*, 681 F. Supp. 2d 76, 85 (D.D.C. 2010).

For the reasons discussed above, the DOJ has failed to satisfy its burden to establish that Exemption 5 justifies the withholding of the Final Predictive Policing Report and associated research and briefing materials. The Final Report is a final—not a pre-decisional or deliberative—document. It has not been linked to any definable decision-making process, and its conclusions are not unduly revealing of the "give-and-take" of the DOJ's internal deliberations. Nor is the Final Report covered by the presidential communications privilege, which has at no point been asserted by someone who actually enjoys the privilege (and does not appear to apply anyway). The DOJ has also failed to demonstrate that the undisclosed research and briefing materials are being properly withheld under Exemption 5. These documents are overwhelmingly factual, not deliberative. At a minimum, the records should be reviewed in detail by the Court to

ensure that their extensive factual content is segregated from any deliberative material and released.

In sum, the agency declarations in this case are not sufficient to establish that all responsive, non-exempt records have been disclosed as required under the FOIA.

CONCLUSION

For the foregoing reasons, the Court should deny the Defendant's Motion for Summary Judgment and grant EPIC's Motion for Summary Judgment.

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Respectfully submitted,

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