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 REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

As the Electronic Privacy Information Center ("EPIC") explained in its Cross-Motion for Summary Judgment and Opposition, the Department of Justice ("DOJ") has erroneously invoked the deliberative process and presidential communications privileges to excuse its unlawful withholding of (1) a final agency report on predictive policing ("Final Report"), and (2) hundreds of pages of related research and briefing materials. In its Reply, the DOJ simply restates its original arguments while failing to distinguish the cases cited in EPIC's brief and failing to establish that the records at issue are subject to the deliberative process or presidential communications privilege. The DOJ has not demonstrated that the Final Report was deliberative or pre-decisional. Nor has the agency shown that the factual research materials or third-party contractor materials are privileged. The DOJ also misstates the applicable standard for determining whether the presidential communications privilege applies and fails to demonstrate that the privilege has been properly invoked by either the President or a competent White House official. Finally, nothing about the Reply and Opposition should persuade the Court that that the DOJ has scrupulously reviewed the withheld documents or methodically identified all segregable, non-exempt information. Because the agency's arguments are broadly lacking in legal and factual support, the Court should deny the DOJ's Motion for Summary Judgment, grant EPIC's Cross-Motion for Summary Judgment, and order the DOJ to release to EPIC all materials that the agency is unlawfully withholding.

I. The DOJ has admitted the facts set forth by EPIC.

As an initial matter, EPIC notes that Defendant did not file a responsive statement to ¶¶ 6–32 of Plaintiff's Statement of Facts as to Which There is No Genuine Dispute, ECF No. 24-2 ("Pl.'s Statement of Facts"). The DOJ has thus admitted the facts set forth in those paragraphs. *See* LCvR 7(h)(1) ("In determining a motion for summary judgment, the Court may assume that

facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."); *accord Standing Order for Cases Before Judge Trevor N. McFadden* at ¶ 14(B)(v). The Court may therefore assume, *inter alia*, the following facts:

- Defendant asserts that the report and cover letter are "partially protected" from FOIA disclosure by the deliberative process privilege. Pl.'s Statement of Facts ¶ 8 (citing Brinkmann Decl. ¶ 44, ECF No. 23-1).
- Defendant does not claim that the report contains any advisory opinions, recommendations, or personal opinions. *Id.* ¶ 14 (citing Brinkmann Decl. ¶¶ 44–45).
- Defendant has not identified any decision or contemplated decision that the report and cover letter preceded. *Id.* ¶ 14 (citing Brinkmann Decl. ¶¶ 44–45).
- Defendant has offered no evidence that President Trump has asserted the presidential communications privilege as to the report and cover letter. *Id.* ¶ 18 (citing Brinkmann Decl. ¶¶ 41–43).
- Defendant has offered no evidence that former President Obama has asserted the presidential communications privilege as to the report and cover letter. *Id.* ¶ 19 (citing Brinkmann Decl. ¶¶ 41–43).
- Defendant has offered no evidence that any immediate presidential advisor, past or present, has asserted presidential communications privilege as to the report and cover letter. *Id.* ¶ 20 (citing Brinkmann Decl. ¶¶ 41–43).
- Defendant has offered no evidence that any White House personnel other than Associate Counsel Kate Heinzelman received the report and cover letter from the DOJ. *Id.* ¶ 21 (citing Brinkmann Decl. ¶¶ 41–43).

II. The DOJ has failed to show that the deliberative process privilege applies to the Final Report or to the research materials.

In a last-ditch effort to revive its deliberative process privilege claim and withhold the Final Report, the DOJ falls back on three "policy purposes" of the privilege identified in earlier cases of this Circuit. Def.'s Reply Supp. Mot. Summ. J. & Opp'n Pl's. Cross-Mot. Summ. J. 2–3, ECF Nos. 30, 31 ("Def's. Reply").[2] But the agency's argument fails on two fronts. First, the DOJ fails to establish that the Final Report is (1) deliberative and (2) pre-decisional, which are the core requirements of deliberative process privilege. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the DOJ makes no attempt to explain how any of the three "policy purposes" would be furthered by withholding the Final Report. Indeed, it is clear from the record that *none* of the policy objectives described by the court in *Defenders of Wildlife v. U.S. Department of Agriculture*, 311 F. Supp. 2d 44, 57 (D.D.C. 2004), would be served by nondisclosure here. The report was the final product of the DOJ and was not part of any formal decision-making process that might warrant deliberative process protection.

A. The DOJ concedes that the Final Report is indeed final, not deliberative.

The DOJ fails to rebut—and in fact, further corroborates—EPIC's argument that the Final Report is a *final* agency product. As the DOJ acknowledges, the agency repeatedly labeled the Final Report as a "final" document at the end of the drafting process. Mem. P. & A. Supp. Pl.'s Opp'n & Cross-Mot. Summ. J. 9–10, ECF Nos. 24-1, 25-1 ("Pl's. Mem."). But contra the DOJ, EPIC's argument does not rely "solely" on these prior agency admissions. Def's. Reply 2. The agency's characterizations of the Final Report in its briefs conclusively demonstrate that the

[2] The DOJ Reply includes a quote, Def.'s Reply 2–3, that appears to be from the District Court decision in *Defenders of Wildlife v. U.S. Department of Agriculture*, 311 F. Supp. 2d 44, 57 (D.D.C. 2004). But rather than cite the district court opinion, the agency attributes the quote to a series of D.C. Circuit decisions from the 1970s and 1980s that were cited by the district court in *Defenders of Wildlife*.

document is not deliberative. As the DOJ states in its Reply, the Final Report reflects "DOJ's findings" about the "current use of predictive analytics" and constitutes a "compil[ation of] research for review by the White House." *Id.* at 3–4. Moreover, the agency has admitted that the Final Report contains no "advisory opinions, recommendations, or personal opinions." *See* Part I, *supra* (quoting Pl.'s Statement of Facts ¶ 14). The Final Report is thus exactly the type of factual compilation that the Court held unprotected by the deliberative process privilege in *Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010).

The DOJ's arguments about finality of the Report are also groundless. The agency attacks a straw man argument—that withholding "was unlawful strictly because the word 'final' is found in the title of the report," Def.'s Reply 2—but then fails to defeat that straw man. The DOJ offers no evidence that the report is anything but final. Nor does the fact that the report "was created for, and reviewed by, the White House," Def.'s Reply 3, support the conclusion that the report was non-final. Presumably the White House reviews final agency reports all the time. It is the job of agencies, after all, to produce final work product within their areas of expertise. The D.C. Circuit has made clear that "drafts" and "final documents" are distinct categories and that the deliberative process privilege can only apply to the former, not the latter. *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014).

B. The Final Report is a policy review and was not part of any definable decision-making process.

The DOJ makes only a feeble attempt to rebut EPIC's argument that the Final Report is not pre-decisional. As EPIC previously explained, the agency has "provided no hint of [what] final agency policy its 'predecisional' material preceded." (Pl's. Mem 11 (quoting *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007)). This omission is fatal to the agency's assertion of the deliberative process privilege. Pl's. Mem 8 (quoting *Judicial Watch, Inc.*, 449 F.3d at 151).

The DOJ attempts to rectify this error in its Reply, asserting that the Final Report was pre-decisional because it was intended to "aid the White House with recommendations and further considerations regarding the current use of predictive analytics in law enforcement." Def.'s Reply 4. But this argument confuses the DOJ's internal process of drafting the Final Report with the unspecified "decision" that the Report is said to have preceded.

The DOJ's entire assertion of the deliberative process privilege rests on the claim that "the White House"—not the DOJ—"was the ultimate decision-maker" with respect to the Final Report. Def.'s Reply 3, 5. If indeed the White House was the relevant decision-maker, then the agency should be able to identify some White House decision or policy to which the Final Report contributed. The law requires no less. *See Nat'l Sec. Archive,* 752 F.3d at 466 (quoting *Senate of Puerto Rico v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987)) ("A document is predecisional if it precedes, in temporal sequence, the decision to which it relates, and [a]ccordingly . . . a court must be able to pinpoint an agency decision or policy to which the document contributed." (quotation marks omitted)); *Morley*, 508 F.3d at 1127 (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983)) ("[T]o ascertain whether the documents at issue are pre-decisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed."). But the agency could not even clear this low bar in its first round of briefing, alluding to only "a nebulous and unbounded [White House] 'decision-making process'" concerning "Big Data." (Pl.'s Mem. 11–12 (quoting Brinkmann Decl. ¶ 44)).

Now, on its second attempt, the DOJ fails again to identify any White House policy or decision to which the Final Report relates. Curiously, the agency suggests that the Final Report is pre-decisional on the basis of DOJ policy review that *predates* the issuance of the Final Report. Def.'s Reply 4. But this is wrong as a matter of law and wrong as a matter of "temporal

sequence." *Nat'l Sec. Archive*, 752 F.3d at 466 (quoting *Senate of Puerto Rico*, 823 F.2d at 585). In order to be pre-decisional, a document must have "*preceded*"—not followed—a "final agency policy" or decision. *Morley*, 508 F.3d at 1127 (emphasis added). The DOJ cannot satisfy this burden through vague allusions to "further [White House] considerations regarding" predictive policing. Def.'s Reply 4. Otherwise the deliberative process privilege would be so "nebulous" and "unbounded" as to cover *any* document sent to the White House, since an agency could always claim that there might be "further considerations regarding" that topic.

After fourteen months of litigation, two substantive briefs, and multiple filing extensions, it is revealing (and indeed, outcome-determinative) that the DOJ cannot point to any White House decision or policy to which the Final Report contributed. Because the agency offers no basis to conclude that the Final Report was pre-decisional, the DOJ's assertion of deliberative process privilege fails.

C. The research materials withheld are factual, not deliberative.

The DOJ doubles down on its argument that *not a single word or fact* from the 296 pages of responsive research materials can be properly released to EPIC. In support of this view, the agency offers hazy references to decades-old cases that are not on point. Yet the agency ignores the great weight of D.C. Circuit case law on the subject, which dictates that factual material falls outside the deliberative process privilege unless it 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 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); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 238 (D.C. Cir. 2008); *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992); *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1184 (D.C. Cir. 1987); *Playboy*

Enterprises, Inc. v. DOJ, 677 F.2d 931, 935 (D.C. Cir. 1982). In view of these binding Circuit precedents, the DOJ has failed justify why agency "bullet points," "source list[s]," and "research" should be categorically shielded from public scrutiny. Def's. Mot. Summ. J. 10. Disclosure of research materials poses no more a threat to the DOJ's deliberative process than an annotated bibliography poses to the academic freedom of a journal contributor.

The few cases that the DOJ cites offer the agency no help. In *Montrose Chem. Corp. of California v. Train*, 491 F.2d 63 (D.C. Cir. 1974), the D.C. Circuit was faced with a very different scenario than present circumstances. The records at issue in *Montrose*—analytical summaries of a 9,200-page administrative record—were analogous "to a judge's use of his law clerk to sift through the report of a special master or other lengthy materials in the record." *Id.* at 68. As the Court explained, "In both situations, when faced with a voluminous record, the decision-maker may wisely utilize his assistants to help him determine what materials will be significant in reaching a proper decision." *Id.*

But a bench memo intended for the private consumption of a jurist is a far a cry from the "source list" and "bullet points" at issue here. Def's. Mot. Summ. J. 10. First, the DOJ has failed to show that the Final Report (or the related research) constitute a deliberative link in a decisional chain. *See* Part II.A–B, *supra*. Even the DOJ characterizes the Final Report as a "DOJ policy review," Brinkmann Decl. ¶ 42—not a deliberative or analytical document. Second, in contrast to *Montrose*, the underlying facts on which the DOJ relied are not currently known to the public. Whereas the summaries in *Montrose* amounted to a *deliberative analysis* of public hearing records, the DOJ's research materials would primarily reveal what *factual material* the DOJ had access to when composing the Final Report. Thus *Montrose* does not bear the weight that the agency places on it.

Nor are the DOJ's arguments supported by *Russell v. Department of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982). In *Russell*, the Court concluded that draft versions of an Air Force historical report were covered by the deliberative process privilege because a "simple comparison" between the drafts and the final product would "reveal the Air Force's deliberative process." *Russell*, 682 F.2d at 1049. "[T]he *Russell* court reasoned that the disclosure of editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis—would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work." *Dudman Commcs'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568–69 (D.C. Cir. 1987). Importantly, however, EPIC is not seeking any draft versions of the Final Report—only the research materials gathered by the DOJ. *See* Pl.'s Mem. 8 n.6. Comparing 296 pages of research to the 26-page Final Report would reveal little or nothing of the fine-grained editorial judgments that the Court sought to protect from public view in *Russell* and *Dudman*. Moreover, the *Russell* Court took pains to emphasize that "agency communications containing purely factual material are generally not protected by Exemption (b)(5)." *Russell*, 682 F.2d at 1048 (citing *EPA v. Mink*, 410 U.S. 73, 90–91 (1972)); *see also In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997) ("[T]he deliberative process privilege does not extend to purely factual material."). Unlike the deliberative drafts in *Russell* and *Dudman*, the risk is far lower that disclosure of the DOJ's factual research materials would chill the agency's deliberative process.

D. The consultant corollary does not apply.

The DOJ's Reply offers no new support for the agency's consultant corollary claim, and instead simply restates the agency's generic arguments concerning records prepared by third party consultants. *Compare* Def.'s Mem. Law. Supp. Mot. Summ. J. 7–8, ECF No. 23 ("Def.'s Mem."), *with* Def.'s Reply 9–10. And to the extent that the DOJ has added new material, Def.'s

Reply 10, the agency "offers little more than bald assertions to support [its consultants'] purported lack of self-interest[.]" *Competitive Enterprise Institute v. Office of Science & Technology Policy*, 161 F. Supp. 3d 120, 133–34 (D.D.C.), *modified*, 185 F. Supp. 3d 26 (D.D.C. 2016). Defendant cannot meet the stringent requirements of the consultant corollary simply by asserting, without factual support, that the interests of the DOJ's consultants are aligned with those of the agency. *See id.*; *COMPTEL v. FCC*, 910 F. Supp. 2d 100, 119 (D.D.C. 2012); *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d 17, 26 (D.D.C. 2002). Because the 282 withheld pages of "[c]ommunications and attachments sent between DOJ and third-party consultants" fail to meet the interagency threshold test of Exemption 5, they are categorically beyond the reach of the deliberative process privilege. Def.'s Mot. Summ. J. 8.

III. The DOJ has failed to release all reasonably segregable, non-exempt material.

The DOJ's arguments concerning segregability do not warrant a substantial response, as they are simply copied and pasted (with minor changes) from the DOJ's original Motion. *Compare* Def.'s Mem. 16, *with* Def.'s Reply 11. The agency has twice failed to support its position that *not a single word or fact* can be reasonably segregated from the 296 pages of research materials, 49 pages of briefing materials, and 26 pages of the Final Report. The DOJ also neglects to address the problems that EPIC identified with the agency's redactions of Document 0.7.11378.11258 and Document 0.7.11378.23749. Pl.'s Mem. 15–16. In view of these failures, the Court should order the DOJ to release all non-exempt information and inspect all records *in camera* to ensure that the agency fulfills its segregability obligations.

IV. The DOJ has failed to show that the presidential communications privilege applies to the Final Report.

The DOJ's Reply does nothing to resuscitate the unsupported assertion that the Final Report is protected by the presidential communications privilege. It is notable that the DOJ

appears to have taken no steps to consult with current or former White House officials regarding this assertion of the presidential privilege. The agency offers no reason why this Court should entertain a third-party assertion of privilege *in vacuo* when no position has been taken by, or even solicited from, the actual privilege holder or his designees. Privilege claims are factual, not theoretical, and the DOJ has simply not presented the necessary facts to support this assertion of privilege.

The agency's core legal theory is also flawed for at least two reasons. First, the DOJ has failed to support the contention that an agency may independently invoke the presidential communications privilege without any statement from, or consultation with, the White House. Citing to a single *district court* case, the DOJ falsely states that "[t]he D.C. Circuit has *expressly stated* that there is no indication in the text of the FOIA that the decision to withhold documents pursuant to the presidential communications privilege of Exemption 5 must be made by the President." Def.'s Reply 12 (emphasis added). To the contrary: the D.C. Circuit expressed the opposite view in *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108 (D.C. Cir. 2004), and *In re Sealed Case*, 121 F.3d 729. In both cases, the court strongly indicated that the privilege must be invoked by (at minimum) a senior-level White House official acting on the instructions of a privilege-holder. *See Judicial Watch,* 365 F.3d at 1114; *In re Sealed Case*, 121 F.3d at 745.

The D.C. Circuit has never suggested, let alone "expressly stated," Def.'s Reply 12, that the privilege operates differently in the FOIA context. And for good reason: an agency FOIA officer acting without instructions from the White House is poorly situated to determine whether and when a *presidential* privilege should be invoked. It may well be the case that neither President Trump nor former President Obama would want the Final Report to be withheld pursuant to the presidential communications privilege. Unfortunately the Court can only guess at

the answer, as the DOJ has neglected to obtain a statement or position from either President or from any other official to whom the privilege might apply.

Second, the DOJ does not even satisfy the test articulated in the district court case it cites (and mistakenly presents as a *D.C. Circuit* case). In *EPIC v. DOJ*, 584 F. Supp. 2d 65 (D.D.C. 2008), the documents at issue were memoranda authored by the Office of Legal Counsel and Office of Information Policy and Review that had been "received either by the President or an immediate advisor to the President." *Id*. at 81. The court noted that under *Judicial Watch*, 365 F.3d at 1116, and *In re Sealed Case*, 121 F.3d at 752, the privilege could only be asserted as to documents "solicited or received by immediate or key advisors to the President." *EPIC v. DOJ*, 584 F. Supp. 2d at 80–81. Here, by contrast, the DOJ has offered no evidence that either the President or his "immediate or key advisors" received the Final Report.

The agency also argues that, because the Final Report was "reviewed by the White House," the document is *necessarily* subject to the presidential communications privilege. Def.'s Reply 13. But this argument is riddled with factual and logical gaps. The DOJ fails to allege—let alone prove—(1) who, if anyone, actually reviewed the Final Report at the White House; (2) who, if anyone, received the Final Report other than former White House attorney Kate Heinzelman; (3) whether or how Kate Heinzelman constitutes a "top presidential adviser" within the meaning of *Judicial Watch,* 365 F.3d at 1114; (4) whether or how any other White House official who received the Final Report might constitute a top presidential adviser; (5) whether the Final Report formed an "integral part of the President's decision," as required by *Judicial Watch v. DOD*, No. 16-360, 2017 WL 1166322 (D.D.C. March 28, 2017); and (6) what unspecified presidential "decision" the Final Report may have informed.

Finally, the agency fails to address the complexities of applying the presidential communications privilege to the records of a prior administration. *See* Pl.'s Mem. 22. Setting aside the agency's lack of authority to invoke the presidential communications privilege, it is not clear whether the DOJ is asserting the privilege on behalf of President Trump, President Obama, or one or more top advisers to either President. *Judicial Watch*, 365 F.3d at 1114. Even if the DOJ had provided the requisite facts to assert the privilege in theory, it is not clear whether the current President can invoke the privilege as to this Final Report. Nor is it clear how the privilege might operate if President Trump and former President Obama were to disagree about its application. *See Nixon v. Freeman*, 670 F.2d 346, 356 (D.C. Cir. 1982); *United States v. Poindexter*, 727 F. Supp. 1501, 1511 (D.D.C. 1989). Thus, even if the DOJ had provided a statement from the current or former President, the agency would still need to establish a legal basis for asserting the privilege in this case. The agency has made no attempt to do so.

In short, the DOJ has not met its "the burden of establishing that [the presidential communications privilege] applies" here. *PETA v. NIH*, 745 F.3d 535, 540 (D.C. Cir. 2014). To allow the privilege to be invoked under these circumstances would impermissibly broaden FOIA Exemption 5 and ignore the D.C. Circuit's instruction that the "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.

CONCLUSION

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

Dated: April 30, 2018

Respectfully submitted,

/s/ Marc Rotenberg
MARC ROTENBERG, D.C. Bar # 422825
EPIC President and Executive Director

ALAN JAY BUTLER, D.C. Bar # 1012128
EPIC Senior Counsel

ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Ave., NW
Suite 200
Washington, DC 20009
(202) 483-1140

Counsel for Plaintiff