ORAL ARGUMENT NOT SCHEDULED

No. 18-5309

In the

United States Court of Appeals

for the District of Columbia

American Center for Law and Justice,
Plaintiff-Appellant

v.

United States Department of Justice, Federal Bureau of Investigation (FBI),
a component of Dept. of Justice (DOJ),
Defendant-Appellee

On Appeal from the United States District Court
for the District of Columbia, No. 1:17-cv-01866-APM

BRIEF OF APPELLANT

Jay Alan Sekulow ([redacted])
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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

The parties include Plaintiff-Appellant American Center for Law and Justice and Defendant-Respondent United States Department of Justice.

B. Rulings Under Review

Appellant seeks review of the Order and Memorandum Opinion of the United States District Court for the District of Columbia, entered on September 19, 2018, granting Defendant's Motion for Summary Judgment (DCT Doc. 14) and denying Plaintiff's Cross-Motion for Summary Judgment (DCT Doc. 16).

C. Related Cases

Plaintiff-Appellant's appeal has not been previously before this court or any other court. Plaintiff-Appellant is aware of the following cases that present substantially similar issues as those involved in this appeal:

1. *Am. Ctr. for Law and Justice v. U.S. Dep't of Justice*, Civil Action No. 16-2188-TJK (D.D.C.).

2. *Am. Ctr. for Law and Justice v. U.S. Dep't of Stat*e, Civil Action No. 16-1355-TJK (D.D.C.).

Date submitted: May 8, 2019

Respectfully submitted,

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/s/ Abigail A Southerland
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, undersigned counsel for Appellant American Center for Law and Justice provides the following corporate disclosure statement:

Appellant American Center for Law and Justice is a non-profit organization dedicated to the defense of constitutional liberties secured by law. Appellant does not have any parent companies, nor outstanding shares or debt securities in the hands of the public, nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

Jay Alan Sekulow
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GLOSSARY OF ABBREVIATIONS

Add.: Addendum

JA: Joint Appendix

DCT Doc.: Entries on the district court's docket not contained within the Appendix.

JURISDICTIONAL STATEMENT

I. Jurisdiction of the District Court

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 552(a)(4)(B), and 5 U.S.C. § 552(a)(6)(C)(i) because it raises claims arising under the Freedom of Information Act (FOIA). Plaintiff-Appellant challenged the failure of the Federal Bureau of Investigation ("FBI"), a component of Defendant-Respondent Department of Justice, to issue a determination as to Plaintiff-Appellant's FOIA request within the statutorily prescribed time period, and seeking the disclosure and release of agency records improperly withheld by Defendant-Respondent.

II. Jurisdiction of This Court

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the district court's order granting Defendant-Respondent's Motion for Summary Judgment and denying Plaintiff-Appellant's Cross-Motion for Summary Judgment, on September 19, 2018, constitutes a final appealable decision. JA 171. Plaintiff-Appellant's notice of appeal was timely filed on October 17, 2018. Pl.'s Notice of Appeal at 1.

STATEMENT OF THE ISSUES

Plaintiff-Appellant, American Center for Law and Justice, (hereinafter "Appellant" or "Appellant FOIA Requestor") is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The Appellant regularly monitors governmental activity and works to inform the public of such affairs. The issue presented on appeal is whether the district court erred in granting Defendant-Respondent's (hereinafter "the Department") summary judgment upholding the withholding of information responsive to Appellant's FOIA request pursuant to Exemption 5 of FOIA.

STATEMENT OF THE CASE

This case arises from the Federal Bureau of Investigation's ("FBI") unjustifiable withholding of factual information contained within documents responsive to Appellant's Freedom of Information Act ("FOIA") request.

On July 15, 2016, Appellant FOIA requestor submitted virtually identical FOIA requests to the Department and FBI seeking information relating to then-Attorney General Lynch's June 27, 2016 meeting with former President Bill Clinton at Sky Harbor International Airport. JA 7, ⁋ 9; DCT Doc. 16-2, ⁋ 1. As Appellant explained in its FOIA request, the matter is of importance to the public because, at the time of the meeting, the Department was engaged in an investigation of Hilary Clinton, Bill Clinton's wife, former Secretary of State and a leading presidential candidate at the time. JA 47. On October 21, 2016, almost four months after ACLJ issued its FOIA request, the FBI informed Appellant that "[n]o records responsive to your request were located." JA 9, ⁋ 21; JA 71. Approximately eight months later, on or about July 3, 2017, and pursuant to a lawsuit filed by Appellant to obtain documents to which it was entitled, the Department began producing documents responsive to Appellant's FOIA Request. JA 9, at ⁋⁋ 25-26; DCT Doc. 16-2, at 6, ⁋ 2. Within the documents produced by the Department were communications involving FBI officials, as well as several privacy redactions specifically designated by the FBI. JA 10, at ⁋⁋ 28-30; DCT Doc. 16-2, at ⁋ 3. On August 3, 2017, ACLJ

reported to the public its findings regarding the FBI – *i.e.*, that the documents produced by the Department revealed that the FBI did, in fact, have documents responsive to Appellant's FOIA Request and that the FBI was surely aware of this fact in light of its own redactions within those documents. JA 10, at ¶ 31; DCT Doc. 16-2, at 6, ¶ 4. The following day, on August 4, 2017, several national media outlets reported ACLJ's findings. JA 10, at ¶32; DCT Doc, at 7, ¶ 5. On August 9, 2017, ACLJ contacted the Office of Government Information Services ("OGIS") to inquire regarding the FBI's false assertion that it did not possess any documents responsive to Appellant's request. JA 11, at ¶ 33; DCT Doc. 16-2, at 7, ¶ 6. On August 15, 2017, Appellant received a letter from the FBI, dated August 10, 2017, notifying Appellant that its request "has been reopened . . . as the FBI has determined records potentially responsive to your request may exist." JA 11, at ¶ 35-36; DCT Doc. 16-2, at 7, ¶ 7. The FBI now admits that it first became aware, through consultation with the Department's Office of Information Policy (OIP), on May 23, 2017, that it may have documents responsive to Appellant's request. DCT Doc. 16-2, at 7, ¶ 8.

Appellant filed a complaint against the FBI on September 12, 2017, alleging that the FBI improperly withheld records by failing to respond to Appellant's FOIA request. JA 6. Six months after discovering that it likely had documents responsive to Appellant's FOIA request, the FBI produced a mere 29 pages of non-exempt responsive documents. JA 6; DCT Doc. 16-2, at 7, ¶ 9. Only through two lawsuits,

and the passage of more than a year, was Appellant able to obtain the documents to which it is entitled.

The FBI released some pages in full, and some in part and withheld information pursuant to FOIA Exemptions 5, 6, and 7(C). JA 158. Following the FBI's production of the documents, both parties moved for summary judgement. *Id.* The Department moved for summary judgment on February 1, 2018. DCT Doc 14. Conversely, on February 26, 2018, the Appellant filed a cross motion for summary judgment, asking the court to: (1) deny the FBI's motion for summary judgement, and (2) order the FBI to conduct an adequate search for documents and produce the challenged withholdings in full. DCT Doc. 16. On June 6, 2018, the FBI conducted additional searches and released eighteen additional pages which prompted the Appellant to drop its challenge to the adequacy of the search. DCT Doc. 21, at 1–2.

Accordingly, on August 7, 2018, the Department responded to the Appellant's cross motion asserting that the "FBI properly invoked exemptions for its withholdings, properly assessed segregability, and released all non-exempt, responsive records." DCT Doc. 22, at 2. On August 23, 2018, the Appellant dropped its initial claim regarding a withholding under Exemptions 6 and 7(C), and accordingly did not challenge any of the FBI's new withholdings. DCT Doc. 24, at 1–2.

Thus, what remained of the dispute were the withholdings in two disclosed records, one withholding under Exemptions 6 and 7(C) and one under Exemption 5 contained within FBI-2-3 and 23-24.[1] JA 158. On September 7, 2018, the district court ordered Mehta the Department to provide unredacted versions of FBI-2-3 and FBI 23-24 containing the Exemption 5 withholdings for *in camera* review no later than September 12, 2018. JA 4. On September 19, 2018, Judge Mehta granted the Department's motion for summary judgment. JA 170-171. Appellant filed a timely Notice of Appeal to the United States District Court of Appeals for the District of Columbia Circuit on October 17, 2018.

SUMMARY OF THE ARGUMENT

In 1966, Congress enacted FOIA to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Rose*, 425 U.S. at 361. Thus, "FOIA 'mandates that an agency disclose records on request, unless they fall within one of nine exemptions.'" *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 777 F.3d 518, 522 (D.C. Cir. 2015) (quoting *Milner v.*

[1] See JA 84-85 for FBI Document 2-3. See JA 104-05 for FBI Document 23-24.

Dep't of Navy, 562 U.S. 562, 565 (2011)). As the Supreme Court has noted, "'the clear legislative intent [of the FOIA is] to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.' As a result, we have repeatedly stated that '[t]he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.'" *Rose*, 425 U.S. at 365-66 (citations omitted).

In the present case, the Department has withheld factual information contained within documents responsive to Appellant's FOIA request. Specifically, the FBI has withheld talking points circulated by the Department's Director of Public Affairs to same or lower level officials at the FBI pursuant to the deliberative process privilege – a privilege falling under Exemption 5 of FOIA and designed to protect the "process by which governmental decisions and policies are formulated." *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014) (citation omitted). The deliberative process privilege generally "applies only to the 'opinion' or 'recommendatory portion' . . . not factual information which is contained in the document." *See, e.g., Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980). The agency bears the burden to show that the withheld material falls within one of the exemptions. *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997).

The issue presented on appeal is one of first impression for this Court. *See Am. Ctr. for Law & Justice v. Dep't of State,* 330 F. Supp. 3d 293, 302 (D.D.C. 2018) (noting that the D.C. Circuit has not "addressed the application of the deliberative process privilege to the formulation of an agency's public statements"); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208–09 (D.D.C. 2010). *See also Seife v. U.S. Dep't of State*, 298 F. Supp. 3d 592, 614 (S.D.N.Y. 2018) ("The Courts of Appeals for the Second and District of Columbia Circuits have yet to establish a clear rule on the matter.").

In this case, the district court erred in concluding that the Department met its burden of proof where it failed to present sufficient evidence to demonstrate that the purely factual information prepared and circulated by a senior official at the Department was both predecisional and deliberative. The district court further erred in concluding that the purely factual information – *i.e.* non-exempt information – could not be segregated because disclosure "would reveal the factual information that agency personnel decided to emphasize in response to media inquiries." JA 169.

Ignoring the Department's failure to present sufficient evidence, the district court accorded the Department certain presumptions regarding the predecisional and deliberative nature of the talking points and construed the exemption broadly in favor of nondisclosure, rather than disclosure.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING THE DEPARTMENT SUMMARY JUDGMENT AND UPHOLDING THE WITHHOLDING OF INFORMATION RESPONSIVE TO APPELLANT'S FOIA REQUEST PURSUANT TO EXEMPTION 5 OF FOIA.

Exemption 5 of FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); Add. 2. Courts have clarified that Exemption 5 "exempts those documents, and only those documents that are normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The deliberative process privilege is the "most frequently invoked executive privilege in the federal courts." Shilpa Narayan, *Proper Assertion of the Deliberative Process Privilege: The Agency Head Requirement*, 77 Fordham L. Rev. 1183, 1184 (2008) (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)).

The privilege applies only to material that is both "predecisional" and "deliberative." *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). "Documents qualify as predecisional and deliberative 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, Inc. v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2009) (internal citations and quotations

omitted). The government agency bears the burden of proving the applicability of claimed exemptions and may satisfy its burden by submitting affidavits that "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and [is] not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082, 1088 (D.C. Cir. 2014) (citation omitted).

Standard of Review

This Court reviews the district court's grant of summary judgment de novo. *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992) ("This circuit applies in FOIA cases the same standard of appellate review applicable generally to summary judgments."). "Summary judgment is in order where, viewing the record in the light most favorable to the nonmoving party, the court finds that there remains no 'genuine issue as to any material fact.'" *Id.* (quoting Fed. R. Civ. P. 56(c)). "'The burden is on the agency' to show that requested material falls within a FOIA exemption," and when an agency seeks to protect material that falls outside the proffered exemption, judgment in favor of the FOIA plaintiff is appropriate. *Petroleum Info. Corp.*, 976 F.3d at 1433 (quoting 5 U.S.C. § 552(a)(4)(B); Add. 1).

A. The Department Failed To Establish That The Talking Points Are Predecisional.

In order to establish that a document is "pre-decisional," the agency must identify "what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp.*, 617 F.2d at 868. Courts also consider the "'[t]he identity of the parties to the memorandum important' because 'a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.'" *Trea Senior Citizens League v. U.S. Dep't of State*, 923 F. Supp. 2d 55, 69 (D.D.C. 2013) (quoting *Coastal States Gas Corp.*, 617 F.2d at 868).

The analysis, conducted by the district court here in determining that the talking points were predecisional, was made prematurely without sufficient consideration of the evidence. JA 166–69. Upon the FBI's summary assertion that the records "were drafted before and in preparation for communications with the press and public," JA 168 (quoting Hardy Decl., at ⁋⁋ 41–42),[2] the court concluded the talking points were "no more than 'advice from subordinates' to senior officials." JA 169. In reaching its decision, the court relied upon the district court case,

[2] Notably, paragraph 41 of the Hardy declaration addresses "portions of e-mail discussions" withheld by the agency and does not speak to the talkers challenged by Plaintiff here. JA 35.

American Center for Law & Justice v. U.S. Department of Justice, 325 F. Supp. 3d 162 at 171–72 (D.D.C. 2018), finding that "the overwhelming consensus among judges in this District is that the privilege protects agency deliberations about public statements including the use of talking points." JA 168.

At the outset, it should be noted that case law is far from unanimous on this issue. There is no consensus among courts on whether talking points are protected under the privilege. *Seife*, 298 F. Supp. 3d at 614 (collecting cases and noting there is currently a "split among district courts [on this issue] in the absence of binding precedent."). Many courts in this circuit and others have determined that talking points and other press related statements do not qualify for protection under the privilege. *See Judicial Watch, Inc. v. U.S. Dep't of State,* 349 F. Supp. 3d 1, 8 (D.D.C. 2018) (finding agency talking points to be exempt from the privilege); *Trea Senior Citizens League*, 923 F. Supp. 2d at 69 (finding agency's withholding of talking points unsupported where agency failed to identify the function, final decision and the decision-making authority of those involved in the process); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 511 F. Supp. 2d 56 (D.D.C. 2007) (finding agency's withholding of talking points unsupported where no information was provided on whether the materials were relied upon or adopted after their preparation); *Judicial Watch, Inc. v. U.S. Dep't of Energy*, 310 F. Supp. 2d 271, 318 (D.D.C. 2004) (finding the agency failed to adequately support its withholding of

talking points under Exemption 5); *News-Press v. U.S. Dep't of Homeland Sec*., No. 2:05-cv-102-FtM-29DNF, 2005 U.S. Dist. LEXIS 27492. *45 (M.D. Fla. Nov. 4, 2005) (reviewing *in camera* certain talking points withheld under Exemption 5 and concluding that the talking points were neither pre-decisional nor deliberative); *N.Y. Times Co. v. U.S. Dep't of Def.*, 499 F. Supp. 2d 501, 514 (S.D.N.Y. 2007) (finding the agency's withholding of talking points unsupported); *Seife,* 298 F. Supp. 3d at 614 (collecting cases and noting that "courts have answered the question in the negative, holding that '[d]eliberations about how to present an already decided policy to the public, or documents designed to explain that policy to—or obscure it from—the public, including in draft form, are at the heart of what should be released under FOIA.'") (quoting *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011)).

Further, while some other courts have found talking points to be predecisional and deliberative, they have done so only where the talking points are clearly drafts and/or undisputedly contain the personal opinions, thoughts, or ideas of subordinates – not facts. *See Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 320 F. Supp. 3d 162, 177 (D.D.C. 2018) (determining after *in camera* review that *draft* talking points contained strategy on how to respond to Congress and were both predecisional and deliberative); *Am. Ctr. for Law and Justice*, 325 F. Supp. 3d 162 at 171–72 (finding various iterations of talking points including early drafts, and those

containing edits or suggestions (as opposed to facts) to be predecisional and deliberative); *Freedom Watch, Inc. v. Nat'l Sec. Agency*, 49 F. Supp. 3d 1, 8 (D.D.C. 2014) (finding *preliminary thoughts* and *ideas* – not facts – prepared for senior officials for an interview with a journalist to be predecisional and deliberative); *Competitive Enter. Inst. v. U.S. Env. Prot. Agency*, 232 F. Supp. 3d 172, 187–88 (D.D.C 2017) (finding documents generated as part of a media strategy in response to litigation to be predecisional and deliberative where the communications were also covered under the attorney-client privilege and included "*personal opinions and thoughts of staff members working to identify options*.").

All of these cases demonstrate that no document is automatically exempt under the privilege. The issue of whether an agency's withholding of press related documents is proper under the privilege can only be decided on a case by case basis. *See Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 167–68 (D.D.C. 2011) (noting that prior cases will provide little help in making a privilege determination because "the 'deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.' *Animal Legal Defense Fund, Inc. v. Dep't of the Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (quoting *Coastal States Gas Corp.*, 617 F.2d at 867)").

In this case, the district court accepted the FBI's vague generalizations regarding the nature of the talking points instead of conducting an adequate review

of the evidence in the light most favorable to Appellant. In *Coastal States Gas Corporation*, the court noted that when "documents are not part of a clear 'process' leading to a final decision on the issue . . . they are less likely to be properly characterized as predecisional; in such a case there is an additional burden on the agency to substantiate its claim of privilege." 617 F.3d at 868. This is particularly important here where the Department has failed to identify a final decision to support the assertion that the talking points transmitted by a senior official and Director of the Office of Public Affairs at the Department (Melanie Newman) to officials at the FBI (and not her superior) were predecisional, rather than final talking points on the matter to be used by Director Newman herself. *See* JA 83, ¶ 40 (simply noting that "all information withheld . . . was drafted before and in preparation for communications with the press and public"); JA 84, ¶ 42 (noting that none of the materials were released in "final format," but failing to identify whether the talking points were used by any senior officials, whether they were followed, and what, if any, statements to the press were made following circulation of the talking points). In fact, at the time Newman sent the talking points to FBI officials, at least one official statement had already been released regarding Lynch's meeting on the tarmac. *See* JA 84 (containing earlier comments made the day prior by the Attorney General regarding the same meeting).

Additionally, the FBI fails to identify a decision maker, other than Newman herself, for whom the talking points were purportedly prepared. *See* JA 36, ⁋ 42 (explaining generally the purpose of talking points and use by "Department officials"); *id*. at ⁋ 43 (again explaining in *general* terms the process for compiling talking points, the many ways the agency uses talking points – *i.e.* "to address various questions that may arise during the course of anticipated meetings, official travel, public interactions, and engagement with the press" and for whom they are typically prepared including "for senior leadership, including the Attorney General"; and *id*. at ⁋ 44 (again stating generally that "[t]alking points, such as those withheld by OIP here, reflect the drafters' opinions . . . [and] Revealing such opinions and analysis would hinder Department staff's ability to provide candid evaluations, as well as prepare Department leadership"). In *Trea Senior Citizens League*, the court deemed such generalizations to be insufficient for determining whether the documents were predecisional. 923 F. Supp. 2d at 69 ("[T]he most the defendant's sworn declarations offer in this regard is the nebulous statement that documents were sent by 'officials' of a given component to other 'officials,' either in the same component or a different component. Such vague statements offer very little information to the Court in determining whether such documents are protected by the deliberative process privilege.").

A close review of the documents themselves disputes the Department's assertions and counsels against a finding that the privilege applies. The first email was authored by a senior official, Melanie Newman, the Department's Director of the Office of Public Affairs. JA 84–85, 105–06. According to the Department's website, "[t]he Office of Public Affairs is the principal point of contact for the Department of Justice with the news media. The Office is responsible for ensuring that the public is informed about the Department's activities and about the priorities and policies of the Attorney General and the President with regard to law enforcement and legal affairs." U.S. Dep't of Justice, *About the Office* https://www.justice.gov/opa/about-office (last updated Aug. 18, 2007) (noting that "the Office of Public Affairs prepares and issues Department news releases and frequently reviews and approves those issued by component agencies. It serves reporters assigned to the Department by responding to queries, issuing news releases and statements, arranging interviews and conducting news conferences."). Newman forwarded the talking points, or "talkers" to colleagues at the FBI, specifically Richard Quinn and Michael Kortan as an "FYI." JA 105-106 ("I want to flag a story that is gaining some traction . . . our talkers on this are below. . . . Please let me know if you get any questions on this."). Kortan was, at the time, chief of Media and Investigative Publicity at the FBI. *Id*. Quinn then forwards the talkers on to senior FBI officials Andrew Mccabe, James Rybicki, and David Bowdich and copies James

Comey. JA 105–06. Again, no commentary or guidance is provided. The subject line simply reads, "From DOJ". *Id*.

Nothing in the record supports the assumption made by the court here that either Newman or the FBI officials to whom she forwarded the talkers were seeking or receiving "advice from subordinates," and/or giving advice to senior officials. JA 169. The evidence fails to support the district court's determination that the talking points are predecisional.

B. The Department Failed To Establish That The Talking Points Are, In Fact, Deliberative.

A document is "deliberative" if it "reflects the give-and-take of the consultative process." *Coastal States Gas Corp.*, 617 F.2d at 866. Deliberative documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id*. In making this determination, courts must "ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication." *Id*.

Courts are clear that given the narrow context in which FOIA exemptions are to be applied, factual information generally must be disclosed and is not covered under the deliberative process privilege. *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, at 87–91 (1973) (noting that the Supreme Court has considered the privilege on several occasions and established the principle that "the privilege applies only to the

'opinion' or 'recommendatory' portion of the report, not to factual information which is contained in the document"). *See also Coastal States Gas Corp.*, 617 F.2d at 867. Thus, even where the agency establishes that it has properly withheld a document under a FOIA exemption, "it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s)." *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011) (internal quotations omitted). All factual material must be disclosed unless it "is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737.

With these principles in mind, we turn to the district court's decision finding the talking points consisting entirely of "facts and source material" deliberative. *See* JA 169 (noting "Hardy accurately characterizes the talking points as a 'selection of facts and source material.'"). The totality of the court's analysis of this second factor is as follows: the "material . . . qualifies as deliberative in that the talking points 'reflect the drafters' opinions and analyses on specific topics and focus on how to best . . . respond to questions on these topics from the Defendant's perspective." JA 168 (quoting Hardy Decl., ¶ 44). Adopting the reasoning employed by Judge Kelly in a related case, *Am. Ctr for Law & Justice*, involving different talking points, *see*

JA 168, note 3, the court concluded the talkers were not "final" and simply moved on to the issue of segregability.[3] JA 168.

The *Am. Ctr for Law & Justice* case does not support a deliberative determination here. In that case, the court reviewed various iterations of talking points (including early drafts circulated among staffers and more likely containing deliberations), and – absent crucially important evidence here that the talking points are simply "facts and source material," – concluded that all drafts of the talking points, including the "final" version, constituted "advice from subordinates." 325 F. Supp. 3d at 172-173. The court reasoned:

> Talking points are typically documents prepared by government employees for the consideration of government decision-makers. There may be some circumstances where "talking points" are intended by agency decisionmakers to be followed literally such that they, in and of themselves, represent the agency's decision about what to say. But the "final" version of talking points prepared by more junior staffers for a more senior official is rarely the final decision about what the senior official will say. Rather, a senior official . . . may elect to use all, some, or none of the talking points prepared for her. Perhaps to the chagrin of their junior staffers, senior officials have a tendency to improvise. And even when senior officials do follow their talking points, they often do not recite the points word-for-word.

[3] While the district court notes that Judge Kelly's opinion in *Am. Ctr. for Law & Justice* supports a finding that the talking points are "predecisional," the district court's focus on whether the talking points are "final" indicates this analysis is most applicable to the deliberative determination. JA 168. Notably, no other case is evaluated or cited by the district court in reaching its decision regarding the deliberative nature of the talking points. *See* JA 168-69.

JA 168 (quoting *Am. Ctr. for Law & Justice*, 325 F. Supp. 3d at 172–73). First, the court's opinion represents a broad and sweeping application of the privilege to talking points. In fact, the court indicates that talking points should be protected under the privilege even where they are in final form, closely followed by the decision-maker and subsequently forwarded to other employees following the "final decision" and press statement. *Am. Ctr. for Law & Justice*, 325 F. Supp. 3d at 172-73 (specifically noting the decision-maker "stuck to the talking points"). As one court has since noted, "stretching the deliberative process privilege [in this manner] would put many important public statements outside FOIA's grasp, even well after the statements were made." *Judicial Watch*, 349 F. Supp. 3d at 8; *see id*. (noting further that the court's consideration in *Am. Ctr. for Law & Justice* is "too much. Extending it to its logical limits means any prepared remarks—even the State of the Union—could be withheld under the deliberative process privilege, since a speaker could always go off-script, extemporally exposing the final stage of a deliberative process."). The *Judicial Watch* court applied a more narrow construction of the exemption and ultimately concluded that several press points and talking points were not covered under the privilege. *Id*. at 9–10 (finding talking points in final form and/or those already used by a spokesperson for the agency and circulated after the initial conference, as well as press *guidance* provided to the White House to be neither predecisional nor deliberative where the talking points are shared as an "FYI"

to keep recipients apprised of the agency's position and no feedback is requested or offered).

Second, for many of the same reasons already described above in Part I.A. above, the facts here fail to support the conclusion reached by the district court in this case that the talking points in FBI-2-3 and 23–24 were intended merely as "advice from subordinates" or that they still reflect the "give-and-take of the consultative process." The talking points here, just like the ones in *Judicial Watch*, "do[] not ask for . . . approval or feedback," "nor do[] [they] contain precatory or suggestive langue." 349 F. Supp. 3d at 11. *See also* JA 169 (affirming that the talking points are simply "a selection of facts"). Further, they do not "relay . . . a tentative plan, but an already settled strategy." *Id*. (also noting that the talking points do not appear to be unfinished and, instead, "read like bulleted talking points and canned answers to expected questions"). *See* Part I. A above (explaining that the talkers were transmitted by a Director at the Department to the FBI as "our talkers"). The talking points claimed to be deliberative by the agency do not contain suggestive language, edits or comments and they are not transmitted for approval or feedback. *See* Part I. A above; JA 84-85, 104-105. These facts serve as a stark contrast to cases finding preliminary drafts containing thoughts and ideas to fall within the privilege.

C. The District Court Erred In Finding The Facts Contained Within The Talking Points Cannot Be Segregated From the Deliberative Process.

The district court's segregability determination also represents an unprecedentedly broad application of the privilege incompatible with D.C. Circuit case law and Congress's intent to confine Exemption 5 and construe it in favor of complete disclosure. *See Senate of P.R. ex rel. Judiciary Comm. v. U.S. Dep't of Justice*, 823 F.3d 574 (D.C. Cir. 1987). The court reasons that the wholly factual information contained within the talking points "cannot be segregated from the deliberative process of creating them." JA 169. According to the court, if the facts were to be disclosed, they "would reveal the factual information that agency personnel decided to emphasize in response to media inquiries." *Id*. Under this blanket application of the privilege, no agency need ever disclose the facts it collects, conveniently chooses to omit, or even misrepresents in responding to media inquiries. Facts gathered by government agencies regarding perceived misconduct by a public official can forever be concealed and kept hidden from the American public. If this Court adopts this reasoning, government agencies will be permitted to do precisely what FOIA was enacted to prevent: shield, unnecessarily, official information from public view. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974) (noting Congress "was principally interested in opening administrative processes to the scrutiny of the press and general public when it passed the Information Act."). *See also Mink*, 410 U.S. at 80–81 (1973) (explaining

that FOIA was enacted to "create a judicially enforceable public right to information from unwilling official hands."). The exception would truly swallow the rule.

The proper inquiry here is whether the mere act of compiling facts for inclusion in talking points "constitutes an exercise of judgement by an agency" sufficient to qualify for protection under the privilege where the facts are not intertwined with deliberations, comments, personal thoughts, and the like. This Court's decisions in *Mapother* and *Ancient Coin Collectors Guild v. Department of State*, 641 F.3d 504 (D.C. Cir. 2011) make it clear that it does not. As this Court in *Mapother* explained, the key consideration is the relationship "between the [factual] summaries and the decision announced." *Mapother*, 3 F.3d at 1539 (citing *Playboy Enters., Inc. v. U.S. Dep't of Justice*, 677 F.2d 931, 936 (1982)). "A 'salient characteristic' of information eligible for protection under deliberative process privilege is its 'association with a significant *policy* decision.'" *Mapother*, 3 F.3d at 1539 (quoting *Petroleum Info. Corp.*, 976 F.2d at 1437 (emphasis in original)). "Where an agency claims that disclosing factual material will reveal its deliberative processes, 'we must examine the information requested in light of the policies and goals that underlie the deliberative process privilege.'" *Mapother*, 3 F.3d at 1537–38 (citing *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988)).

In *Playboy Enterprises*, this Court rejected a similar argument advanced by the FBI here. The Department sought to withhold facts it uncovered in an investigation into government misconduct in the early 1960s on the grounds that the Rowe report reflected the "choice, weighing and analysis of facts," and was thus deliberative. 677 F.2d at 935. This Court responded,

> 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.

Id. at 936. Distinguishing the report from cases involving complex decision-making, this Court ordered the government to produce the factual portions of the report:

> In [*Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974)] summaries were prepared for the sole purpose of assisting the Administrator to make a complex decision in an adjudicatory proceeding.[4] Disclosure of the summaries would have permitted inquiry into the mental processes of the Administrator by revealing what materials he considered significant in reaching a proper decision, and how he evaluated those materials. The Rowe Report on the other hand was prepared only to inform the Attorney General of facts which he in turn would make available to members of Congress.
>
> For similar reasons the Department's argument is not supported by *Mead Data Central, Inc. v. Department of Air Force*, 184 U.S. App. D.C. 350, 566 F.2d 242 (1977). In that case we held that documents containing discussions among agency personnel about the relative merits of various positions, which might be adopted by the Air Force in future contract negotiations, were protected by Exemption 5. That

[4] The case summaries were compiled by several aids from an extensive universe of documents totaling more than 9,200 pages. *Montrose Chem. Corp.*, 491 F.2d at 65.

> material was clearly deliberative in nature, in contrast to the document requested in this case.[5]

Id. at 936. This Court's subsequent decisions in *Mapother* and *Ancient Coin Collectors Guild* affirm that the holding in *Playboy Enterprises* appropriately applies here. In *Mapother*, the factual information deemed deliberative was located in a 204 page report prepared by an investigative unit of the Department of Justice, which provided the basis for an order issued by the Attorney General barring a foreigner from entering the United States because of evidence that he may have participated in war crimes for Nazi Germany. 3 F.3d at 1535. Like the information requested in *Montrose Chemical*, the majority of the report's factual material "was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action." *Id*. at 1539. Nonetheless, this Court still required disclosure of some of the report consisting of facts organized chronologically. *Id*. (noting the chronology's relation to any Justice Department deliberations is simply too attenuated to be protected by the deliberative process privilege). Likewise, in *Ancient Coin Collectors Guild*, the information sought by the FOIA requester related to a specific policy – *i.e.* import restrictions imposed by the State Department on cultural artifacts– and consisted of factual summaries "culled by the Committee from the much larger universe of facts

[5] Importantly, in *Mead Data*, the court still ordered disclosure of factual and narrative portions of the document. 566 F.2d at 935.

presented to it," which were then used to determine what issues were most relevant to "predecisional findings and recommendations." 641 F.3d at 513–14.

The agency's compilation of facts regarding the Attorney General's meeting on the tarmac with the former President occurring two days prior is less than one page long. It is neither "a complex decision in an adjudicatory proceeding" nor a "significant *policy* decision." *Mapother*, 3 F.3d at 1539. Pursuant to the FOIA, the "the public is entitled to know what its government is doing and why." *Coastal States Gas Corp.*, 617 F.2d at 868–69 (D.C. Cir. 1980). The Department's attempts to withhold the non-exempt information in this case and under these facts defies the government's asserted "commitment to ensuring an open Government" and express instruction to "adopt a presumption in favor of disclosure." Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 F.3d. Reg. 4693 (Jan. 21, 2009); *accord* Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009).

CONCLUSION

This Court should reverse the district court's grant of summary judgment upholding Defendant-Respondent's withholding of the talking points.

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Respectfully submitted,

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