IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CENTER FOR LAW AND JUSTICE,	)	
Plaintiff,	)	
vs.	)	Case No. 16-cv-02188-TJK
UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In introducing the predecessor of the bill that was enacted as the federal Freedom of Information Act ("FOIA"), its sponsor, Senator Edward Long, clearly identified the principle necessitating such a law: "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prolog to a farce or a tragedy or perhaps both." 111 CONG. REC. 26821 (1965) (quoting James Madison). In direct contravention of this principle, the Defendant Department of Justice (DOJ) has obstructed Plaintiff's access to information to which it is entitled –through significant delay (failing to produce documents for over a year) followed by withholding information pursuant to a privilege that clearly does not apply here. DOJ admits that it is withholding primarily factual information regarding a meeting orchestrated on June 27, 2016, between then-Attorney General Lynch and former President Bill Clinton on a tarmac in Arizona just a few days before Hillary Clinton was interviewed by the FBI as part of an ongoing criminal investigation into her handling of classified documents and sensitive information, and the report on Benghazi was released. The Department's abusive assertions of the deliberative process privilege represents a complete disregard for FOIA. The DOJ has failed to meet its obligations under FOIA to (1) conduct an adequate search and produce all responsive material to which the Plaintiff, American Center for Law and Justice (ACLJ), is entitled and (2) prove that Exemption 5 properly applies to the withholdings DOJ has made.

BACKGROUND

On July 15, 2016, Plaintiff submitted a FOIA request to the DOJ seeking information relating to then-Attorney General Lynch's June 27, 2016 meeting with former President Bill

Clinton at Sky Harbor International Airport. (Dkt. #1-1, at 2) (Exhibit A to Complaint). On November 2, 2016, almost four months after ACLJ issued its FOIA request and DOJ failed to issue a determination or produce responsive documents, the ACLJ filed suit to enforce FOIA and require the DOJ to comply with its statutory obligations. Complaint (Dkt # 1). On July 3, 2017 – nearly one year after ACLJ issued its FOIA request – the DOJ provided an "interim release" consisting of ninety-eight pages responsive to the FOIA request. Defendant's Statement of Material Facts (Dkt # 21-2), at 4. On or about August 1, 2017 – more than one year after ACLJ issued its FOIA request – the DOJ made its second and final production consisting of 315 pages, more than half of which contained partial or full redactions. Southerland Decl. at 2. Defendant admits that it has withheld information containing selected factual material. Brinkmann Decl. (Dkt. # 22-1) ¶¶ 16-17. On December 1, 2017, ACLJ received documents responsive to a similar FOIA request issued to the Federal Bureau of Investigation (FBI). Southerland Decl. at ¶ 5-6. Within this document production is an e-mail from a DOJ official within the Office of the Attorney General, Shirlethia Franklin, to three FBI officials regarding the meeting. *Id.* at ¶ 6; Plaintiff's Exhibit C. This email – while responsive to ACLJ's FOIA request issued to DOJ in this case – was never produced by the DOJ in the instant case. *Id.* at ¶ 7.

LEGAL STANDARD

The majority of FOIA cases are resolved on summary judgment. *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 20 F. Supp. 3d 260, 267 (D.D.C. 2014) (quoting *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011)). At the summary judgment stage, the agency has the burden of showing that it complied with the FOIA. In response to a challenge to the adequacy of its search for requested records, the agency must provide "a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain

responsive materials … were searched." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Further, "[w]hen an agency's response to a FOIA request is to withhold responsive records, either in whole or in part, the agency 'bears the burden of proving the applicability of claimed exemptions.'" *Judicial Watch*, 20 F. Supp. 3d 267 (quoting *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)). The government may sustain its burden through the submission of declarations detailing, with specificity, the reason that a FOIA exemption applies, along with an index, as necessary, describing the materials withheld. *Id.* (citations omitted). *See also Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) (A grant of summary judgment based on agency affidavits is appropriate only "if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.") (Internal citations and quotations omitted). In resolving a summary judgment motion in a FOIA case, however, a court must interpret the statute broadly in favor of public disclosure and construe any exemptions narrowly. *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988).

ARGUMENT

I. The DOJ Has Failed to Present Evidence Necessary to Support Its Summary Judgment Motion.

The first deficiency in the DOJ's attempt to obtain summary judgment is its failure to submit a *Vaughn* index or, in the alternative, the necessary information to support is withholdings. While the government may sustain its burden through the submission of declaration(s) detailing the reason that a FOIA exemption applies, the government is not absolved from also providing a *Vaughn* index which describes with particularity the justification for *each* withheld document or material. *See Natural Resources Defense Council v. N.R.C*, 216 F.3d 1180, 1190 (D.C. Cir. 2000)

("this Circuit requires an agency to provide a plaintiff with a *Vaughn* index, a description of and detailed justification for the non-disclosure of each withheld document) (internal quotations and citations omitted); *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945, 948-49 (D.D.C. 1979) (rejecting FBI's submission of affidavits in lieu of a *Vaughn* index and noting "the index requirement is to facilitate court review of agency FOIA rulings by making clear the basis for the agency's refusal to release certain information"); *Accord Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Indeed, even in *Larson v. Department of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) – cited by Defendant in this case to suggest an affidavit, alone, is sufficient – the agency provided a *Vaughn* index to support its withholdings and deletions. At a minimum, there are "three indispensable elements of a Vaughn index" that must be present to support an agency's withholdings or deletions: "(1) [t]he index should be contained in one document, complete in itself"; "(2) [t]he index must adequately describe *each* withheld document or deletion from a released document"; and "(3) the index must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant." *Founding Church of Scientology, Inc.*, 603 F.2d at 948-49 (emphasis added) (explaining further that the description of the withheld material must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA). Not only has the DOJ failed to provide Plaintiff and this Court with a *Vaughn* index but also the declaration submitted in support of its motion for summary judgment falls short of satisfying these requirements. First, while the DOJ has identified in a footnote all documents to which Plaintiff maintains a specific challenge to the assertion of the deliberative process privilege,[1] it fails to identify each document, provide a description of each document

[1] Defendant fails to articulate in the Brinkmann Declaration the full extent of Plaintiff's challenges to the withholdings. In addition to the documents listed in footnote 3 of the Brinkmann Declaration for which the ACLJ asserted specific objections to Exemption 5 and 6 withholdings, ACLJ maintains a standing objection to all withholdings made by the DOJ to the extent that segregable factual information remains redacted. *See* Southerland Decl., at ⁋ 2; Pl. Exhibit B.

according to the withholding made, or explain how the exemption is relevant to each document. *See* Brinkmann Decl., at ¶ 9, fn. 3. *See also id*. at ¶¶ 11, 13 (asserting that the information withheld consists of three kinds of communications, but failing to identify which document(s) falls under which of the three categories defined). DOJ's failures are particularly critical here where the agency fails to identify or distinguish early drafts of press statements and talking points from final versions for which no further deliberations are present. The consequence of DOJ's failure is the inability to conduct the necessary analysis for each withheld record, resulting in DOJ's failure to meet its burden and succeed on a summary judgment motion.

II. DOJ Has Failed To Meet Its Burden of Showing The Information Withheld Properly Falls Within FOIA Exemption 5.

Case law regarding the proper application of Exemption 5 and the deliberative process privilege is clear. The withheld information must be both pre-decisional and deliberative. *Judicial Watch, Inc.*, 20 F. Supp. 3d at 269. Importantly, under the deliberative process privilege, factual information generally must be disclosed. Only materials embodying officials' *opinions* are ordinarily exempt. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (citing *EPA v. Mink*, 410 U.S. 73, 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"). For the reasons identified more fully below, DOJ has failed to meet its burden to show that the majority of the withholdings meet the "prerequisites for invocation of th[e] privilege." *Judicial Watch, Inc.*, 20 F. Supp. 3d at 269.

The DOJ asserts there are three categories of documents for which Defendant has redacted information under Exemption 5 pursuant to the deliberative process privilege: (1) email communications on how to respond to press inquiries; (2) prepared press statements regarding AG

Lynch's meeting; and (3) talking points memorandums. Brinkmann Decl. at ⁋⁋ 11, 13. What Defendant is required—but fails—to do is give a detailed description of each document or identify the specific category under which each document falls. This failure enables Defendant to ignore, and even conceal, the fact that many of these documents – while indeed falling under one of the three categories above – do not contain any deliberations for which the protection would properly apply. Instead, many of the documents represent an end to the deliberations. These include, for example, final, agreed-upon press statements and talking points. *See* Pl. Ex. A. For example, in an e-mail from Melanie Newman to Attorney General Lynch's alias email (Elizabeth Carlisle) dated June 28, 2016, at 3:46 PM, Ms. Newman sends the "Final version" of Talking points/statement and informs Attorney General Lynch that the final version is "printing now." *Id*. at 49-54. Attorney General Lynch acknowledges receipt of the talking points at 4:28 PM that same day. *Id*. at 49. These "talkers" are then circulated in the following days to numerous government officials including some outside the DOJ. *Id*. at 26 (Email from Newman to FBI officials dated June 29, 2016 at 4:39 PM), *id.* at 28 (Email from Newman to Marc Raimondi on June 30, 2016 at 9:08 AM), *id.* at 35 (Email from Newman to Axelrod dated June 29, 2016, at 4:03 PM). In an email from Melanie Newman (DOJ) to Matthew Axelrod, Ms. Newman forwards the talking points and notes "Peter –OLA is going to get questions about this and I think the talking points we drafted will be useful for your purposes." *Id*. at 35. A few minutes later, Ms. Newman forwards the talking points to several FBI officials and writes: "I want to flag a story that is gaining some traction tonight . . . Our talkers on this are below. . . . Please let me know if you get any questions about this." *Id*. at 26. Ms. Newman does not request input regarding the talkers. Clearly, no deliberation by the talkers was contemplated, yet the "talkers" were redacted in full. Ms. Newman forwards these talking points to Marc Raimondi on June 30, 2016 with the subject line "TPs and transcript."

Id. at 28. Again on July 11, 2016, Alicia O'Brien (Office of Legislative Affairs) sends talking points to Herwig and Pokorny in the AG's office. *Id*. at 30. The subject line of the email is "final." The attachment (which is withheld in full) is entitled "Top Line TPs (Final).docx." *Id.*

Finally, several of these documents admittedly contain "facts," Brinkmann Decl., at ⁋ 16, rather than opinions. *See e.g.*, *id.* at ⁋ 17 (noting that the withholdings contain a "selection of facts and source material"); ⁋ 18 (affirming that facts are contained within the withheld material). This withheld information does not qualify for protection under the privilege. Only materials embodying officials' *opinions* are exempt. *In re Sealed Case*, 121 F.3d 729,737 (D.C. Cir. 1997) ("The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations."). *Id*. (ordering the White House to produce all materials containing wholly factual and segregable factual assertions).

Talking points and press statements which contain factual information are no exception to this rule. In *Judicial Watch, Inc. v. Dep't of Treasury*, 802 F. Supp. 2d 185, 194-95 (D.D.C. 2011), the court found that portions of a draft talking points document contained reasonably segregable material and should have been released. In *Trea Senior Citizens League v. Dep't of State*, 923 F. Supp. 2d 55, 69 (D.D.C. 2013), the court denied the State Department's motion for summary judgment as to its Exemption 5 withholding of draft talking points. *See also Judicial Watch, Inc. v. 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. Dep't of Homeland Sec*., 2005 U.S. Dist. LEXIS 27492 (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) In yet another case, the D.C Circuit held, following *in camera* review, that the DOJ's redactions fell beyond the scope of the privilege where only the first sentence and footnotes contained opinion and the rest consisted of factual information. The court ordered that the report, with the exception of the first sentence and footnotes, be produced without redaction, finding that any "relation to any . . . deliberations [was] simply too attenuated to be protected by the deliberative process privilege." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539-40 (D.C. Cir. 1993).

Here, in an abusive application of the deliberative process privilege, DOJ has admittedly withheld factual information from Plaintiff and the public on the grounds that, because it chose not to reveal those facts to the public last year, it should not be required to do so now. *See* Brinkmann Decl. at ⁋ 16 (asserting -- without any legal support -- that "the decision to include or exclude certain factual information in or from analytical material is itself an important part of the deliberative process"); *Id*. at ⁋ 17 (asserting -- again without any legal support -- that the selection of facts and source material is part of the deliberative process and should not be disclosed). DOJ's position is not only unsupported by the law; it is antithetical to the FOIA and defies Congress's intent to confine Exemption (b)(5) narrowly and in favor of complete disclosure. *See Senate of Puerto Rico ex rel. Judiciary Comm. v. Dep't of Justice*, 823 F.3d 574 (D.C. Cir. 1987). Because the Brinkmann Declaration falls significantly short of providing the "specific and detailed proof that disclosure would defeat, rather than further, the purposes of FOIA," *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Mead Data Cent. v. Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977)), and DOJ's argument is without legal support, the agency's motion for summary judgment fails. Plaintiff is entitled to unredacted copies of the documents challenged, in addition to production of all segregable factual information.

III. Even If Defendant's Withholdings Properly Qualify Under The Privilege, The Privilege Is Outweighed By The Public's Need.

Even if DOJ had succeeded in meeting its burden of proof to show that the withheld information properly falls under Exemption 5 and the deliberative process privilege, the privilege is not absolute. *Trevino v. Jones*, 2009 U.S. Dist. LEXIS 124206 (S.D. Ohio May 26, 2009) (citing *Cobell v. Norton*, 213 F.R.D. 1, 4 (D.D.C. 2003)). The D.C. Circuit has explained that the deliberative process privilege "can be overcome by a sufficient showing of need." *In re Sealed Case*, 121 F.3d at 737. A determination of need is to be made on "a case-by-case ad hoc basis." *Id.* (noting further that "[e]ach time the deliberative process privilege is asserted the district court must undertake a fresh balancing of the competing interests") (citing *In re Subpoena Served Upon the Comptroller of the Currency,* 967 F.2d 630, 634 (D.C. Cir. 1992). Factors to be considered include the "relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees." *Id.* (internal quotations and citations omitted). A primary example offered by the Court in *In re Sealed* is particularly relevant here: "where there is reason to believe the documents sought may shed light on government misconduct, 'the privilege is routinely denied,' on the grounds that shielding internal government deliberations in this context does not serve 'the public's interest in honest, effective government.'" *Id.* (quoting *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs,* 60 F.3d 867, 885 (1st Cir. 1995).

Here, DOJ admits that the withheld information includes facts relating to then-AG Lynch's meeting with former President Clinton at a time that the mere occurrence of the meeting raised the specter of impropriety. One can only conclude, based on DOJ's assertions, that these facts are ones the agency chose not to share with the public regarding that meeting, or the events leading up to the meeting. AG Lynch's meeting, and the personal and political relationship she maintained with

the former president, implicated DOJ's own ethical guidelines in light of the ongoing criminal investigation by the very department AG Lynch led at that time. *See* Dkt. # 1-1; DOJ, Ethics Handbook for On and Off-Duty Conduct (January 2016), No. 14, *available at* https://www.justice.gov/jmd/page/file/190546/download (requiring all DOJ employees to avoid the appearance of impropriety). The meeting has led to numerous allegations of malfeasance. *See* Dkt # 1-1 (detailing numerous news stories and reports regarding the meeting, as well as a comment by a U.S. Senator). The need to shed light on the alleged malfeasance is sufficient to overcome the privilege. *In re Sealed Case*, 121 F.3d at 738 ("the privilege may be overridden where necessary . . . to shed light on alleged government malfeasance") (internal quotations and citations omitted). To that end, the agency must not be permitted to hide evidence of its own misconduct, or conceal facts that would shed more light on the context of the meeting.

IV. The Evidence Indicates That DOJ Has Failed To Conduct An Adequate Search And Produce All Responsive Documents.

As stated above, the agency bears the burden of demonstrating that it has conducted an adequate search. *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "In response to a challenge of the adequacy of the search, the agency may meet its burden by providing "a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched. The plaintiff may then provide 'countervailing evidence' as to the adequacy of the agency's search." *Iturralde v. Comptroller of the Currency,* 315 F.3d 311, 313-14 (D.C. Cir. 2003) (citations omitted).

Based on new evidence obtained by ACLJ just three days ago, it is impossible for DOJ to meet this burden. As counsel for the ACLJ explains in a supporting declaration, on December 1, 2017, ACLJ received documents responsive to a similar FOIA request issued to the Federal Bureau of Investigation (FBI). Within the December 1, 2017, FBI document production is an e-mail

regarding the Clinton-Lynch meeting from a DOJ official within the Office of the Attorney General, Shirlethia Franklin, to three FBI officials. *See* FOIA document produced by the FBI, attached hereto as Exhibit C. This email – while responsive to ACLJ's FOIA request issued to DOJ in this case – was never produced by the DOJ in the instant case. The existence of additional, responsive documents never produced by the DOJ demonstrates the *in*adequacy of the agency's search and renders summary judgment in favor of DOJ inappropriate. *Iturralde*, 315 F.3d at 314 (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1995)).

CONCLUSION

The primary objective of the FOIA is disclosure, not secrecy, and it should never be used to shield information regarding governmental operations that do not call for protection. Accordingly, exemptions to disclosure under FOIA are to be interpreted and applied narrowly, and upheld only when properly supported by the agency invoking them. For the foregoing reasons, Defendant falls significantly short of meeting its burden to obtain a grant of summary judgment. This Court should deny Defendant's motion, grant Plaintiff's cross-motion for summary judgment, and order that all challenged withholdings be produced in full.

Dated: December 4, 2017

Respectfully submitted,

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