IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. U.S. DEPARTMENT OF COMMERCE, Defendant.	Civil Docket No. 15-cv-2088 (CRC)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant U.S. Department of Commerce hereby moves for summary judgment on all of Plaintiff's claims. This motion is supported by a statement of material facts as to which there is no genuine issue, a memorandum of points and authorities, the Declarations of Mark Graff and Dr. Richard Spinrad, and a *Vaughn* index. A proposed order is attached.

Dated: December 15, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ Kevin M. Snell
KEVIN M. SNELL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 6108
Washington, D.C. 20530
Tel.: (202) 305-0924
Fax: (202) 616-8460
E-mail: Kevin.Snell@usdoj.gov

Counsel for Defendant

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this Freedom of Information Act ("FOIA"), Plaintiff Judicial Watch requested from the National Oceanographic and Atmospheric Administration ("NOAA"), a component of the Department of Commerce, records relating to different temperature metrics and datasets.[1] The parties conferred and reached an agreement regarding the scope of the request and relevant search parameters. Using those agreed-upon parameters, NOAA conducted a search and ultimately produced responsive, non-exempt material.

Plaintiff now challenges the adequacy of NOAA's search and all of its redactions and withholdings. But as discussed more fully herein, NOAA conducted a search that was reasonably calculated to locate all non-duplicative records in its possession responsive to Plaintiff's request. Moreover, all of the challenged information and records that NOAA withheld were properly exempt from production. The Court should therefore grant summary judgment in favor of the Department of Commerce.

FACTUAL BACKGROUND

I. The Hiatus Paper

The FOIA request at issue centers around a June 4, 2015 study authored by NOAA scientists and published in the journal *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* ("Hiatus Paper" or "the Paper"). Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change ("IPCC") released a report in stages that concluded that the upward global surface temperature trend from 1998-2012

[1] The FOIA request also sought communications between NOAA and the House of Representatives Committee on Science, Space, and Technology. The agency made a separate production of these records, which Plaintiff's counsel indicated in writing that Plaintiff did not intend to challenge. Therefore, this motion for summary judgment and accompanying documents do not address the agency's response to that aspect of the request.

was lower than that from 1951-2012. Declaration of Mark Graff ("Graff Decl.") Decl. ¶ 9 (attached herein as Exhibit A). The apparent observed slowing of the global surface temperatures was dubbed the "hiatus." *Id.* The Hiatus Paper, drafted after that report by a team of NOAA scientists, sought to properly account for the alleged "hiatus."

NOAA's National Centers for Environmental Information ("NCEI") produces and maintains datasets for global ocean areas and global land areas. *Id.* ¶ 6. Scientists throughout the government, including scientists at agencies other than NOAA, and outside of the government, use the sea surface temperature and land surface temperature datasets for a variety of purposes, including for climatic research and climate assessments. *Id.* NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. *Id.* There were two significant developments related to the "hiatus" after the IPCC's report. In particular, 2013 and 2014 were two of the five warmest years on record for the globe. *Id.* ¶ 10. Also, NOAA scientists made significant improvements to its sea surface temperature dataset, one of largest being a correction that accounted for the difference in data collected from ships and buoys. *Id.* Buoys have been increasingly used since the 1970s to measure sea surface temperatures, and scientists developed a method to correct for the difference between these two observing systems and incorporated those corrections into the dataset. *Id.*

NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. *Id.* ¶ 7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. *Id.* ¶ 8.

Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged "hiatus" based on the additional two years of global temperature data and the improvements to

NOAA's sea surface temperature dataset. *Id.* ¶ 11. Karl sought feedback on the draft paper, and a team of scientists at NOAA worked to develop a manuscript. *See id.* ¶¶ 11-13. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on the implications of other researchers' work, and so on. *Id.* ¶ 13. Such collaboration via discussions and drafts is standard practice at NCEI. *Id.* ¶ 13.

In December 2014, the authors submitted the draft paper to the journal *Science*. *Id.* ¶ 14. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. *Id.* ¶ 20. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See id.* ¶ 21. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. *Id.* ¶ 23.

II. The FOIA Request and NOAA's Response

Plaintiff's FOIA request, dated October 30, 2015, sought in relevant part:

> 1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
>
> 2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
>
> 3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the

> utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.

Graff Decl. ¶ 24; *see also* Answer, ECF No. 8-1.

Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. *Id.* During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. *Id.* ¶ 26. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. *Id.*

The parties ultimately "reached an agreement regarding the scope of the request and relevant search parameters." Second Joint Status Report, ECF No. 10 at 2. For Plaintiff's FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: "NMAT," "Night Marine Air Temperatures," "ISTI," "ICOADS," "sea ice," "satellite," "Advanced Very High Resolution Radiometer," "AVHRR," "Advanced Microwave Scanning Radiometer," and "AMSR." *Id.*; Graff Decl. ¶ 27.

After NOAA directed those custodians to run the agreed-upon searches, it made a production on May 27, 2016 of 102 pages of material in its entirety and 90 partially redacted pages. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records, and informed Plaintiff that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12. The parties then

discussed the details of potential challenges to NOAA's production, and NOAA agreed to provide Plaintiff a draft *Vaughn* index in an attempt to narrow the issues in dispute. *See* Fifth & Sixth Joint Status Report, ECF Nos. 13 & 14. Upon further review of the withheld information, on September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's cell phone number), Graff Decl. ¶ 30, and contemporaneous with this filing on December 15, 2016, NOAA released an additional 62 records, Graff Decl. ¶ 31.

STANDARD OF REVIEW

A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). In deciding at the summary judgment stage whether an agency has fully discharged its obligations under FOIA, "the agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

ARGUMENT

I. NOAA's Search Was Reasonable, Adequate, and Satisfies Its Obligation Under the FOIA

A. The Standard for an Adequate Search

The touchstone for determining whether an agency should prevail on a motion for summary judgment in FOIA litigation is whether the agency demonstrates that its "search for documents was adequate." *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009). An agency's search is adequate if "it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The adequacy of a FOIA

search is thus gauged "not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). In short, "[t]he adequacy of the search . . . is judged by a standard of reasonableness." *Steinberg*, 23 F.3d at 551; *see also DiBacco v. U.S. Army*, 795 F.3d 178, 194–95 (D.C. Cir. 2015) ("A search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986))).

"In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith." *Id*. (quoting *Weisberg v. Dep't. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Such affidavits are sufficient if they "set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched." *Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (quoting *McCready v. Nicholson*, 465 F.3d 1, 7 (D.C. Cir. 2006)). This standard does not require that "the affidavits of the responding agency set forth with meticulous documentation the details of an epic search for the requested records." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). "Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice . . . ." *Id*. Moreover, "[s]uch agency affidavits attesting to a reasonable search 'are afforded a presumption of good faith,' and 'can be rebutted only with evidence that the agency's search was not made in good faith.'" *Riccardi v. US Dep't of Justice*, 32 F. Supp. 3d 59, 63 (D.D.C. 2014) (quoting *Defs. of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp.2d 1, 8 (D.D.C. 2004)).

Finally, courts in this circuit recognize the "well-worn rule . . . that the adequacy of a FOIA search is not to be judged by its results." *Rosenberg v. United States Dep't of Immigration & Customs Enf't*, 13 F. Supp. 3d 92, 104 (D.D.C. 2014). "The question is not 'whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.'" *Steinberg*, 23 F.3d at 551 (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (emphases in original). Thus, courts have rejected challenges to the adequacy of a search, even when a "slim yield may be intuitively unlikely" and a "reasonable observer would find th[e] result[s] unexpected." *Ancient Coin Collectors Guild*, 641 F.3d at 514. Moreover, "mere speculation that as yet uncovered documents might exist[] does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004); *see also Sheffield v. Holder*, 951 F. Supp. 2d 98, 101 (D.D.C. 2013) (noting that a requester "cannot rest . . . on mere conjecture or 'purely speculative claims about the existence and discoverability of other documents'" (quoting *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 107 (D.D.C. 2005))).

B. NOAA Conducted an Adequate Search

As set forth in Mark Graff's Declaration, NOAA's search for records responsive to Plaintiff's FOIA request was more than adequate. *See Perry*, 684 F.2d at 127. Judicial Watch and NOAA reached an agreement as to how the search would be carried out. The agency would search the records of the nine Hiatus Paper authors for any record referring to that study and containing the term "NMAT," "night marine air temperatures," "ISTI," "ICOADS," "sea ice," "satellite," "advanced very high resolution radiometer," "AVHRR," "advanced microwave scanning radiometer," and "AMSR." Graff Decl. ¶ 27; Second Joint Status Report at 2, ECF No.

10. The timeframe for the search would be October 1, 2014 to June 4, 2015. *Id.* NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. *Id.* ¶ 33. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. *Id.* ¶ 35. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. *Id.* ¶¶ 36-38.[2] There were no common areas at NCEI for NOAA to search. *Id.* ¶ 37. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. *Id.* ¶ 44.

On this record, NOAA's search should be upheld under FOIA. NOAA has provided "a reasonably detailed [declaration], setting forth the search terms and the type of search performed," and averred that all files likely to contain responsive, non-duplicative materials were searched. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68). NOAA has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68.

II. NOAA Properly Withheld Information Under Exemption 5

FOIA does not require disclosure of "matters that are . . . inter-agency or intra-agency memorandums or letters [which] would not be available by law to a party other than an agency in

[2] One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. *See* Graff Decl. ¶ 36 n.1. No additional records responsive to this request from that author are known to have existed following his retirement. *See id.*

litigation with the agency." 5 U.S.C. § 552(b)(5). "Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus protects the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege. *Id.*; *see also Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001).

The deliberative process privilege "allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). According to the D.C. Circuit,

> There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds.

Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

The privilege is necessary because "those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." *Sears*, 421 U.S. at 150-51. "[E]fficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'" *EPA v. Mink*, 410 U.S. 73, 87 (1973), *abrogated on other grounds*, Pub. L. No. 93-502, 88 Stat. 1561 (1974). There are "[t]wo requirements [that] are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative." *In re Sealed Case*, 121 F.3d at 737.

The agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions.'" *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears*, 421 U.S. at 151). NOAA's justification for asserting Exemption 5 is "sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

Here, NOAA properly withheld information under Exemption 5 that is protected by the deliberative process privilege because the information withheld reflects deliberations in preparation for decisions of how to analyze and present data and theory, as well as decisions about how to respond to peer review comments and deliberations on developing public communications and congressional presentations. *See* Graff Decl. ¶¶ 50-63. Disclosure of such information, which is predecisional and deliberative, and contains selected factual material intertwined with opinion, would inhibit candid internal discussions and the expression of recommendations and judgments. *Id.* ¶ 64. Disclosure of the details of these confidential discussions and drafts could reasonably be expected to chill the open and frank exchange of comments and opinions that NOAA officials engage in, as well as inhibit candid internal discussions and recommendations regarding preferred courses of action for agency personnel. *Id.*

The documents withheld in full or in part under the deliberative process privilege fall generally into three categories: (1) drafts of the Hiatus Paper; (2) internal deliberations, including email exchanges; and (3) peer review materials, both formal and informal. As explained below and in the attached *Vaughn*, each redacted or withheld document contains both predecisional and deliberative information. Accordingly, NOAA properly asserted Exemption 5 based on the deliberative process privilege.

1. Drafts of the Hiatus Paper

NOAA withheld pursuant to Exemption 5 inter- or intra-agency, predecisional, and deliberative draft versions of the Hiatus Paper (including drafts of its accompanying figures and "supplementary materials") that were produced while NOAA scientists were developing the Paper. Graff Decl. ¶ 51.[3] "[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors." *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (citation omitted). Accordingly, "drafts are commonly found exempt under the deliberative process exemption." *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007). Among other reasons for this, disclosure of "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 Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987). Indeed, drafts are ordinarily exempt regardless of whether or to what extent segments of the draft made their way into the final product: "If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so." *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) (quoting *Lead Industries Ass'n v. OSHA.*, 610 F.2d 70, 86 (2d Cir. 1979)); *see ViroPharma Inc. v. HHS*, 839 F. Supp. 2d 184, 193 (D.D.C. 2012) ("The choice of what factual

[3] The fact that some draft versions were shared for peer review purposes outside of the federal government does not affect those drafts' status as inter- or intra-agency. *See infra* at Section II.3.

material . . . to include or remove during the drafting process is itself often part of the deliberative process, and thus is properly exempt under Exemption 5."); *cf. Marzen v. HHS*, 825 F.2d 1148, 1155 (7th Cir. 1987) (noting that privilege "protects not only the opinions, comments and recommendations in the draft, but also the process itself").

These drafts are predecisional inasmuch as they were generated to assist the agency in preparing the final version of the Hiatus Paper. *See Quarles v. Dep't of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (explaining that materials are predecisional when "prepared in order to assist an agency decisionmaker in arriving at . . . decisions"). And they are deliberative in that they reflect the development of the final paper; these non-final, predecisional drafts contain opinions and recommendations of the NOAA authors; draft language, data, and data interpretation for consideration by other NOAA authors; comments on previous drafts of the paper; and/or responses to other NOAA authors' or peer reviewers' comments on earlier drafts of the paper. *See* Graff Decl. ¶ 51; *Vaughn* part 2 Category A. Withholding this material under Exemption 5 was proper, and the release of such drafts would inhibit agency scientists from expressing their views and deter NOAA scientists from participating candidly in the development of scientific products in the future. *See* Graff Decl. ¶ 51.[4]

2. Communications Among NOAA Personnel

Also integral to the drafting of the Hiatus Paper, the authors frequently communicated and exchanged ideas with one another via email during the Paper's development. Here, NOAA

[4] Equally appropriate, NOAA's *Vaughn* also shows that the agency withheld draft documents that aided in or related to the development of the Paper, such as "[d]raft graphs of land and ocean temperature data created by NOAA scientists to be used in the paper," *Vaughn* part 2 at bates pages 1170-73, "[d]raft graphs and charts of SST data to be used in [the] development of the paper," *Vaughn* part 2 at bates pages 2071-76, and a "[d]raft powerpoint by [an] author presenting information on global temperature and presenting data analysis done by NOAA scientists for the paper," *Vaughn* part 2 at bates pages 1876-86.

withheld inter- or intra-agency, predecisional, and deliberative communications. *See* Graff Decl. ¶ 50. In pursuing a research objective, scientists may begin with only a rough idea, and then develop, test, and revise that idea as data is collected and interpreted. Declaration of Richard W. Spinrad ("Spinrad Decl.") ¶ 14 (attached herein as Exhibit B). Possible interpretations are generated and tested in part through candid debates and exchanges among peers. *Id.* ¶ 15. Indeed, the exchange and debate among peers is the mechanism that allows NOAA to ensure its scientific products are robustly developed and accurately tested. *Id.* ¶ 16. And there is a general and well-established presumption that such discussions are not intended to be, and will not be, shared with a wider audience, as confidentiality is essential to ensuring participants feel free to propose new ideas or explanations without fear of misinterpretation or being taken out of context. *Id.* ¶ 20. It is critical that this type of information be protected so as not to chill candid exchanges and debates, as well as to avoid the risk of confusing the public with preliminary or incomplete information. *See id.* ¶¶ 23-25.

NOAA's *Vaughn* index reinforces that these types of predecisional and deliberative communications occurred here, were integral to the development of the Hiatus Paper, and were appropriately withheld or redacted. *See Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015) ("[O]fficials should be judged by what they decided, not for matters they considered before making up their minds" (citation and internal quotation mark omitted)). For example, NOAA is redacting or withholding communications between scientists in which authors asked for clarification on data analysis conducted for developing the Paper, *Vaughn* part 1 at bates pages 22-23, shared opinions on the results of a draft data analysis for developing the Paper, *Vaughn* part 1 at bates page 15, offered opinions as to the best approach to take in the Paper, *Vaughn* part 1 at bates pages 300, 335, 362-63, and provided opinions on statistical error

uncertainty ranges for development of the Paper, *Vaughn* part 1 at bates page 245. Moreover, NOAA withheld a document that presented questions and draft graphs to spur discussion among the NOAA scientists. This document was created and circulated for the purpose of author discussions during the development of the Hiatus Paper, and shows NOAA scientists considering what constitutes the best data analysis and presentation for the Paper. *See Vaughn* part 2 Category E; Graff Decl. ¶ 52.[5]

In addition to withholding communications concerning the development of the Hiatus Paper, NOAA also withheld communications and information reflecting the development of a plan by its officials for communications and press release in preparation for publication of the paper, *e.g. Vaughn* part 1 at bates page 289-90, *Vaughn* part 2 at bates page 7446-50, as well as the agency's development of a presentation to Congress, *e.g.*, *Vaughn* part 1 at bates pages 143, 324 (explaining that redacted email reflected "NOAA scientist discussing climate change research and developing the agency's presentation for Congress"). This withheld information, which reflects NOAA's development of how to brief Congress and the public, is predecisional and deliberative and falls squarely within Exemption 5. *E.g.*, *Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011) (noting email discussing response to press inquiry protected under deliberative process privilege).

All of this material is precisely the sort of information that the deliberative process privilege is designed to protect. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854,

[5] Similarly, NOAA withheld information reflecting discussions among scientists concerning potential scientific inquiries. *See, e.g.*, *Vaughn* part 1 at bates page 75 (discussing future climate research and asking for opinion on this research and on possible role of NOAA scientists in this research). Again, such material is predecisional and deliberative, and therefore is exempt from disclosure. *E.g.*, *Sears*, 421 U.S. at 151 n.18 (explaining that protection extends to records that are part of decisionmaking process even where process does not produce actual decision by agency).

866 (D.C. Cir. 1980) (document is "predecisional" if it is "generated before the adoption of an agency policy" and "deliberative" if it "reflects the give-and-take of the consultative process"); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001) (explaining that deliberative process privilege's "object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government") (citation omitted); *Russell*, 682 F.2d at 1048 ("[T]he exemption protects not only communications which are themselves deliberative in nature, but all communications which, if revealed, would expose to public view the deliberative process of an agency."). Moreover, any factual material in the withheld documents reflect the authors' selection and presentation of factual material, Graff Decl. ¶ 65, and as such it too is covered by the deliberative process privilege. *See, e.g.*, *Ancient Coin Collectors Guild*, 641 F.3d at 513 (explaining that factual material can be withheld where it reflects "an exercise of discretion and judgment calls" and that the "legitimacy of [the] withholding" turns on "whether the selection or organization of facts is part of an agency's deliberative process").

Because all of the redacted and withheld information is inter- or intra-agency, predecisional, and deliberative in nature, NOAA properly applied Exemption 5.

3. Peer Review Material

NOAA also withheld inter- or intra-agency material reflecting the different peer review processes its analyses and drafts underwent prior to publication of the Hiatus Paper. *Science* follows a formal peer review process in which subject matter experts evaluate the rigor and merit of the paper, and provide feedback on an array of issues. Graff Decl. ¶ 15. Those anonymous, impartial reviewers share their reviews with the authors, *Science*'s board, and potentially other reviewers (for cross-comment). *Id.* ¶ 17.

Here, *Science* sent the manuscript to five anonymous peer reviewers, and the scientists received two rounds of comments. Upon receiving these reviewers' comments, the NOAA scientists deliberated internally as to how to how to respond in writing to every comment received. NOAA properly withheld peer reviewer comments, the agency's internal draft responses to these peer reviewer comments, draft cover letters NOAA's scientists wrote to accompany their response, as well as the agency's final responses to peer reviewer comments. *See* Graff Decl. ¶¶ 53-54; *Vaughn* part 2 Category B, C, D.

The D.C. Circuit has specifically held that comments provided by peer reviewers during the peer review process for publication of scientific articles in scientific journals are covered by Exemption 5 because they are both "pre-decisional because it preceded the agency's decision whether and in what form to publish" the paper and were part of the agency's deliberative process "because the agency secured review commentary in order to make that decision." *See Formaldehyde Inst. v. U.S. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1123-25 (D.C. Cir. 1989). As that Court recognized, agency scientists "must regularly rely on the comments of expert scientists to help them evaluate the readiness of agency work for publication [and i]n that sense they must rely on the opinions and recommendations of temporary consultants." *Id.* at 1125.

The scientists' draft responses to the peer reviewer comments are also covered by Exemption 5 since these materials, including personal opinions and recommendations, draft language, data, and data interpretation for consideration, as well as comments on previous drafts of the responses, reflect predecisional and deliberative discussions. *See Vaughn* part 2 Category C; Graff Decl. ¶ 54. Similarly, the final responses to peer review comments that NOAA submitted to *Science* during the peer review process reflect the agency's response to constructive

criticism and advice, and were part of the process to assist in the authors' deliberation as to whether and in what form to publish the paper. *See Vaughn* part 2 Category D; Graff Decl. ¶ 55. These final responses, then, fit comfortably within Exemption 5. *See Petroleum Info. Corp.*, 976 F.2d at 1434 (agency documents that were "prepared in order to assist an agency decisionmaker in arriving at his decision" are "predecisional" (citation omitted)); *Coastal States Gas Corp.*, 617 F.2d at 866. Finally, the draft cover letters to *Science* accompanying the scientists' responses to the peer review comments contain edits or otherwise do not include the final wording of the letter, reflecting that the scientists' final approach had not been finalized at that point. *Vaughn* part 2 Category B; Graff Decl. ¶ 53. Withholding such draft material was appropriate.

The fact that the peer review comments were sent by *Science*, and the responses to those peer reviewer comments were sent back to *Science*, does not affect their status as "intra-agency" materials that may be protected by Exemption 5. "Recognizing that the purpose of the exemption was to promote the quality of agency policy decisions and that often these policy decisions were best made by incorporating the advice of outside experts, [the D.C. Circuit] developed a 'consultant corollary' whereby communications with temporary consultants would be considered 'intra-agency' for the purposes of Exemption 5." *Judicial Watch v. U.S. Dep't of Transp.*, 950 F. Supp. 2d 213, 216 (D.D.C. 2013) (citing cases). "When communications between an agency and a non-agency aid the agency's decision-making process and the non-agency did not have an outside interest in obtaining a benefit that is at the expense of competitors, the communication must be considered an intra-agency communication for the purposes of FOIA Exemption 5." *Judicial Watch*, 950 F. Supp. 2d at 218-19 (citing *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677 680-85 (D.C. Cir. 2008) ("*NIMJ*"); *Lardner v. U.S. Dep't of Justice*, No. 03-0180, 2005 WL 758267, at *1 (D.D.C. Mar. 31, 2015);

see also, e.g., *Hooker v. HHS*, 887 F. Supp. 2d 40, 55 (D.D.C. 2012) (upholding agency's withholding of predecisional and deliberative letter from former employee where he "played the same role in the agency's process of deliberation after his departure that he would have played had he remained"), *aff'd*, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014); *see also Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 46 (D.D.C. 2012) ("In order to be excluded from the exemption, the contractors must assume a position that is 'necessarily adverse' to the government.").[6]

Moreover, maintaining the confidentiality of these communications is important, as disclosure would discourage the sharing of candid thoughts of the reviewers and scientists. Graff Decl. ¶ 55, 64; *see also* Spinrad Decl. ¶¶ 20-21 (explaining importance of confidentiality in developing scientific products). Here, as in *Formaldehyde*, it is "indisputable" that both "reviewers' comments are expected to be confidential" and "disclosure of reviewers' comments would seriously harm the deliberative process." 889 F.2d at 1124 (internal citations and quotations omitted).

Outside of *Science*'s formal peer review process, NOAA scientists welcomed the informal peer review from a limited number of consultants in evaluating the underlying datasets

[6] *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), holding that Exemption 5 did not protect documents submitted by American Indian Tribes to the Interior Department addressing tribal interests that were then the subject of state and federal water allocation proceedings, does not prevent the application of the consultant corollary here. Rather, the D.C. Circuit "has allowed any communication that aids the agency's deliberative process to be protected as 'intra-agency,'" and "*Klamath* only modifies this by requiring that we not protect communications with interested parties seeking a government benefit that is adverse to others seeking that benefit." *Judicial Watch*, 950 F. Supp. 2d at 218 (footnote omitted).

Also, to fall within the consultant corollary, there is no requirement that an individual must possess a contractual relationship with the agency in question. *See, e.g.*, *NIMJ*, 512 F.3d at 679-87 (deliberative process privilege exempted from disclosure comments received by Department of Defense, in the course of issuing regulations, from non-governmental lawyers who were former high ranking governmental officials or academics or both).

and developing the Hiatus Paper. Graff Decl. ¶ 56; *see also Formaldehyde Inst.*, 889 F.2d at 1125. In the field of climate science, only a small number of scientists have the relevant, specialized expertise, *see* Spinrad ¶ 17, and it is common for scientists to seek input from colleagues both inside and outside the federal government, *id.* ¶ 19. Sometimes experts that are located outside of the federal government have an expertise that can aid the agency. *See id.* ¶ 17. The consultants here, each of whom is highly regarded in his specialized field, Graff Decl. ¶ 58, share the common goal with NOAA of advancing scientific inquiry and developing accurate information on climate science, *see id.* ¶ 56; *see also Formaldehyde*, 889 F.2d at 1122, quoting *Ryan v. Dep't of Defense*, 617 F.2d 781, 789-90 (D.C. Cir. 1980) ("'In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.'").

As the *Vaughn* and Mark Graff's declaration make clear, withholding this informal peer review was also appropriate, as their input was used by NOAA to ensure that only the highest quality scientific product would be released. Tom Karl, for example, asked a scientist affiliated with the National Center for Atmospheric Research to comment on a draft while the paper was in development, and that scientist provided insights and feedback in response. Graff Decl. ¶ 59; *Vaughn* part 1 bates 66-67 (explaining redacted information contained feedback and review of a data analysis for the paper and raises issue for further discussion). Other climate science experts responded to the authors upon learning from *Science* of the pending publication, as commonly occurs after an author submits a high-profile scientific paper for publication. *See* Graff Decl. ¶ 60. Two other experts provided feedback on the Paper, discussed implications of the Hiatus

Paper's conclusion, or provided and discussed data analyses, Graff Decl. ¶¶ 62-63, *Vaughn* part 1 at bates 292-93, which helped provide important feedback about the agency's product and informed the agency's continuous, ongoing work of updating agency datasets and trend analyses, Graff Decl. ¶¶ 62-63; *see Vaughn* part 1 at bates 295-96 (noting that expert's work may be incorporated into a future NOAA analysis). With respect to these types of communications, a general and well-established presumption exists that these communications will not be shared with a wider audience, which is essential to scientific exchanges and the testing and refinement of ideas that help ensure that the agency's scientific products are well developed and robust. *See* Spinrad Decl. ¶ 20. Disclosing this material could inhibit candid discussions and exchanges and chill the open and frank exchanges upon which NOAA scientists rely. *See* Graff Decl. ¶ 64.

In sum, NOAA's *Vaughn* and declarations make plain that the agency appropriately applied Exemption 5 to redact and withhold information protected by the deliberative process privilege.

III. NOAA Properly Withheld Information Under Exemption 6

Exemption 6 protects the privacy of individuals from unwarranted invasion. Exemption 6 allows the withholding of information about individuals in "personnel and medical files and similar files" when the disclosure of such information would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 requires the agency to balance the individual's right to privacy against the public's interest in disclosure. *See U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). When weighing the public interest involved in disclosure, the court considers: (1) whether disclosure would serve the "core purpose" for which Congress enacted the FOIA. *i.e.*, to show "what the government is up to," and (2) the public interest in general, not particular interests of

the person or group seeking the information. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press,* 489 U.S. 749, 750, 775 (1989).

Here, Exemption 6 has been applied to protect information in which individuals have a recognized privacy interest, specifically, the phone numbers of NOAA scientists. *See, e.g.*, *Vaughn* part 1 at bates 23. Because this information can be identified as applying to a specific individual, the information withheld under Exemption 6 constitutes "similar files" within the meaning of statute; courts have routinely held that phone numbers meet this threshold test. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Dep't of State,* 875 F. Supp. 2d 37, 47 (D.D.C. 2012); *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283 (D.D.C. 2011); *Lowy v. IRS*, No. C 10-767, 2011 WL 1211479, at *16 (N.D. Cal. Mar. 30, 2011).

This threshold test having been met, the next step is to compare the privacy interest at stake with the benefit disclosure would provide toward the public's understanding of how government operates. *Dep't of Def. v. Fed. Labor Relations Auth*., 510 U.S. 487, 495 (1994). Here, there is a substantial privacy interest at stake in preventing the burden of unsolicited phone calls and harassment. *See Moore v. Bush*, 601 F. Supp. 2d 6, 14 (D.D.C. 2009); *United Am. Fin., Inc. v. Potter*, 667 F. Supp. 2d 49, 65-66 (D.D.C. 2009); *cf. Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18 (D.D.C. 2013) (protecting email address). By contrast, an individual's phone number sheds no light on the operations and activities of the agency. NOAA balances the individual's strong privacy interests against the fact that release of this information would fail to shed any light on the conduct of governmental business, and reasonably concluded that, with regard to the information withheld pursuant to Exemption 6, the individual privacy interests outweighed any public interest in disclosure. Graff Decl. ¶ 66. *See FLRA*, 510 U.S. at 497 ("We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA

balancing analysis – the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know what their government is up to."). Accordingly, Exemption 6 was properly applied.

IV. NOAA Has Produced All Reasonably Segregable Information

The FOIA requires that, if a record contains information that is exempt from disclosure, any "reasonably segregable" information must be disclosed after deletion of the exempt information, 5 U.S.C. § 552(b), unless the non-exempt portions are "inextricably intertwined with exempt portions." *Mead Data Ctr. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). This provision does not, however, require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat'l Sec. Archive Fund v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (concluding that no reasonably segregable information existed because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words"). Consistent with this obligation, NOAA has reviewed each of the documents redacted or withheld and has concluded that there is no additional non-exempt information that may reasonably be segregated and released. *See* Graff Decl. ¶ 67. Accordingly, no further non-exempt material is subject to release.

CONCLUSION

NOAA has conducted an adequate search for documents responsive to Plaintiff's request, and properly withheld information exempt from disclosure under Exemptions 5 and 6. Furthermore, all reasonably segregable information has been released to Plaintiff. For these reasons, the Department of Commerce respectfully requests that summary judgment be entered in its favor.

Dated: December 15, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ Kevin M. Snell
KEVIN M. SNELL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 6108
Washington, D.C. 20530
Tel.: (202) 305-0924
Fax: (202) 616-8460
E-mail: Kevin.Snell@usdoj.gov

Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. U.S. DEPARTMENT OF COMMERCE, Defendant.	Civil Docket No. 15-cv-2088 (CRC)

STATEMENT OF MATERIAL FACTS IN SUPPORT OF UNITED STATES DEPARTMENT OF COMMERCE'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Civil Rule 7(h)(1), the following is a statement of material facts as to which the movant, the United States Department of Commerce ("the Department"), contends there is no genuine issue:

1. Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change released a report in stages that concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. Declaration of Mark Graff ("Graff Decl.") ¶ 9.
2. The apparent observed slowing of the global surface temperatures was dubbed the "hiatus." Graff Decl. ¶ 9.
3. The National Centers for Environmental Information ("NCEI") at NOAA produces and maintains datasets for global ocean areas and global land areas. Graff Decl. ¶ 6.
4. NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. Graff Decl. ¶ 5.

5. NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. Graff Decl. ¶ 7.
6. On June 4, 2015, a study authored by NOAA scientists was published in *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* ("Hiatus Paper" or "the Paper"). Graff Decl. ¶ 23.
7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. Graff Decl. ¶ 10.
8. Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged "hiatus" based on the additional two years of global temperature data and the improvements to NOAA's sea surface temperature dataset. Graff Decl. ¶ 11.
9. Karl sought feedback on the draft paper, and a team of scientists at NOAA formed to develop a manuscript. *See* Graff Decl. ¶¶ 11-13.
10. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on implications of other researchers' work, and so on. Graff Decl. ¶ 13.
11. Such collaboration via discussions and drafts is standard practice at NCEI. Graff Decl. ¶ 13.
12. In December 2014, the authors submitted the draft paper to the journal *Science*. Graff Decl. ¶ 14.

13. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. Graff Decl. ¶ 20.

14. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See* Graff Decl. ¶ 21.

15. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. Graff Decl. ¶ 23.

16. Plaintiffs' FOIA request, dated October 30, 2015, sought in relevant part:

> 1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
>
> 2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
>
> 3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.

Graff Decl. ¶ 24; *see also* ECF No. 8-1.

17. Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25.

18. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. Graff Decl. ¶ 25.

19. During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. Graff Decl. ¶ 26.
20. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. Graff Decl. ¶ 26.
21. The parties ultimately "reached an agreement regarding the scope of the request and relevant search parameters." Second Joint Status Report, ECF No. 10 at 2.
22. For Plaintiff's FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: "NMAT," "Night Marine Air Temperatures," "ISTI," "ICOADS," "sea ice," "satellite," "Advanced Very High Resolution Radiometer," "AVHRR," "Advanced Microwave Scanning Radiometer," and "AMSR." Second Joint Status Report, ECF No. 10 at 2; Graff Decl. ¶ 27.
23. NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. Graff Decl. ¶ 33.
24. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. Graff Decl. ¶ 35.
25. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. Graff Decl. ¶¶ 36-38.

26. One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. No additional records responsive to this request from that author are known to have existed following his retirement. *See* Graff Decl. ¶ 36 n.1.

27. There were no common areas at NCEI for NOAA to search. Graff Decl. ¶ 37.

28. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. Graff Decl. ¶ 44.

29. On May 27, 2016, NOAA produced 102 pages of material in its entirety and 90 partially redacted pages. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2

30. NOAA informed Plaintiff at that time that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29

31. Upon further review of the withheld information, NOAA made two supplemental productions. *See* Graff Decl. ¶¶ 30-31.

32. On September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's phone number), Graff Decl. ¶ 30.

33. Contemporaneously with this filing (on December 15), NOAA is releasing an additional 62 records. Graff Decl. ¶ 31.

34. NOAA withheld information pursuant to FOIA Exemption 5 and the deliberative process privilege. *See Vaughn* Index.

35. NOAA withheld information pursuant to FOIA Exemption 6. *See Vaughn* Index.

Dated: December 15, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ Kevin M. Snell
KEVIN M. SNELL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 6108
Washington, D.C. 20530
Tel.: (202) 305-0924
Fax: (202) 616-8460
E-mail: Kevin.Snell@usdoj.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I filed the attached electronically with the Clerk of the United States District Court for the District of Columbia through the CM/ECF system, which caused the following counsel of record to be served by electronic means:

Lauren Burke
Judicial Watch, Inc.
425 Third Street SW, Suite 800
Washington, DC 20024
(202) 646-5172
Lburke@judicialwatch.org

Attorney for Plaintiff

/s/ Kevin M. Snell