UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant U.S. Department of Commerce. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying "Brief in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment," and "Plaintiff's Response to Defendants' Statement of Material Facts Not in Dispute and Statement of Material Facts in Support of Cross-Motion for Partial Summary Judgment."

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Lauren M. Burke

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
	)	Civ. No. 1:15-cv-2088 (CRC)
v.	)	
U.S. DEPARTMENT OF COMMERCE,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch ("Plaintiff" or "Judicial Watch"), by counsel, respectfully submits this memorandum in opposition to Defendant Department of Commerce's ("Defendant" or "Commerce Department") motion for summary judgment and to support Plaintiff's cross-motion for summary judgment.

INTRODUCTION

Defendant has failed to provide all records in its possession, or at least the reasonably segregable, non-exempt portions of such records, and has, therefore, unreasonably withheld material responsive to Plaintiff's FOIA request. Failing to meet its burden of proof, Defendant cannot justify the withholding of responsive documents as validly exempt under FOIA and should be ordered to disclose the improperly withheld records.

Defendant is improperly withholding information and records asserting Exemption 5 under FOIA. However, the information and documents Defendant is withholding do not validly fall within the parameters of Exemption 5 as part of the "deliberative process privilege" as intended by Congress. The "deliberative" nature of the records being withheld is factual,

investigative, scientific research related to a study published in a non-agency, peer-review journal, Science. The information reflects no policy or law of the agency. Therefore, the information and records being withheld are not validly exempt from disclosure under FOIA.[1]

BACKGROUND

In June, 2015, the independent, scientific, peer-review journal *Science* published a scientific study by Thomas Karl and eight other scientists, entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* ("Karl Study") *See* Defendant's Statement of Material Facts ("Def's SOF) ¶6, ECF 16 (attached to Defendant's Motion for Summary Judgment). The Karl Study specifically set out to investigate and formulate a conclusion regarding the "pause" or "slowdown" in global warming as reported the previous year (September 2013-November 2014) by the Intergovernmental Panel on Climate Change ("IPCC"). *See* Pl.'s SOF ¶ 1. The IPCC report concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. *See* Def's SOF ¶ 1. The Karl Study claimed that the 'pause' or 'slowdown' in global warming reported in the IPCC report never existed. *See* Plaintiff's Statement of Material Facts ("Pl.'s SOF") ¶ (attached herein).

Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study. *See* Pl. SOF ¶ 11. NOAA officials did not comply with the subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality. *Id.*

[1] Plaintiff initially challenged the adequacy of Defendant's search for responsive records. Having reviewed the Declaration of Mark Graff submitted with Defendant's motion for summary judgment, Plaintiff is no longer challenging the adequacy of the search. Plaintiff has no objection to Defendant withholding phone numbers of NOAA scientists pursuant to Exemption 6 under FOIA for privacy considerations. Plaintiff's Opposition and Cross-Motion for Summary Judgment addresses only its challenges to Defendant's B5 assertions.

On October 30, 2015, Plaintiff submitted a FOIA request to NOAA, *See*king access to:

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.
4. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to a subpoena issued for the aforementioned information by Congressman Lamar smith on October 13, 2015.[2]

See Complaint ("Compl.") ¶5, ECF No. 1.

Plaintiff filed this FOIA lawsuit on December 2, 2015 after NOAA violated its obligations in 5 U.S.C. § 552, the Freedom of Information Act ("FOIA"). *See* Compl. ¶¶ 7-10. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request. *See* Pl.'s SOF 1. Plaintiff agreed to narrow its request and limit the agency's search parameters to the topics specifically identified in its request. *See* Def.'s SOF ¶ 22. On May 27, 2016, Plaintiff received 102 pages of records produced in full and 90 pages of records produced in part. *See* Fourth Joint Status Report, ECF No. 12 ¶ 2. NOAA informed Plaintiff it was withholding 8,013 pages of records in full as duplicative or exempt under FOIA. *See* Fourth Joint Status Report, ECF No. 12. Plaintiff requested NOAA provide a draft *Vaughn* index to review the specific

[2] Plaintiff is not challenging Defendant's production of records related to this portion of the FOIA request.

exemptions and withholdings being asserted. *See* Fifth & Sixth Joint Status Reports, ECF Nos. 13 & 14. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search. *See* Pl.'s'SOF ¶ 2 On September 16, 2016, Plaintiff received an additional 44 pages of responsive records previously withheld by Defendant. *See* Def's SOF ¶32. On December 15, 2016, Plaintiff received 62 additional records previously withheld. *See* Def's SOF ¶ 33.

On February 4, 2017, DailyMail.com, a British news blog website, reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study "was based on misleading, 'unverified' data." *See* Pl.'s SOF 4. The article reports the Karl Study was never subject to NOAA's "rigorous internal evaluation process." *See* Pl.'s SOF 5. Dr. Bates accused Tom Karl of "insisting on decisions and scientific choices that maximized warming and minimized documentation…in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy." Id. The article reports it learnt [*sic*] "that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming." *Id.* "[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings 'unstable."

LEGAL STANDARD

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to "withhold or disclose information under FOIA are reviewed *de novo*." *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Also in FOIA litigation, but unlike in most other federal litigation, the agency defending the action, not the plaintiff, must prove. 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"); *accord Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981). "[T]he agency must demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

FOIA requires complete disclosure of requested agency information unless the information falls into one of FOIA's nine exemptions. 5 U.S.C. § 552(b); *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001); *See also Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). "These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* Because of FOIA's goal of promoting agency disclosure, the exemptions are to be construed narrowly. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-151 (1989). "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Department of State v. Ray*, 502 U.S. 164, 173 (1991).

ARGUMENT

1. Defendant Improperly Applies the Deliberative Process Privilege

Defendant is withholding information and records responsive to Plaintiff's FOIA request asserting the deliberative process privilege under Section 5 of FOIA. The withheld documents reflect communications among scientists related to factual data and conclusions of the scientific investigation reported in the Karl Study. *See Vaughn* index, Exhibit 1 to Declaration of Mark Graff ("Vaughn index"), ECF No. 16-2. The withheld records do not contain suggestions or recommendations on legal or policy matters. *See Vaugh v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Rather, any recommendations or opinions in the documents are of a scientific, factual, and investigatory nature. The information and records are related to a scientific research study published in a non-agency, peer review journal, Science. The communications and analysis do not reflect the "agency policy" envisioned by Congress as requiring protection from disclosure. *See Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992) (a "salient characteristic" of information eligible for protection under deliberative process privilege is its "association with a significant *policy* decision") (emphasis in original).

a. Scientific deliberations and decisions are not policy-related

Deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co*., 421 U.S. at 150 (internal quotation marks omitted). Congress did not intend to shield the public from the scientific discovery and research process. To withhold information under the deliberative process privilege, an agency must demonstrate that the information 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) (*quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). Further, the information must be "pre-decisional and it must be deliberative[,]" and the agency should "not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual." *Id*. (citations omitted).

Scientific deliberations are not equivalent to policy deliberations. Scientific studies, such as this one, are objective, factual presentations of research and investigatory reports. The material is not part of the policy-making process and does not fall into the category of predecisional deliberative memoranda under Exemption 5. The deliberative process privilege is a limited privilege. In applying the deliberative process privilege, courts assess the substance of the records requested to determine if the information is purely factual or policy-related; (2) whether factual material is "reasonably segregable", and (3) whether the material is both predecisional and deliberative. *See Nat'l Wildlife Fed'n,* 861 F.2d at 1118-20; *Senate of P.R. v. U.S. Dep't of Justice,* 823 F.2d 574 (D.C. Cir. 1987).

To be part of the deliberative process, the document must be part of the decision-making process, or, as the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has described, "[must] reflect[] the give-and-take of the consultative process." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Id.* at 868.

To determine whether the Defendant's claim that the documents are validly being withheld, it is crucial to understand the function the documents serve within the agency. *Coastal States Gas Corp. v. U.S. Dep't of Energy,* 617 F.2d 854, 858 (D.C. Cir. 1980); *NLRB v. Sears,*

Roebuck & Co., 421 U.S. 132 (1975). Defendant asserts the drafts and information withheld contain opinions and recommendations of the authors and responses to peer review which qualify the material as "deliberations". Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment ("Def.'s SJM"), ECF No. 16 at 10. However, such opinions, recommendations and peer responses are part of a *scientific deliberation* process and are not shielded from public disclosure under FOIA. Here, Defendant misconstrues the internal functioning of the scientific deliberative process. The withheld communications are not the documents Congress intended to be protected under the deliberative process privilege. *See Coastal States*, 617 F.2d at 867. They are not "suggestions or recommendations as to what agency policy should be." *Id*.

Rather, the "deliberative" information and documents Defendant is attempting to withhold are more "resource opinion" relating to the applicability of existing – and discovered - science to a certain set of existing – and developing - data and methodology. Shielding such deliberations from the public is unnecessary and no protection from disclosure exists under FOIA.

Defendant provides the declaration of Dr. Richard W. Spinard who points to the "exchange and debate among peers as the mechanism that allows us to ensure that the scientific products we develop and release to the public are robustly developed and accurately tested. Such rigorous vetting is critical to developing and releasing scientific information of the highest possible quality to inform the public and decision-makers." Spinrad Decl. ¶ 15. Communications among the authors and their peers involve discussions about the tests, results, data, conclusions, etc., and analysis, theory, and presentation. Def.'s SJM at 10. Scientific answers and discoveries are realized through this open forum discussion and scientific progress

is advanced. However, Defendant argues that revealing the collaboration among scientists and disclosing these discussions will hinder the "robustness of the scientific progress." Spinrad Decl. ¶ 24. However, the purpose of Exemption 5's deliberative process protection specifically relates to agency policy-making. What purpose does Exemption 5 shield scientific deliberations that do not amount to agency policy? Scientific deliberations contemplate real, conclusive answers derived from concrete, measurable findings. Policy deliberations consider theoretical opinions and ideas molded into creating a rule or law. Congress' intention to shield the theoretical "molding process" of policy deliberations cannot be concluded to similarly apply to the investigative research process of scientific deliberations.

Here, *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) is instructive. There is no support for application of exemption 5 to scientific deliberations (as opposed to policy deliberations) in the statutory text, which the Supreme Court has "insisted be read strictly in order to serve FOIA's mandate of broad disclosure", which was expected and intended to affect Government operations (refusing to read an "Indian trust" exemption into the statute noting "as a general rule we are hesitant to construe statutes in light of legislative inaction" *citing Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983)).

Dr. Richard W. Spinrad asserts "these requests for input often lead to candid discussions and debates that can be thought of as a type of informal peer review that fulfills a valuable role in developing scientific thought and promoting scientific understanding." Decl. ¶19. However, Candid discussions and informal peer review do not lead to the development of or advising on agency policy. Rather, these discussions among peers involve analysis and application of factual material and investigative techniques that "generate new ideas" in science. There is no advising

on agency policy. Rather, such deliberations are part of the scientific process in any research endeavor – the end result of which is not creation of policy, but factual, scientific discovery.

The D.C. Circuit has held that information is part of the deliberative process if disclosing such materials would expose the agency's decision-making process in such a way to discourage candid discussion within agency and undermine the agency's ability to perform its functions. *Dudman*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Here, Defendant's Motion for Summary Judgment Memorandum and supporting declarations repeatedly state that disclosure of the withheld information and documents would inhibit candid internal discussions" and "chill the open and frank exchange of comments and opinions." Def.'s SJM at 10; Spinrad Decl. ¶¶ 22, 23, 27; Graff Decl. ¶ 64. However, the communications and deliberations related to the Karl Study at issue here do not reflect agency policy, there is no force of law. The purpose of these communications and deliberations was to adequately and accurately publish scientific findings in a peer-review journal, not to create agency policy. FOIA – and Congress in creating specific statutory exemptions – does not apply to the scientific method statutorily. Nor has it been held by courts it was the intention of Congress for exemption 5 to be so expansive as to encompass all intellectual or developmental discussions among peers. Exemption 5 relates to policy deliberations specifically. Even courts that have edged on judicial expansion of the meaning of deliberative process have cautioned and not done what Defendants *See*k here.

In *Petroleum Information Corp. v. U.S. DOI*, 976 F.2d 1429, 1435 (D.C. Cir. 1992), the D.C. Cir. held that factual information should be shielded by the privilege, or not, according to "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents." *See Mink*, 410 U.S. at 87 (privilege designed to promote "frank discussion of legal and policy matters") (quoting S.REP. No. 813,

89th Cong., 1st Sess. 9 (1965)); id. at 89 ("Exemption 5 requires different treatment for material reflecting deliberative or policy-making processes" and "purely factual, investigative matters"); *Coastal States*, 617 F.2d at 869 (resting conclusion that documents were not within Exemption 5 in part on ground that the documents did not "discuss the wisdom or merits of a particular agency policy, or recommend new agency policy"). "Conversely, when material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable." Petroleum Information Corp. v. DOI, 976 F. 2d at 1435; *See Playboy Enterprises v. Department of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers' mission was simply "to investigate the facts," and because report was not "intertwined with the policy-making process.") Here, Defendant cannot point to any agency policy sought to be protected. Rather, Defendant asks the court to conclude a sufficient justification for applying Exemption 5 to scientific deliberations analogous to policy-making deliberations of an agency. The deliberations are comments among the authors and scientific community peers – there is no agency policy decision . Defendant fails to point to any agency policy at issue that warrants Exemption 5 privilege protection. The results of research are factual, not deliberative, information and are not the discussions Congress intended to protect under the deliberative process privilege. *See Hennessey*, 1997 WL 537998 ("report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5" *citing Petroleum Info,* 976 F.2d at 1437); *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4th Cir. 1994) ("privilege does not protect a document which is merely peripheral to actual policy formulation"); *Chi Tribune Co., v. HHS*, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) (scientific judgments not protectable when they do not address agency policymaking.) Disclosure of the

scientific discussions within the withheld records will not "impinge[] on the policymaking decisional processes intended to be protected by this exemption." *EPA v. Mink,* 410 U.S. 73, 92. The disclosure sought by Plaintiff will not reveal the deliberative process that Exemption 5 protects.

Disclosure of records under FOIA is required unless it squarely falls within one of the enumerated exemptions as written and specifically intended by Congress. Defendant argues this transparency requirement Congress placed on federal agencies will halt scientific progress by hampering scientists from discussing factual, scientific processes and findings. *See* Def's SJM at 10, 20; Spinrad Decl. ¶¶ 21, 23, 24.

It cannot be possible that a scientist performing his duties would be less "frank" or "honest" if he or she knew the document might be made public. Here, withholding the communications serves no legitimate policy interest of the government. *See Coastal States,* 617 F.2d 854, 869.

Dr. Richard W. Spinard asserts "This would narrow the range of perspectives taken into account in generating our scientific products and therefore reduce the overall robustness of the scientific process." Decl. ¶ 24. However, *"*robustness of the scientific process" is not statutorily protected under FOIA. Science is not Policy. While deliberations about judgments, opinions, and theories are part of the scientific research process, such exchanges among non-policy decision-makers are not protected from disclosure under FOIA. Such communications are necessary and play a major role in development of science and furthering research, but the substantive nature of scientific research is objective reporting of facts and findings, not subjective policy decisions.

2. The Evidence Revealed by Dr. John Bates Shows Misconduct Sufficient to Defeat Privilege

In this Circuit, the government misconduct exception to the deliberative process privilege applies in two circumstances. First, the "deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred." *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (internal quotations omitted). And second, "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.* at 738 (internal quotations omitted). There is more than enough "reason to believe" government misconduct may have occurred here. Former top NOAA scientist recently revealed to DailyMail.com that the Karl Study is based on "unverified" data and was never subject to rigorous internal evaluation process. *See* Pl.'s SOF. Dr. Bates reports the Karl Study was never subject to NOAA's "rigorous internal evaluation process." *See* Pl.'s SOF. Dr. Bates accused Tom Karl of "insisting on decisions and scientific choices that maximized warming and minimized documentation…in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy." *Id.* The article reports "that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming." *Id.* "[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings 'unstable." This is not mere speculation. Rather, Dr. Bates purports to have "irrefutable evidence". *Id.*

This standard has been further elaborated by this Court. For instance, documents that constitute "circumstantial evidence" of wrongdoing should be released under the misconduct exception. *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

This Court has held that the government misconduct exception applies to documents withheld under FOIA. *Nat'l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) ("With respect to Defendant's legal argument, there is no authority supporting its contention that the government-misconduct exception cannot apply in FOIA cases.").

In addition, a finding that the government misconduct exception applies does not require the Court to make a "determination as to the ultimate question of the lawfulness of Defendant's actions," but only requires a finding of sufficient "misconduct." *Nat'l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 69 (D.D.C. 2012)

Even if the Court determined the communications are deliberative, NOAA must produce the records because the government misconduct exception applies here.

Government misconduct can be "nefarious" or "extreme" or a "serious breach of the responsibilities of representative government," in which to apply the exception. ICM Registry, LLC v. U.S. Dep't of Commerce, 538 F. Supp. 2d 130, 133 (D.D.C. 2008). Misleading the public about scientific data…is nefarious and extreme wrongdoing. Coupled with NOAA's refusal to comply with Representative Smith's congressional subpoena, there is ample evidence to *See* that government misconduct is an issue here.

The misconduct here is arguably more nefarious and extreme than the alleged misuse of the IRS at issue in *Tax Reform Research Grp. V. Internal Revenue Serv*, 419 F.Supp. 415, 426 (D.D.C. 1976), in which the exception was found to apply

3. Defendant Failed to Produce Reasonably Segregable Information

The segregability analysis required by FOIA cannot be understated. In *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), the Court held that "even where specific exemptions apply, the agency is required to conduct a segregability analysis and determine if any non-exempt portions of the record can be released." This requirement is so essential that, "before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld … [and] [i]f the district court approves withholding without such a finding, remand is required even if the requester did not raise the issue of segregability before the court." *Sussman,* 494 F.3d at 1116 (internal citations omitted); *See* also *Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (non-exempt material may be protected only if it is "inextricably intertwined" with exempt information).

Defendants' declaration offers only the barest, conclusory statement that the withheld information is not segregable. *See* Def's SJM at 22. This is inadequate to meet Defendant's burden in FOIA litigation. Conclusory language in agency declarations that provides no specific basis for segregability findings by district courts may be found inadequate. *See Dorsett v. United States Dep't of the Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part "[b]ecause of [agency's] inadequate and conclusory segregability explanation," and ordering renewed motion with affidavit solely addressing segregability); *Animal Legal Def. Fund v. Dept. of Air Force*, 44 F. Supp. 2d 295, 301 (D.C. Cir. 1999) (conclusory statement regarding segregability are "patently insufficient"); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (finding that "boilerplate" statement that "no segregation of nonexempt, meaningful information can be made for disclosure" is "entirely insufficient"); *See also Patterson v. IRS*, 56 F.3d 832, 839 (7th Cir. 1995) ("[B]ecause

the [agency declaration] lumps all of the withheld information together in justifying nondisclosure, the district court could not have independently evaluated whether exempt information alone was being withheld or deleted in each instance.")

4. *In Camera* Review is Warranted

Courts have departed from routine reliance on agency affidavits where exemptions are not sufficiently proven, or where other good cause may exist to order release information under FOIA. The Court has "the option to conduct *in camera* review." *Juarez v. DOJ*, 518 F.3d 54, 59-60 (D.C. Cir. 2008); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) ("Where the agency fails to meet that burden, a not uncommon event, the court may employ a host of procedures that will provide it with sufficient information to make its *de novo* determination, including *in camera* inspection."). Here, the court should undergo an *in camera* review to determine the appropriateness of Defendants' asserted claims of deliberative process privilege.

Because the requested records are "few in number and of short length," the Court may reasonably review the responsive records *in camera*. *Allen*, 636 F.2d at 1298. *In camera* review is "particularly appropriate" in cases like this one, where the "agency affidavits are insufficiently detailed to permit meaningful review of exemption claims." *Quinon & Strafer v. Federal Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). In addition, as the D.C. Circuit Court has explained:

> In cases that involve a strong public interest in disclosure there is also a greater call for in camera inspection… When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency's withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for in camera inspection is greater. *Allen*, 636 F.2d at 1299.

The public interest in disclosure, and the distinct possibility of the agency being "protective" of information given the circumstances, dictates such a review here.

Conclusion

For all of the foregoing reasons and the reasons, Plaintiff's cross-motion for summary judgment should be granted and the material should be produced to Plaintiff.

Dated: February 21, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND PLAINTIFF'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7(h), respectfully submits this response to Defendant's Statement of Material Facts Not in Dispute (ECF 25-5) and Plaintiff's Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

I. Plaintiff's Response to Defendants' Statement of Material Facts Not in Dispute.

General Objection

As an initial matter, Plaintiff objects that Defendant's statement does not comply with Local Civil Rule 7(h)(1). The failure to comply with the requirement to file a proper statement of material facts in "making or opposing a motion for summary judgment may be fatal to the delinquent party's position." *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980); *see also Adagio Investment Holding Ltd. v. Federal Deposit Insurance Corp.*, 338 F. Supp.2d 71, 75 (D.D.C. 2004); *Smith Property Holdings, 4411 Connecticut L.L.C. v. U.S.*, 311 F. Supp. 2d 69, 78 (D.D.C. 2004); *Robertson v. American Airlines*, 239 F. Supp.2d 5, 8-9 (D.D.C.

2002). Defendants' statement of material facts contains an improper mix of fact and legal conclusions and therefore fails to "assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record . . ." *Robertson*, 239 F. Supp. 2d at 9 (citations omitted).

Specific Objections

1. Not disputed.

2. Not disputed. as plaintiff lacks sufficient knowledge to confirm or deny whether Defendant directed its search efforts as described. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

3. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

4. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

5. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

6. Not disputed.

7. Disputed

8. Disputed

9. Disputed

10. Disputed

11. Disputed

12. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

13. Disputed

14. Disputed.

15. Disputed

16. Disputed

17. Disputed

18. Not disputed

19. Not disputed

20. Not disputed

21. Not disputed

22. Not disputed

23. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

24. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

25. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

26. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

27. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

28. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

29. Not disputed

30. Not disputed

31. Not disputed as to supplemental productions. Otherwise, disputed.

32. Not disputed

33. Not disputed

34. Not disputed as to NOAA's asserted exemption

35. Not disputed as to NOAA's asserted exemption

II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.

1. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request.

2. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search.

3. On February 4, 2017, David Rose from Britain's Mail on Sunday column on the DailyMail.com blog website published an article entitled: Exposed: How World Leaders Were Duped Into Investing Billions Over Manipulated Global Warming Data. The article can be found on the DailyMail.com website at: http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html

4. The article reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study "was based on misleading, 'unverified'

data."

5. The article reports the Karl Study was never subject to NOAA's "rigorous internal evaluation process."

6. Dr. Bates accused Tom Karl of "insisting on decisions and scientific choices that maximized warming and minimized documentation…in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy."

7. The article reports it learnt [sic] "that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming."

8. Additionally, "The land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings 'unstable."

9. The article reports that the Karl Study specifically set out to investigate and formulate a conclusion regarding the "pause" or "slowdown" in global warming as reported by the Intergovernmental Panel on Climate Change ("IPCC").

10. The article reports that the Karl Study claimed that the 'pause' or 'slowdown' in global warming reported in the IPCC report never existed.

11. Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study.

12. NOAA officials did not comply with the congressional subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality.

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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