**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**DEFENDANT'S COMBINED OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND REPLY IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTES**



**OTHER AUTHORITIES**

## INTRODUCTION

Plaintiff Judicial Watch's primary argument in its opposition to the U.S. Department of Commerce's Motion for Summary Judgment, as well as the basis for its Cross-Motion, is that the National Oceanic and Atmospheric Administration ("NOAA") could not withhold *any* of the withheld and redacted material here because the deliberative process privilege does not apply to deliberations resulting in the publication of a scientific study, *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* ("Hiatus Paper" or "the Paper"). Plaintiff's extraordinarily broad legal theory is foreclosed by binding precedent and misapplies the deliberative process privilege. Thus, it must be rejected.

Plaintiff's remaining arguments fare no better. It argues that the Court should disallow the deliberative process privilege because the withholdings shield alleged government misconduct. But Plaintiff's attempt in a Freedom of Information Act ("FOIA") case to invoke this rare exception to the deliberative process privilege is entirely without merit. Plaintiff has not tied any alleged misconduct to the withheld and redacted material here and has failed to demonstrate any type of government misconduct, let alone the type of extreme wrongdoing necessary to invoke this exception. Plaintiff's argument that NOAA has not produced all reasonably segregable information fails because NOAA has undertaken conscientious efforts to release all non-exempt information, has shown with reasonable specificity why any withheld or redacted records cannot be further segregated, and nothing points to the contrary. Finally, Plaintiff's request for *in camera review* reflects nothing more than an unwarranted fishing expedition that would waste the Court's valuable resources.

The Court should enter summary judgment on the U.S. Department of Commerce's behalf.

## ARGUMENT

**THE DEPARTMENT OF COMMERCE IS ENTITLED TO SUMMARY JUDGMENT**

In its opposition brief, Plaintiff does not dispute the adequacy of NOAA's search or its withholdings pursuant to Exemption 6 to shield individuals' privacy interests. *See* Pl.'s Mem. Law Supp. Pl.'s Opp'n to Def.'s Mot. Summ. J. & Supp. Cross-Mot. Summ. J. ("Pl.'s Opp'n") at 2 n.1, ECF Nos. 21 & 22.[1] With respect to NOAA's assertion of the deliberative process privilege, Plaintiff does not challenge that the withheld material is intra- and inter-agency materials, nor does it challenge NOAA's determination that any specific withholdings are both predecisional and deliberative. Indeed, Plaintiff does not address NOAA's *Vaughn* index, and makes no specific objection to its supporting affidavits. Instead, Plaintiff argues that the deliberative process privilege cannot apply to deliberations among scientists and thus is inapplicable to any withholding here. And even if it did apply, Plaintiff argues, alleged government misconduct vitiates its application. Both arguments fail, as does Plaintiff's assertions that NOAA did not produce reasonably segregable information and that *in camera* review is warranted. This Court should deny Plaintiff's cross-motion and grant summary judgment to the Department of Commerce.

### I. NOAA Appropriately Applied the Deliberative Process Privilege

Plaintiff makes a blanket legal argument that *none* of the material identified as protected by the deliberative process was properly withheld because "science is not policy" and that "the

[1] Pursuant to this Court's January 24, 2017 Minute Order, Plaintiff's combined cross-motion for summary judgment and opposition to the U.S. Department of Commerce's motion was due February 20, 2017. But Plaintiff failed to make its filing until February 22, 2017. Although Plaintiff has not yet asked, the U.S. Department of Commerce would not oppose a motion for extension of time *nunc pro trunc* to have Plaintiff's combined response and cross-motion be considered timely filed.

purpose of these communications and deliberations was to adequately and accurately publish scientific findings in a peer-review journal, not to create agency policy." Pl.'s Opp'n at 10, 12. But Plaintiff's argument is foreclosed by binding precedent that permits the withholding of this type of material in such a situation.

The D.C. Circuit has already held that the sort of deliberations withheld here qualify for the deliberative process privilege. In *Formaldehyde v. Department of Health & Human Services*—which NOAA cited in its opening brief but Plaintiff entirely ignores—the court shielded peer review comments evaluating a scientific report about the effects of formaldehyde that were used by the agency in development of a document for potential publication in a peer-review journal. Such comments were held to be both "predecisional because [they] 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." 889 F.2d 1118, 1120,1123-25 (D.C. Cir. 1989). Thus, "[t]he D.C. Circuit has found that where a plaintiff requests records of correspondence surrounding or leading up to an agency publication," as Plaintiff did here, "the relevant agency decision for purposes of applying the deliberative process privilege is the decision to publish." *See Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 57 (D.D.C. 2012), *aff'd*, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014). As such, courts repeatedly protect deliberative material used to assist an agency in drafting a final publication or report. In *Hooker*, for example, where the plaintiff sought all correspondence among agency researchers regarding the publication of a study regarding vaccines and occurrences of autism in a nongovernmental journal, the court protected a draft manuscript and reviewer comments, as well as communications discussing a draft, the underlying analysis, a pending study, and potential publication. 887 F. Supp. 2d at 48, 57-59;

*see also Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782-83 (D.D.C. 1993) (shielding draft manuscript of a statistical analysis of impurities of an amino acid that was created for the candid review and discussion among colleagues, as well software created in conjunction with study that was "designed to manipulate a set of data in a certain way"). That the final report is "factual" is immaterial; the give-and-take of the agency personnel in crafting such reports has long been protected. *See, e.g.*, *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 465 (D.C. Cir. 2014) (protecting draft manuscript of history of Bay of Pigs operation); *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568-59 (D.C. Cir. 1987) (protecting draft manuscript of history of Air Force in South Vietnam between 1961 and 1964); *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (withholding draft manuscript concerning history of herbicide use in Vietnam conflict).

NOAA's withholdings here fall squarely in line with this precedent and are equally appropriate. NOAA's mission is, in part, "[t]o understand and predict changes in climate," and "[t]o share that knowledge and information with others" "for use by public, private, and academic sectors." National Oceanic and Atmospheric Administration, *Our Mission and Vision*, http://www.noaa.gov/our-mission-and-vision. To further this mission, NOAA's National Centers for Environmental Information ("NCEI") acts as the "Nation's Scorekeeper" regarding climate trends, Graff Decl. ¶ 4, ECF No. 16-1, and NCEI scientists regularly interpret and analyze datasets for public use, often via publication in scientific journals. *See* Graff Decl. ¶ 7; *see also* National Centers for Environmental Information, *Current Publications*, https://www.ncdc.noaa.gov/climate-information/science-papers-and-publications/current-publications (listing recent NCEI papers and publications in third-party journals). The Hiatus Paper is one example of agency scientists advancing NOAA's mission by understanding the

most up-to-date climate science and publishing that information for the public's benefit. *See* Graff Decl. ¶ 8; *see also* National Oceanic and Atmospheric Administration, Science *Publishes New NOAA Analysis: Data Show No Recent Slowdown in Global Warming*, http://www.noaanews.noaa.gov/stories2015/noaa-analysis-journal-science-no-slowdown-in-global-warming-in-recent-years.html (press release for the Hiatus Paper informing the public that "*Science* publishe[d] [a] new NOAA analysis"). The information withheld here clearly meets the requirements for the deliberative process privilege: it is intra- or inter-agency, predates the publishing of the Paper, and reflects agency officials' give-and-take as to how best to further NOAA's mission of understanding climatic events and conveying that knowledge to the public. *See* Mem. P. & A. Supp. Def's Mot. Summ. J. at 8-20, ECF No. 16. And shielding this information will plainly serve the three policy bases for the privilege—protecting "creative debate and candid consideration of alternatives within an agency," "the public from the confusion that would result from premature exposure," and "the integrity of the decision-making process." *Russell*, 682 F.2d at 1048; *see* Spinrad Decl. ¶¶ 20-26, ECF No. 16-4 (explaining necessity of confidentiality and risk of chilling candid discussions, which is "particularly high" in area of climate research and analysis, and the "risk that the public may become confused by preliminary or incomplete information" is "somewhat elevated" in climate science context); Graff Decl. ¶¶ 50-58, 64-65 (describing material and explaining that release risks "inhibit[ing] candid internal discussions" and "misconstruing or taking out of context" information). Courts have routinely recognized this. *See, e.g.*, *Formaldehyde*, 889 F.2d at 1120 ("Releasing [requested] materials . . . could seriously hamper the efforts of CDC to fulfill its clear Congressional mandate to conduct and publish scientific research for the public benefit."); *Hooker*, 887 F. Supp. 2d at 59 (finding release of internal discussions and recommendations of

employees and consultants "about which research findings and data to include would undermine the purposes to be served by the exemption."); *Cleary*, 844 F. Supp. at 782 ("From a policy perspective . . . the disclosure of such draft documents would undercut the openness of decision-making embodied by Exemption 5.").

Yet, according to Plaintiff, the agency's determination as to whether and in what form to publish the Hiatus Paper was somehow not related to "policy" and thus the deliberative process privilege cannot apply. Of course, this argument is foreclosed by the precedent highlighted above that demonstrates that NOAA's development of a scientific product to carry out its mission entails precisely the type of development of an agency position or "policy" encompassed by the privilege. In any event, Plaintiff's cramped reading of "policy"—which it declines to define but appears to equate with an agency creating rules or law, *see* Pl.'s Opp'n at 9 ("Policy deliberations consider theoretical opinions and ideas molded into creating a rule or law.")—hinges on a misunderstanding of the deliberative process privilege.

The deliberative process privilege applies to "decisionmaking of executive officials generally," and protects documents containing deliberations that are part of the process by which government decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir. 1997). "Significantly . . . the privilege serves to protect the processes by which 'governmental decisions' as well as 'policies' are formulated." *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 29 (D.D.C. 2008). As the purpose of the privilege is to "prevent injury to the quality of agency decisions," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975), "[t]he fact that the decision-making activity d[oes] not relate to a particular . . . policy decision does not remove the documents from the protection of [the deliberative process privilege]," *Shurtleff v. U.S. EPA*, 991 F. Supp. 2d 1, 14 (D.D.C. 2013). Courts therefore routinely apply the privilege to decisions that

do not create "rules or law," *e.g.*, *Judicial Watch, Inc. v. Consumer Fin. Prot. Bureau ("CFPB")*, 60 F. Supp. 3d 1, 9 (D.D.C. 2014) ("Internal communications regarding how to respond to media and Congressional inquiries have repeatedly been held to be protected under the deliberative process privilege."), and reject arguments like Plaintiff's that documents are somehow not sufficiently tied to agency "policy," *e.g.*, *Formaldehyde*, 889 F.2d at 1123 (rejecting argument "that HHS was unable to state any policy decision that is the subject of deliberation"); *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998) ("[T]his court has applied the deliberative process privilege to protect materials that concern individualized decisionmaking, rather than the development of generally applicable policy."); *Russell*, 682 F.2d at 1049 n.2 (rejecting argument that "the deliberative process privilege is intended to protect decisionmaking concerning legal or policy matters in the context of an agency's exercise of rulemaking, adjudication, awarding of contracts or grants, or decisions involving health, safety or foreign affairs" because "there is nothing in the case law or legislative history that indicates the privilege is so limited, and appellants fail to give a reason why it should be so confined"); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 575 F.2d 932, 935 (D.C. Cir. 1978) ("While [plaintiff] correctly notes that the end product of these Air Force deliberations . . . is not a 'broad policy' decision, that deliberation is nonetheless a type of decisional process that [the deliberative process privilege] seeks to protect from undue public exposure."); *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117–18 (9th Cir. 1988) (rejecting plaintiff's argument that a document must contain recommendations on law or policy to qualify for privilege).

Plaintiff fails to cite a single decision holding that documents tied to only certain agency "rules or laws"—or other unspecified "policies"—qualify for the deliberative process privilege. The cases it cites for this purported requirement instead simply found the privilege inapplicable

for picayune factual material that do reflect the give-and-take of the deliberative process among agency personnel. *See, e.g., Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1433, 1437 (D.C. Cir. 1992) ("essentially technical and facilitative" task of "organiz[ing] public records in a more manageable form");[2] *Playboy Enters., Inc. v. Dep't of Justice*, 677 F.2d 931, 935-36 (D.C. Cir. 1982) (factual material that did not reflect agency's deliberative process and was not intertwined with the policymaking process of the decisionmaker); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) ("opinion about the applicability of existing policy to a certain state of facts, like examples in a manual"); *Hennessey v. U.S. Agency for Int'l Dev.*, No. 97-1133, 1997 WL 537998, at *4-*5 (4th Cir. Sept. 2, 1997) (per curiam) (a final report that was drafted with intent to be shared with plaintiff and was "almost entirely factual in nature" and used for "a garden variety construction scheduling dispute"—a "minor issue [that is] essentially technical and facilitative"); *Ethyl Corp. v. U.S. EPA*, 25 F.3d 1241, 1249 (4th Cir. 1994) ("summaries or graphical representations of purely statistical data" without

[2] Plaintiff's citation to *Petroleum Information Corp.* only undermines its cause. That case recognized that "[t]h[e] privilege shelters 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which *governmental decisions and* policies are formulated.'" (emphasis added) (quoting *NLRB*, 421 U.S. at 150). In explaining that factual information must generally be disclosed, it described the privilege as protecting the process by which "policy" is formulated, and went on explain that "[i]nquiring whether the requested materials can reasonably be said to embody an agency's policy-informed or -informing judgmental process . . . helps us answer the 'key question' . . .: whether disclosure would tend to diminish candor within the agency," as well as appropriately containing the exemption within its "proper scope" of protecting "agency judgments" and not, "for example, materials relating to standard or routine computations or measurements over which the agency has no significant discretion." *See* 976 F.2d at 1435-36 (citation omitted). The unrebutted record here establishes that disclosure would inhibit candor within the agency, and the development, publication, and promotion of the Hiatus Paper cannot be considered on par with "routine computations" over which the agency lacks discretion. *See id.* at 1436 & n.8 ("To be protected under Exemption 5, the kind and scope of discretion involved must be of such significance that disclosure genuinely could be thought likely to diminish the candor of agency deliberations in the future.").

explanation as to deliberative character). NOAA already explained that "[t]o the extent the redacted or withheld information contains some factual material, the authors' selection and presentation of that factual material reflects the agency's deliberative process." Graff Decl. ¶ 65; *see also, e.g.*, Ex. 1 to Graff Decl. ("*Vaughn* index") at part 1 Bates 37, ECF No. 16-2 ("NOAA scientist discussing *proposed* data analysis and *potential* research methods") (emphases added). Thus, Plaintiff's cited cases lack applicability here. *See, e.g., Hooker*, 887 F. Supp. 2d at 58 ("While the document here included some discussion of factual matters, such as test results and which tests should be run again, they involve deliberation and discussion about the data, not mere summaries."); *Goodrich Corp. v. U.S. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (shielding draft groundwater flow model because "evolving iterations" may not represent agency's "ultimate opinion" and "even if the data plugged into the model is itself purely factual, the selection and calibration of data is part of the deliberative process to which Exemption 5 applies").

Because Plaintiff's argument is foreclosed by precedent, as well as the scope of the of the deliberative process privilege itself, the Court should deny Plaintiff's cross-motion and hold that the withheld material is protected.[3]

[3] NOAA previously explained how other items, such as drafts of the Paper and its supporting materials, as well as communications reflecting the development of a communications plan and press release in preparation for publication of the Paper fell within the deliberative process privilege, as did as communications among scientists regarding potential scientific inquiries. *See* Mem. P. & A. Supp. Def.'s Mot. Summ. J. at 11-14 & n.4, n.5. Plaintiff does not separately address this material. For the reasons stated in the U.S. Department of Commerce's opening motion and supporting memorandum, as well as for the reasons stated herein, this information is also exempt from production.

**II. No Misconduct Defeats the Privilege**

Plaintiff next asserts that the privilege should nevertheless be defeated because of alleged government misconduct.[4] Plaintiff's argument fails on at least two levels. First, as the *Vaughn* index and supporting declarations in this case amply demonstrate, there is no evidence that the withheld material here relates to or reflects any alleged misconduct, and the information withheld involves core predecisional and deliberative discussions. Indeed, Plaintiff makes *no* attempt to link a *single* withheld or redacted document to the misconduct it alleges. And second, the government-misconduct exception, to the extent it even applies to FOIA, is exceptionally rare and reserved for conduct bearing no resemblance to Plaintiff's allegations.

"Under the government-misconduct exception to the deliberative-process privilege, '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.'" *Nat'l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (quoting *In re Sealed Case*, 121 F.3d at 738). Although the D.C. Circuit has never recognized a misconduct exception to Exemption 5, certain courts in this district have found that FOIA plaintiffs may, in rare instances, invoke the government-misconduct exception to overcome Exemption 5. *See, e.g., id.* at 66-68 (summarizing district court cases); *ICM Registry, LLC v.*

[4] Plaintiff is apparently shopping this argument around the courthouse, *see Judicial Watch v. U.S. Dep't of State*, Civil Action No. 1:15-cv-692, ECF Nos. 43 & 46 (D.D.C.) (APM); *Judicial Watch v. Dep't of State*, Civil Action No. 1:14-cv-1511, ECF Nos. 34 & 40 (D.D.C.) (ABJ), and thus far without success, *see Judicial Watch, Inc. v. United States Dep't of State*, No. CV 15-687 (JEB), -- F. Supp. 3d -- 2017 WL 680371, at *3-4 (D.D.C. Feb. 21, 2017) (rejecting government-misconduct argument).

*U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008); *see also Hall & Associates v. U.S. EPA*, 14 F. Supp. 3d 1, 9 (D.D.C. 2014) (noting that "other courts have not been entirely consistent in applying the government-misconduct exception to FOIA cases" and declining to do so because "Plaintiff's argument would not succeed even if the exception did apply"). But in doing so, these district courts have emphasized the narrowness of that exception, both in the FOIA and discovery contexts, limiting the exception to "extreme government wrongdoing." *Nat'l Whistleblower Ctr.*, 903 F. Supp. 2d at 68 (quoting *ICM Registry,* 538 F. Supp. 2d at 133); *Thompson v. U.S. Dep't of Justice*, 146 F. Supp. 3d 72, 87 (D.D.C. 2015) (government-misconduct exception applies "only in cases of extreme government wrongdoing").

Courts must apply the exception narrowly, otherwise "the exception would swallow the rule." *Nat'l Whistleblower Ctr.*, 903 F. Supp. 2d at 69. For this reason, Courts have applied the exception only in "rare cases" where the discussions for which protection was sought "were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government." *ICM Registry*, 538 F. Supp. 2d at 133 (declining to apply misconduct exception where plaintiff alleged that agency's deliberations concerned a policy outside the scope of the agency's responsibility). Thus, it is only when "[t]he very discussion . . . was an act of government misconduct" that "the deliberative process privilege disappeared." *Id.*[5]

[5] The court in *ICM Registry*, cited two cases to explain what falls within "extreme government wrongdoing:" *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999), in which the court held the deliberative process privilege did not protect a document that suggested a cover-up regarding alleged misuse of a government personnel file; and *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976), where the court held the privilege did not apply to documents concerning government recommendations to improperly use the powers of the IRS against "enemies" of the Nixon administration.

Other courts have used the word "nefarious" to describe the kind of conduct giving rise to the exception. *ICM Registry*, 538 F. Supp. 2d at 134 (citing *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1425, n.2 (D.C, Cir. 1998); *Enviro Tech Int'l, Inc. v. U.S. EPA*, 371 F.3d 370, 376-77 (7th Cir. 2004) (refusing to apply misconduct exception to a case where the EPA was debating a worker exposure standard for a harmful chemical that was properly a matter for OSHA)). Indeed, even a showing that the government has violated a statute does not rise, on its own, to the level of "misconduct" necessary to create an exception. *In re Subpoena Duces Tecum*, 145 F.3d at 1425, n.2 ("misconduct" does not apply where an agency allegedly violated a statute where proving violation requires a showing of intent but not a showing of bad faith). Absent a showing that mere *consideration* of the policy at issue was outside an agency's purview, or that an agency had "nefarious purposes," the action is not misconduct within the meaning of the exception to the deliberative process privilege. *ICM Registry*, 538 F. Supp. 2d at 133.

Plaintiff bears the burden to provide a "discrete factual basis" for believing that information withheld under the deliberative process privilege could shed light on government misconduct. *Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 15-16 (D.D.C. 2000) (rejecting argument "that the burden is upon the government to prove a negative, i.e., to prove in the first instance that a document does *not* reveal any government misconduct"); *Nat'l Whistleblower*, 903 F. Supp. 2d at 67 ("[t]he party seeking release of withheld documents under this exception must 'provide an adequate basis for believing that [the documents] would shed light upon government misconduct.'") (alteration in original) (quoting *Judicial Watch of Fla., Inc.*, 102 F. Supp. 2d at 15). Plaintiff must show more than evidence of a "disagreement within the governmental entity at some point in the decisionmaking process" to invoke the

misconduct exception. *Hinckley*, 140 F.3d at 285-86 (finding that a review board's overruling of a unanimous decision by a patient's treatment team did not evince "improper motivations"); *see also Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97, 105 (D.D.C. 2009) ("Plaintiff must provide enough reason to believe misconduct took place."). In fact, the deliberative process privilege exists precisely to permit the type of debate and inevitable disagreement that is crucial to ensuring informed decision making. *See Schell v. HHS*, 843 F.2d 933, 942 (6th Cir. 1988) ("It is the free flow of advice, rather than the value of any particular piece of information, that Exemption 5 seeks to protect.").

Even though the burden rests with Plaintiff and "[t]here must be at least some connection between the government misconduct and the documents for the privilege to yield," *Convertino*, 674 F. Supp. 2d at 104, Plaintiff does not even attempt to show a nexus between the withheld information and any alleged misconduct. Instead, Plaintiff parrots accusations made in a British website that NCEI datasets were "unverified" and "not subject to rigorous internal evaluation process." Pl.'s Opp'n at 13.[6] But the FOIA request—and the withheld material—do not cover the promulgation, development, and maintenance of the underlying datasets, but instead pertain to the development of the Hiatus Paper. Although some of those records involve analysis and interpretation of the underlying data, they do so in the context of drafting the Paper. *See* Graff Decl. ¶¶ 5, 7-8; *see also, e.g.*, *Vaughn* index at part 1 Bates 6 ("NOAA scientist sharing draft

[6] Plaintiff apparently incorrectly attributes to the cited article the accusation that the Hiatus Paper "was never subject to NOAA's 'rigorous internal evaluation process.'" *See* Pl.'s Opp'n at 13 (citing Plaintiff's statement of facts). But that statement in the article alleges that the underlying data—not the Paper—was not subjected to NOAA's internal evaluation process. *See* David Rose, *Exposed: How World Leaders Were Duped into Investing Billions over Manipulated Global Warming Data*, Daily Mail (Feb. 4, 2017 17:57 EDT), http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html.

data analysis, based on scientist discussions, for development of the paper with other scientists."). Plaintiff's allegations are therefore outside of the scope of this FOIA request and the litigation. Indeed, Plaintiff does not identify a single document or *Vaughn* entry that purportedly reflects any impropriety with NOAA's underlying datasets (or any other alleged misconduct). Thus, Plaintiff has plainly failed to carry its burden to show that the challenged documents would shed light on any alleged misconduct. *See Judicial Watch of Fla.*, 102 F. Supp. 2d at 15-16 (rejecting government-misconduct exception because plaintiff "ma[de] no attempt to provide evidence suggesting [that the withheld material] would reveal [the alleged] misconduct"); *Thompson*, 146 F. Supp. 3d at 87 (rejecting government-misconduct exception because handful of cases alleging that black individuals were wiretapped does not provide an adequate basis to believe that withheld information would shed light on alleged misconduct of conspiracy to conceal wiretapping of black individuals in certain district).[7]

Not only does Plaintiff fail to tie the withheld information to any misconduct, Plaintiff fails to allege any relevant government misconduct. It points to allegations of unverified datasets. But it is the *analysis* of those underlying datasets for developing the Hiatus Paper that is at issue here. Although analysis of allegedly unverified data may yield ineffective results, such analysis is not "misconduct." And even if were, it would fail to reach the level of "nefarious" or "extreme" government wrongdoing to justify abandoning the deliberative process privilege. Although Plaintiff posits that "[t]he misconduct here is arguably more nefarious and extreme" than in *Tax Reform Research Group v. IRS*, there is no comparison. There, the court

[7] Plaintiff also alleges that "NOAA refus[ed] to comply with Representative Smith's congressional subpoena," which purportedly supports applying the government-misconduct exception here. Pl.'s Opp'n at 14. This vague allegation is irrelevant and does nothing to show that the documents at issue here reflect government misconduct.

held the privilege did not apply to documents concerning government recommendations to improperly use the powers of the IRS against "enemies" of the Nixon administration. 419 F. Supp. 415, 426 (D.D.C. 1976). Here, Plaintiff cites an article alleging that the processing of NCEI datasets did not follow agency protocol. These allegations in no way amount to "the sort of 'extreme government wrongdoing' that would prevent Defendant from invoking the deliberative-process privilege here," *Nat'l Whistleblower Ctr.*, 903 F. Supp. 2d at 68, and expanding the definition of misconduct in such a novel way would, if adopted, allow "the exception [to] swallow the rule," destroying the deliberative process privilege, *id.*

Thus, Plaintiff's government-misconduct argument fails and the deliberative process privilege applies.

**III. NOAA Produced All Reasonably Segregable Information to Plaintiff**

Plaintiff also asserts that NOAA's declaration is too conclusory to support its assertion that the withheld information is not segregable. Pl.'s Opp'n at 15. As an initial matter, NOAA is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). And Plaintiff's contention lacks merit because NOAA has shown "with reasonable specificity" why any withheld or redacted records cannot be further segregated. *See Brown v. U.S. Dep't of Justice*, 734 F. Supp. 2d 99, 110 (D.D.C. 2010).

NOAA's declaration adequately avers that that all reasonably segregable material has been released. NOAA's declarant explains that he read the *Vaughn* index, reviewed the documents referenced therein, and determined that the redacted material falls within the applicable FOIA exemption. Graff Decl. ¶ 45. He then describes the different categories of withheld deliberative material and what those categories encompassed, *id.* ¶¶ 51-55, and explains

that "[d]isclosure of any of this information that is pre-decisional and deliberative would inhibit candid internal discussions and expressions," *id.* ¶ 64. NOAA's detailed *Vaughn* index further accounts for all withheld and redacted information and illustrates how that information reflects predecisional and deliberative information. *See generally Vaughn* index. "To the extent the redacted or withheld information contains some factual material," NOAA's declarant explains that "the authors' selection and presentation of that factual material reflects the agency's deliberative process." Graff Decl. ¶ 65. Thus, NOAA "reasonably concluded that there was no additional non-exempt, responsive information that could be reasonably segregated and released to the plaintiff." *Id.* ¶ 67. *See Loving v. Dep't of Def.*, 550 F.3d 32, 41 (D.C. Cir. 2008) (stating that "the description of the document set forth in the *Vaughn* index and the agency's declaration that it released all segregable material" is "sufficient for [the segregability] determination"); *Brown*, 734 F. Supp. 2d at 110 (declaration was adequate that, *inter alia*, stated that "after extensive review of the documents at issue, I have determined that there is no further reasonably segregable information to be released"); *Blackwell v. FBI*, 680 F.Supp.2d 79, 96 (D.D.C. 2010) (holding agency satisfied segregability requirement where its declaration explained that "documents were processed to achieve maximum disclosure" and "further disclosure or attempt to describe information withheld would identify information protected by on[e] of the FOIA exemptions").

NOAA's conscientious efforts at segregation are further demonstrated by the multiple productions made to Plaintiff. On top of the 102 pages of material that NOAA initially released to Plaintiff without any redactions, Graff Decl. ¶ 29, "because of the further segregation and responsiveness review," Graff Decl. ¶ 32, NOAA made a supplemental production in September of an additional 44 pages of material (7 of which were partially redacted), and another

production in December of 62 records, Graff Decl. ¶¶ 30-31. *See Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 262 n.59 (D.C. Cir. 1977) (agency had dealt with FOIA request "in a conscientious manner" where it disclosed much material, released additional material as the result of an administrative appeal, and came forward with newly discovered documents as located); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 160 F. Supp. 3d 226, 245 (D.D.C. 2016) (finding segregability adequate where agency "provided a detailed Vaughn index and an affidavit asserting that each responsive document was re-reviewed for segregability"); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, No. 01-639, 2006 WL 2038513, at *5-7 (D.D.C. July 19, 2006) (rejecting plaintiff's segregability claim where agency submitted a declaration which declared that "all reasonably segregable information has been disclosed" and released further information after a second review of withheld material). Moreover, NOAA's efforts are exemplified by its disclosure to Plaintiff of over 100 records that were redacted only in part. *See Fischer v. U.S. Dep't of Justice*, 723 F. Supp. 2d 104, 114 (D.D.C. 2010) ("Defendant's conscientious efforts at segregation are manifest by the agency's disclosure to plaintiff of 1,108 partially redacted pages of records, compared with only 48 pages withheld in full.").

To the extent that any doubt remains, NOAA's declaration attached hereto removes it entirely. That declaration explains that NOAA carefully reviewed each document individually to identify non-exempt information that could be reasonably segregated from exempt information for release and has implemented segregation where possible. Second Graff Decl. ¶ 7 (attached hereto). Any remaining responsive material that was withheld was done so because it was intertwined with this information and segregating it would drain finite resources only to produce disjointed words, phrases, or sentences, that taken separately or together, would have minimal or

no informational content. *Id.* ¶¶ 8-9. Thus, all segregable information has been released to Plaintiff. *Id.* ¶ 7. *See DiBacco v. U.S. Dep't of Army*, 983 F. Supp. 2d 44, 65–66 (D.D.C. 2013) (finding that agency met segregability requirement when it performed document-by-document review and plaintiffs offered no evidence to rebut the assertion that it produced all reasonably segregable material), *aff'd in part, remanded in part sub nom. DiBacco v. U.S. Army*, 795 F.3d 178 (D.C. Cir. 2015).

There is no indication that NOAA has acted in bad faith in segregating and releasing nonexempt information in the records released to Plaintiff, and there is no reason to disregard NOAA's statement that all reasonably segregable non-exempt material has been released. *See Brown*, 734 F. Supp. 2d at 111 (finding "no indication that the [agency] has acted in bad faith in segregating and releasing nonexempt information" and "no reason to disregard [the agency's] statement that all reasonably segregable non-exempt material has been released"); *see also Mead Data Cent., Inc.*, 566 F.2d at 261 n.55 (An agency need not "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content."); *Schoenman v. FBI*, 841 F. Supp. 2d 69, 84 (D.D.C. 2012) (same). NOAA has therefore produced all non-exempt, "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b), and its segregability analysis should be upheld.[8]

[8] As illustrated through its productions, declarations, and *Vaughn* index, NOAA has supported its segregability analysis with far more than the insufficient records before the courts in decisions highlighted by Plaintiff. For example, in *Dorsett v. U.S. Department of Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004), the *Vaughn* was not sufficiently detailed and the affidavit simply stated that agency released all segregable material to plaintiff and further efforts at segregation would provide little information or would be unduly burdensome. And in *Animal Legal Defense Fund v. Department of Air Force*, 44 F. Supp. 2d 295, 301 (D.D.C. 1999), the court found the declarant's "unsophisticated parroting of FOIA's statutory language [to be] patently insufficient."

**IV. *In Camera* Review Is Not Warranted**

Plaintiff argues that the Court should conduct an *in camera* review "to determine the appropriateness of Defendant['s] asserted claims of deliberative process privilege." Pl.'s Opp'n at 16. But "*[i]n camera, ex parte* review, though permitted under FOIA and sometimes necessary, is generally disfavored . . . ," and "should be invoked only when the issue at hand could not be otherwise resolved." *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (citation omitted), *abrogated on other grounds by Milner v Dep't of Navy*, 562 U.S. 562 (2011); *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'"). The court can resolve the issues here by reviewing the parties' briefs as well as NOAA's *Vaughn* index and its supporting declarations. As such, *in camera* review is not warranted.

With respect to decisions to review documents in FOIA cases, courts "look to such factors as evidence of bad faith and the detail used in the *Vaughn* index and affidavit to describe the contents of the documents." *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984). Here, no evidence shows bad faith, nor is there any indication that the agency intended to impede a probe into its practices, as Plaintiff suggests. *See* Pl.'s Opp'n at 16. And although Plaintiff broadly asserts the agency's declarations are "insufficiently detailed," Pl.'s Opp'n at 16, it fails to explain how so. *See generally* Pl.'s Opp'n. Plaintiff in no way meaningful way challenges the *Vaughn* index or declaration's description of the withheld material, both of which provide as much detail about the content of the withheld information as possible without revealing the information itself, and those descriptions are sufficient to justify the claimed exemptions. *See Ctr. for Auto Safety*, 731 F.2d at 22. *In camera* review is therefore neither necessary nor

appropriate. *See Canning v. U.S. Dep't of State*, 134 F. Supp. 3d 490, 502 (D.D.C. 2015) ("*In camera* review is a last resort, not a fishing expedition.") (citations omitted). Indeed, if the mere possibility "that some bits of non-exempt material may be found among exempt material even after a thorough agency evaluation" is "enough automatically to trigger an *in camera* investigation, one will be required in every FOIA case." *See Ctr. for Auto Safety*, 731 F.2d at 21-22. "This is clearly not what Congress intended," *id.*, nor is it necessary here.

## CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in the U.S. Department of Commerce's Motion for Summary Judgment and accompanying Memorandum of Points and Authorities in Support, the U.S. Department of Commerce respectfully requests that summary judgment be entered in its favor, and that Plaintiff's cross-motion be denied.[9]

Dated: March 17, 2017

Respectfully submitted,

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[9] Plaintiff also mistakenly charges that the U.S. Department of Commerce's Statement of Material Facts Not in Dispute "contains an improper mix of fact and legal conclusions." Pl.'s Resp. Statement of Material Facts at 1-2. Plaintiff fails to point to any such assertion, and none exist. Moreover, the circumstances present in the cases it cites bear no resemblance to the material here.

*Counsel for Defendant*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**DEFENDANT'S RESPONSES TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

Pursuant to Local Rule 7(h) of the Civil Rules of the U.S. District Court for the District of Columbia, Defendant U.S. Department of Commerce ("DOC") responds, by and through undersigned counsel, as follows to Plaintiff's Statement of Material Facts Not in Dispute. Plaintiff's numbered statements are reproduced below, each followed by Defendants' response.

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

**Response:** Undisputed.

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.

**Response:** Undisputed, except for any assertion that Plaintiff narrowed its challenges to DOC's withholdings after receiving the draft *Vaughn* index.

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.

**Response:** Plaintiff's statement consists of a description of an article on a website. DOC respectfully directs the Court to the referenced article for a complete and accurate statement of the article's contents and denies any description inconsistent with that article.

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."

**Response:** Plaintiff's statement consists of a description of an article on a website. DOC respectfully directs the Court to the referenced article for a complete and accurate statement of the article's contents and denies any description inconsistent with that article.

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

**Response:** Plaintiff's statement consists of a description of an article on a website. DOC respectfully directs the Court to the referenced article for a complete and accurate statement of the article's contents and denies any description inconsistent with that article.

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."

**Response:** Plaintiff's statement consists of a description of an article on a website. DOC respectfully directs the Court to the referenced article for a complete and accurate statement of the article's contents and denies any description inconsistent with that article.

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."

**Response:** Plaintiff's statement consists of a description of an article on a website. DOC respectfully directs the Court to the referenced article for a complete and accurate statement of the article's contents and denies any description inconsistent with that article.

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

**Response:** Plaintiff's statement consists of a description of an article on a website. DOC respectfully directs the Court to the referenced article for a complete and accurate statement of the article's contents and denies any description inconsistent with that article.

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").

**Response:** Plaintiff's statement consists of a description of an article on a website. DOC respectfully directs the Court to the referenced article for a complete and accurate statement of the article's contents and denies any description inconsistent with that article.

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

**Response:** Plaintiff's statement consists of a description of an article on a website. DOC respectfully directs the Court to the referenced article for a complete and accurate statement of the article's contents and denies any description inconsistent with that article.

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.

**Response:** DOC is not required to respond to the statements in paragraph 11 of Plaintiff's Statement of Material Facts because the alleged facts, regardless of whether true, are not material to the resolution of Plaintiff's Motion for Summary Judgment in this Freedom of Information Act ("FOIA") case. "Material facts" are those facts which, under the governing substantive law, "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed. R. Evid. 401 (stating that "[e]vidence is relevant if . . . the fact is of consequence in determining the action"). None of the purported facts in this paragraph has any bearing on the outcome of this FOIA suit under applicable law. Since parties must identify genuine issues only with respect to "material" facts, Fed. R. Civ. P. 56(c), LRCiv 7.1(h), DOC is not required to respond to this paragraph.

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.

**Response:** DOC is not required to respond to the statements in paragraph 12 of Plaintiff's Statement of Material Facts because the alleged facts, regardless of whether true, are not material to the resolution of Plaintiff's Motion for Summary Judgment in this FOIA case. "Material facts" are those facts which, under the governing substantive law, "might affect the outcome of the

suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed. R. Evid. 401 (stating that "[e]vidence is relevant if . . . the fact is of consequence in determining the action"). None of the purported facts in this paragraph has any bearing on the outcome of this FOIA suit under applicable law. Since parties must identify genuine issues only with respect to "material" facts, Fed. R. Civ. P. 56(c), LRCiv 7.1(h), DOC is not required to respond to this paragraph.

Dated: March 17, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2017, 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:

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