

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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DAVE LEVINTHAL, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 15-1624 (APM)
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
	)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S REPLY  
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO  
PLAINTIFFS’ CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Dave Levinthal and the Center for Public Integrity (“CPI”) filed suit under the Freedom of Information Act (“FOIA”) to obtain documents that contain analyses of vulnerabilities within the Federal Election Commission’s (“Commission”) information technology systems and recommendations about addressing such vulnerabilities. The uncontested record in this case makes clear that these documents contain sensitive information that, if disclosed, could be used by outside persons or entities to wrongfully interfere with the Commission’s information technology systems or to access the Commission’s data systems to circumvent the law. The record also makes clear that these documents are manifestly deliberative and predecisional. The Commission properly withheld these documents from public disclosure because they are statutorily exempt under the plain language of FOIA.

“FOIA represents a carefully considered balance between the right of the public to know what their government is up to and the often compelling interest that the government has in keeping certain information private, whether to protect particular individuals or the national interest as a whole.” *ACLU v. F.B.I.*, 429 F. Supp. 2d 179, 186-87 (D.D.C. 2006). Here, the

Commission has satisfied its burden by filing detailed declarations demonstrating that it properly withheld the requested documents pursuant to FOIA Exemptions 5 and 7(E), and plaintiffs have barely even attempted to refute the Commission's demonstration that the requested documents are exempt from disclosure.

Indeed, plaintiffs' summary judgment brief essentially concedes that the withheld documents meet the elements of the deliberative process privilege, while simply ignoring the relevant cases interpreting and applying the law enforcement privilege. And plaintiffs' filing fails to rebut the Commission's demonstration that there are no segregable, non-exempt portions of the requested documents that are subject to disclosure under FOIA, relying merely on their subjective disagreement with the Commission's determination. Plaintiffs also fail to provide any support for their argument that the public interest requires disclosure of *the particular documents at issue here*. The Court should grant summary judgment to the Commission and deny plaintiffs' cross-motion.

**I. PLAINTIFFS HAVE FAILED TO CONTROVERT THE COMMISSION'S UNDISPUTED MATERIAL FACTS AND THOSE FACTS SHOULD BE DEEMED ADMITTED**

Plaintiffs have failed to identify any "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue exists only when "sufficient evidence supporting the claimed factual dispute [is] shown to require a jury or judge to resolve the parties' differing versions of the truth." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (internal quotation marks omitted). Under Local Rule 7(h)(1), an opposition to a motion for summary judgment must include a statement of genuine issues "setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated," with references to "the parts of the record relied on to support the statement." In particular, a party opposing summary judgment "must respond to each of the [movant's] alleged facts with an indication of

whether the non-moving party admits or denies the fact.” *Jackson v. District of Columbia*, 83 F. Supp. 3d 158, 161 (D.D.C. 2015).

In this Circuit, “[i]f the party opposing the motion fails to comply with this local rule, then ‘the district court is under no obligation to sift through the record’ and should ‘[i]nstead . . . deem as admitted the moving party’s facts that are uncontroverted by the nonmoving party’s Rule [7(h)] statement.’” *SEC v. Banner Fund Int’l*, 211 F.3d 602, 616 (D.C. Cir. 2000) (citation omitted); *see* Local Rule 7(h)(1) (“[T]he Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.”); Fed. R. Civ. P. 56(e) (where “a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact,” the district court may “consider the fact undisputed for purposes of the motion”).

Here, plaintiffs failed to oppose the Commission’s Statement of Material Facts (Docket No. 13-1). The Commission’s Statement of Material Facts should therefore be deemed admitted.<sup>1</sup>

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<sup>1</sup> Plaintiffs’ own submission of four material facts “as to which there is no genuine issue” (Plaintiffs’ Statement of Material Facts as to Which There is No Genuine Issue at 1 (Docket No. 14-1)) does not remedy their failure to file a statement of genuine issues. *See, e.g., Austin Inv. Fund, LLC v. United States*, No. 11-2300, 2015 WL 7303514, at \*11-12 (D.D.C. Nov. 19, 2015) (finding that plaintiff had violated local and federal rules and deeming facts in defendant’s statement of material facts to be “‘admitted’” (quoting LCvR 7(h)(1))); *Quick v. U.S. Dept. of Commerce, Nat’l Inst. of Standards and Tech.*, 775 F. Supp. 2d 174, 178 (D.D.C. 2011) (“To the extent the Court is unable to discern the extent of [plaintiff’s] agreement or disagreement with [defendant’s] proffered facts from the contents of his statement, the Court shall, in an exercise of its discretion, assume the uncontroverted facts identified by [defendant] to be admitted for purposes of resolving the pending motions.”).

## II. THE COMMISSION PROPERLY WITHHELD THE NIST STUDY UNDER FOIA EXEMPTION 7(E)

The Commission's opening brief and supporting declarations demonstrated that the agency properly withheld the NIST Study under FOIA Exemption 7(E). (FEC Summ. J. Mem. at 10-17 (Docket No. 13); Declaration of Alec Palmer ¶¶ 16-28 (Docket No. 13-2) ("Palmer Decl.")). As previously explained (FEC Summ. J. Mem. at 13), this Court recently held that records about governmental databases used for law enforcement purposes are covered by Exemption 7(E). *Long v. Immigration & Customs Enf't*, No. CV 14-00109 (APM), 2015 WL 8751005, at \*5 (D.D.C. Dec. 14, 2015). Such records "clearly have a rational 'nexus' to [the government] Defendants' law enforcement duties," the Court found, and there is a "clear connection between the records and possible security risks or violations of law." *Id.* In a number of cases in this district, Exemption 7(E) has repeatedly been held to protect computer records and data that, if disclosed, could facilitate unauthorized access to federal government computer systems. (FEC Summ. J. Mem. at 14 (collecting cases).)

Plaintiffs have failed to refute the Commission's arguments and evidence. Indeed, rather than provide any substantive response to the authority cited by the FEC, plaintiffs attempt (Pls.' Cross-Mot. for Summ. J. and Opp'n to Def.'s Mot. for Summ. J. (Docket No. 14) at 4 ("Pls.' Summ. J. Mem.")) to categorically dismiss it. But plaintiffs' unsupported generalization that "each of th[e] cases" cited by the Commission exclusively involve "data [that] were themselves law-enforcement records," (*id.* at 4) is wrong. Again, as detailed in the FEC's opening brief (FEC Summ. J. Mem. at 11, 13-14), cases in this district have explicitly and repeatedly held that computer data and codes *that are not themselves law enforcement techniques or guidelines* are nevertheless exempt from disclosure under Exemption 7(E).

In *Skinner v. Department of Justice*, for example, the district court held that Exemption 7(E) applies to computer access codes that “are not themselves ‘guidelines for law enforcement investigations or prosecutions’ entitled to categorical protection under Exemption 7(E),” where the government has “adequately demonstrate[d] that release of the codes ‘would disclose guidelines for law enforcement investigations or prosecutions’” by enabling users to “exploit the information to circumvent the law or to corrupt the database itself.” 893 F. Supp. 2d 109, 114 (D.D.C. 2012), *aff’d sub nom. Skinner v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 12-5319, 2013 WL 3367431 (D.C. Cir. May 31, 2013); *see also, e.g., Barouch v. Dep’t of Justice*, 87 F. Supp. 3d 10, 30 (D.D.C. 2015) (finding that defendant properly invoked Exemption 7(E) to withhold information relating to computer file numbers and codes, “primarily used to store and retrieve law enforcement information” because disclosure of this information “could allow individuals outside the agency to circumvent agency functions and gain access to sensitive investigative information” and to “alter or create false records.” (internal quotation marks omitted)).

The Commission’s cited authorities thus directly undercut plaintiffs’ assertion (Pls.’ Summ. J. Mem. at 4) that the NIST Study is not connected to a specific law enforcement investigation. As described above and in the Commission’s opening brief (FEC Summ. J. Mem. at 11, 13-14), Exemption 7(E) imposes no such requirement. On the contrary, the Court of Appeals has recognized that “Exemption 7(E) sets a relatively low bar for the agency to justify withholding,” and does *not* require “a highly specific burden of showing how the law will be circumvented,” but rather a demonstration of “logically how the release of the requested information might create a risk of circumvention of the law.” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (internal quotation marks omitted); *see Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (explaining that Exemption 7(E) “looks not just for circumvention

of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk”).

The cases cited by the Commission likewise undermine plaintiffs’ erroneous suggestion (Pls.’ Summ. J. Mem. at 4-5) that the Commission was required to “establish[] that the vulnerabilities described in the NIST Study still exist.” Indeed, plaintiffs’ failure to identify any authority suggesting such a specific requirement is unsurprising given that the demonstration plaintiffs would demand could itself implicate the very security concerns that exempt the Commission from disclosing the documents requested here. Further, the Commission has provided evidence — which plaintiffs have not contested — that disclosure of the NIST Study *could* pose a significant security threat: The information contained in the NIST Study can be used to, among other threats, gain unauthorized access to the Commission’s information technology systems, “obtain and manipulate sensitive and confidential data” about parties regulated by the Commission, and “seriously threaten the Commission’s ability to fulfill its civil enforcement and other statutory duties.” *See* Palmer Decl. ¶ 19; *see also Willis v. Dep’t of Justice*, 581 F. Supp. 2d 57, 66 (D.D.C. 2008) (“Courts must ‘accord substantial weight’ to an agency’s affidavits regarding FOIA exemptions.”).

The uncontested record demonstrates that the NIST Study advised the Commission on how to ensure the security of the agency’s information technology infrastructure, which is necessarily related to the agency’s law enforcement functions, and that if disclosed, the NIST Study could be used by outside persons to wrongfully access or interfere with the Commission’s information technology systems to circumvent the law. The Commission has demonstrated,

without refutation, that the NIST Study is exempt from disclosure under FOIA Exemption 7(E), and for this reason alone, summary judgment should be granted in the Commission's favor.

### **III. THE COMMISSION PROPERLY WITHHELD THE NIST STUDY UNDER FOIA EXEMPTION 5**

The Commission also explained in its opening brief (FEC Summ. J. Mem. at 17-21) that the NIST Study is comprised of deliberative, intra-agency documents that are exempt from disclosure under FOIA Exemption 5. Plaintiffs do not dispute the general applicability of Exemption 5 here, (Pls.' Summ. J. Mem. at 5 ("Plaintiffs do not doubt that the NIST Study contains predecisional recommendations.")), and the Court may thus deem the applicability of this exemption as conceded. *See Hopkins v. Women's Div., General Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." (citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997))). Although plaintiffs do contest the Commission's withholding of "factual sections of the report [that] are consistent with its recommendations," (Pls.' Summ. J. Mem. at 5), as explained below, they have failed to refute the Commission's demonstration that the entire NIST Study is generally exempt and that the requested documents were thus properly withheld in their entirety.

### **IV. THE COMMISSION PROPERLY DETERMINED THAT THE NIST STUDY CONTAINS NO NON-EXEMPT, SEGREGABLE PORTIONS THAT MUST BE RELEASED**

As explained in detail in the FEC's opening summary judgment brief and supporting declarations (FEC Summ. J. Mem. at 15-17, 20-21; Palmer Decl. ¶¶ 15, 23, 25-27), agency officials carefully examined the NIST Study and determined that no portion of it could be released without risk of circumvention of the law. The entire NIST Study is thus exempt from

disclosure under FOIA Exemption 7(E). In particular, the FEC's Office of the Chief Information Officer conducted line-by-line examinations of the documents that comprise the NIST Study and, based on its expertise in information technology and with the Commission's information technology assets, determined that no portion of the NIST Study could be released without risk of circumvention of the law because each component of the NIST Study provides part of a blueprint to persons who may attempt to breach the Commission's networks and thereby frustrate its law enforcement functions. (*See* Palmer Decl. ¶¶ 25-28.)

The Commission is "'entitled to a presumption'" that it has complied with its duty to disclose any "'reasonably segregable material,'" *Competitive Enter. Inst. v. EPA*, 12 F. Supp. 3d 100, 123 (D.D.C. 2014) (quoting *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013)), and plaintiffs have not even acknowledged, let alone responded to, the Commission's demonstration that no portion of the NIST Study could be released without risk of circumvention of the law. The Court should thus conclude that the entire NIST Study is covered by Exemption 7(E), and no portion of the NIST Study must be disclosed.

Plaintiffs have similarly failed to refute the Commission's demonstration that the entire NIST Study is exempt from disclosure under FOIA Exemption 5. As the Commission previously explained, although *purely* factual information is generally not exempt from disclosure pursuant to the deliberative process privilege protected by Exemption 5, such material is protected by Exemption 5 if its disclosure would expose the deliberative process or is inextricably intertwined with deliberative material. (*See* FEC Summ. J. Mem. at 20 (citing cases)). The Commission has demonstrated that its FOIA staff conducted line-by-line examinations of the NIST Study in an effort to identify any reasonably segregable, nonprivileged, nonexempt portions of the NIST Study that could be released. (*See* Declaration of Robert M. Kahn ¶ 12 (Docket No. 13-3).) Because the factual descriptions in the NIST Study

are inextricably intertwined with deliberative material or are central to its analyses, (*See* FEC Summ. J. Mem. at 20-21), disclosure of these factual observations would release the substance of the vulnerability analysis submitted to the Commission for its consideration in determining whether to accept the NIST Study's recommendations. The Commission therefore had no obligation to segregate and disclose any factual material contained in the NIST Study. The Commission has demonstrated that it properly withheld the entire NIST Study under FOIA Exemption 5, and plaintiffs have provided nothing to suggest otherwise.

Indeed, plaintiffs' only response to the Commission's demonstration regarding segregability is their facially erroneous assertion (Pls.' Summ. J. Mem. at 5) that the Commission supposedly "admitted that there are segregable factual portions" of the NIST Study. But as described above, the opposite is true: through scrupulous examinations of the NIST Study, the Commission determined that it must withhold "*all* of the factual portions of the NIST Study." (FEC Summ. J. Mem. at 20 (emphasis added); *see also* Kahn Decl. ¶ 12; Palmer Decl. ¶ 27.) Plaintiffs have thus failed to identify any legal or factual basis for rejecting the Commission's demonstration that the NIST Study contains no non-exempt, segregable portions that were required to be released.

**V. PLAINTIFFS' PUBLIC INTEREST ARGUMENTS ARE LEGALLY AND FACTUALLY INCORRECT**

**A. In This FOIA Case, the Applicable FOIA Exemptions Supersede Any Alleged Public Interest in Disclosure**

Plaintiffs' overbroad and unsupported reference to FOIA's basic purpose of "ensur[ing] an informed citizenry" (Pls.' Summ. J. Mem. at 3-4) simply ignores that FOIA's public disclosure purpose is balanced by the equally important, countervailing need to protect the confidentiality of certain categories of information, including the records at issue here. *ACLU*, 429 F. Supp. 2d at 186-87 ("FOIA represents a carefully considered balance between the right of

the public to know what their government is up to and the often compelling interest that the government has in keeping certain information private, whether to protect particular individuals or the national interest as a whole.”). Where, as here, documents were properly withheld under applicable FOIA exemptions, the public’s interest in disclosure of such documents is irrelevant. *See In Re Sealed Case*, 121 F.3d 729, 737 & n. 5 (D.C. Cir. 1997) (per curiam) (noting that the deliberative process privilege “can be overcome by a sufficient showing of need” in the civil discovery context, but “that the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure”); *Jewett v. U.S. Dept. of State*, No. 11-cv-1852 (RLW), 2013 WL 550077, at \*9 (D.D.C. Feb. 14, 2013) (“Because [ ] Exemption [7(E)] grants categorical protection to these materials, it requires no demonstration of harm or balancing of interests.” (citing *Keys v. United States Dep’t of Homeland Security*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007)); *Sierra Club v. U.S. Dept. of Interior*, 384 F. Supp. 2d 1, 29 (D.D.C. 2004) (“Once a document is deemed exempt from disclosure pursuant to Exemption 5, there is no need for the court to consider the public interest in disclosure. . . . [I]t is clear that despite the ‘public interest’ that may exist in the disclosure of withheld documents, this interest cannot overcome Exemption 5 in a FOIA case.”). The Commission properly withheld the NIST Study pursuant to Exemptions 5 and 7(E), and thus other interests need not be balanced here.

**B. Even if Plaintiffs’ Public Interest Arguments Were Relevant, the Factual Record Suggests That Publicly Releasing the NIST Study Would Undermine, Rather than Serve, the Public Interest**

Next, plaintiffs’ public interest argument raised in their cross-motion is inapplicable to the facts here. But even if this Court were to consider public interest, plaintiffs fail to take into account the record evidence that disclosure of the NIST Study could cause serious harm to the Commission’s ability to fulfill its law enforcement functions and could enable circumvention of the law. Plaintiffs state in a conclusory manner that disclosure of the NIST Study would “serve

the important purpose of informing the public,” (*See* Pls.’ Summ. J. Mem. at 3), but they fail to specify how disclosure of the NIST Study would serve the public interest in any concrete and meaningful way. Plaintiffs also fail to address the record evidence that disclosure of the NIST Study could in fact *undermine* the public interest by potentially disrupting the Commission’s law enforcement functions through exposure of its systems to the very threats that the Commission sought to address when it undertook the NIST Study in the first place.

### CONCLUSION

For all the foregoing reasons, as well as those set forth in the Commission’s Memorandum in Support of its Motion for Summary Judgment, the Court should grant the Commission’s motion for summary judgment, deny plaintiffs’ cross-motion for summary judgment, and award judgment in favor of the Commission.

April 28, 2016  
Washington, DC

Respectfully submitted,

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