

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

<hr/>)	
CENTER FOR PUBLIC INTEGRITY,)	
)	
Plaintiff,)	Civ. No. 17-1162 (CRC)
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	MOTION FOR
)	SUMMARY JUDGMENT
)	
Defendant.)	
<hr/>)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
MOTION FOR SUMMARY JUDGMENT**

Defendant Federal Election Commission (“Commission”) hereby moves this Court for an order granting summary judgment to the Commission pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h). As demonstrated in the accompanying memorandum of points and authorities, the Commission has complied with its obligations under the Freedom of Information Act. There are no material facts in dispute and the Commission is entitled to judgment in its favor as a matter of law. A statement of material facts not in dispute and a proposed order are attached to the Commission’s memorandum.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
l Stevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

/s/ Seth Nesin
Seth Nesin
Attorney
snesin@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

September 7, 2017

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

<hr/>)	
CENTER FOR PUBLIC INTEGRITY,)	
)	
Plaintiff,)	Civ. No. 17-1162 (CRC)
)	
v.)	
)	MEMORANDUM IN SUPPORT OF
FEDERAL ELECTION COMMISSION,)	MOTION FOR SUMMARY JUDGMENT
)	
Defendant.)	
<hr/>)	

**FEDERAL ELECTION COMMISSION’S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel

Harry J. Summers
Assistant General Counsel

Kevin Deeley
Associate General Counsel

Seth Nesin
Attorney

FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

September 7, 2017

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	2
I. @altFEC FREEDOM OF INFORMATION REQUEST	2
II. EOP.gov FREEDOM OF INFORMATION REQUEST	3
ARGUMENT	5
I. STANDARDS OF REVIEW.....	5
II. THE @altFEC DOCUMENTS ARE PROPERLY WITHHELD PURSUANT TO FOIA EXEMPTION 5	7
A. The Withheld Documents Are Predecisional.....	8
B. The Withheld Documents Are Deliberative.....	10
C. A Perceived Public Interest in the Withheld Documents Is Not Relevant to the Exemption 5 Analysis	11
D. The Withheld Documents Do Not Contain Reasonably Segregable, Non- Exempt Factual Information	11
E. The Withheld Documents Are Not Appropriate for Discretionary Release	13
II. THE GOVERNMENT NEITHER IMPROPERLY WITHHELD NOR UNREASONABLY DELAYED ITS REVIEW OF THE REQUESTED EOP.GOV EMAILS TO THE FEC	14
A. The FEC’s Lawful Referral of the Request for EOP.gov Emails Means That the Agency Did Not Improperly Withhold Them	15
B. The Government Did Not Unreasonably Delay in Responding to the Request for EOP.gov Emails	17
CONCLUSION.....	19

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>ACLU v. U.S. Dep’t of Def.</i> , 628 F.3d 612 (D.C. Cir. 2011)	6
<i>Ancient Coin Collectors Guild v. U.S. Dep’t of State</i> , 641 F.3d 504 (D.C. Cir. 2011)	8
<i>Anguimate v. Dep’t of Homeland Security</i> , 918 F. Supp. 2d 13 (D.D.C. 2013).....	6
<i>Baker & Hostetler LLP v. U.S. Dep’t of Commerce</i> , 473 F.3d 312 (D.C. Cir. 2006)	7
<i>Brannum v. Dominguez</i> , 377 F. Supp. 2d 75 (D.D.C. 2005)	12
<i>Brayton v. Office of the U.S. Trade Representative</i> , 641 F.3d 521 (D.C. Cir. 2011)	5
<i>Coastal States Gas Corp. v. Dep’t of Energy</i> , 617 F.2d 854 (D.C. Cir. 1980).....	9-10
<i>Davis v. DOJ</i> , 970 F. Supp. 2d 10 (D.D.C. 2013)	6
<i>DOJ v. Reporters Comm. for Freedom of the Press</i> , 489 U.S. 749 (1989).....	5, 11
<i>Elec. Frontier Found. v. DOJ</i> , 739 F.3d 1 (D.C. Cir. 2014).....	10, 11, 12
<i>Elec. Frontier Found. v. DOJ</i> , 892 F. Supp. 2d 95, 102 (D.D.C. 2012).....	10
<i>Elec. Privacy Info. Ctr. v. Dep’t of Homeland Security</i> , 892 F. Supp. 2d 28 (D.D.C. 2012).....	12, 13, 18
<i>Elec. Privacy Info. Ctr. v. DOJ</i> , 15 F. Supp. 3d 32 (D.D.C. 2014)	18
<i>FTC v. Grolier Inc.</i> , 462 U.S. 19 (1983).....	11
<i>Gahagan v. U.S. Citizenship and Immigration Servs.</i> , 111 F. Supp. 3d 754 (E.D. La. 2015).....	17, 18
<i>Gallant v. NLRB</i> , 26 F.3d 168 (D.C. Cir. 1994)	6, 7
<i>Gold Anti-Trust Action Comm. Inc. v. Bd. of Governors of the Fed. Reserve Sys.</i> , 762 F. Supp. 2d 123 (D.D.C. 2011).....	9
<i>Jordan v. DOJ</i> , 591 F.2d 753 (D.C. Cir. 1978)	8
<i>Judicial Watch Inc. v. Dep’t of State</i> , 650 F. Supp. 2d 28 (D.D.C. 2009).....	10
<i>Judicial Watch, Inc. v. U.S. Postal Serv.</i> , 297 F. Supp. 2d 257 (D.D.C. 2004).....	6-7

Keys v. Dep’t of Homeland Sec., 570 F. Supp. 2d 59 (D.D.C. 2008)..... 15, 16

Mapother v. DOJ, 3 F.3d 1533 (D.C. Cir. 1993)..... 8, 12

Marriott Int’l Resorts, L.P. v. United States, 437 F.3d 1302 (Fed. Cir. 2006)..... 7

Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987) 7, 11

McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983) 7, 15, 16

McKinley v. Bd. of Governors of Fed. Reserve Sys., 647 F.3d 331 (D.C. Cir. 2011)..... 9

McKinley v. Fed. Deposit Ins. Corp., 744 F. Supp. 2d 128 (D.D.C. 2010)..... 9

Mead Data Cent., Inc. v. US. Dep’t of Air Force, 566 F.2d 242 (D.C. Cir. 1977)..... 12

Mobley v. Dep’t of Justice, 870 F. Supp. 2d. 61 (D.D.C. 2012)..... 6

Montrose Chem. Corp. of Cal. v. Train, 491 F.2d 63 (D.C. Cir. 1974)..... 9

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)..... 7, 8

Or. Nat. Desert Ass’n v. Gutierrez, 409 F. Supp. 2d 1237, (D. Or. 2006) 16-17, 18

Russell v. Dep’t of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982)..... 8

SAE Prods., Inc. v. FBI, 589 F. Supp. 2d 76 (D.D.C. 2008) 5

SafeCard Servs., Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991) 6

Snyder v. Cent. Intelligence Agency, 230 F. Supp. 2d 17 (D.D.C. 2002)..... 16

Sussman v. U.S. Marshals Serv., 494 F.3d 1106 (D.C. Cir. 2007) 5, 15

Taxation With Representation Fund v. IRS, 646 F.2d 666 (D.C. Cir. 1981)..... 8

United States v. Exxon Corp., 87 F.R.D. 624 (D.D.C. 1980) 9

Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975)..... 8

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)..... 6

Waterkeepers Alliance v. U.S. Coast Guard, 2014 WL 5351410 (D.D.C. Sept. 29, 2014) 18

Wolfe v. HHS, 839 F.2d 768 (D.C. Cir. 1988)..... 9, 10, 12

Wolfson v. United States, 672 F. Supp. 2d 20 (D.D.C. 2009)..... 9

Statutes and Regulations

Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146..... 2

5 U.S.C. § 552..... 1

5 U.S.C. § 552(a)(4)(B) 14, 15

5 U.S.C. § 552(a)(6)(A)(i) 18

5 U.S.C. § 552(a)(6)(B)(iii)(III)..... 16

5 U.S.C. § 552(a)(8)(A) 13

5 U.S.C. § 552(b)(5) 2

11 CFR § 4.5(d) 15

Miscellaneous

Memorandum from Associate Attorney General Webster L. Hubbell (Nov. 3, 1993) at
<https://www.justice.gov/oip/blog/foia-update-foia-memo-white-house-records>.....4-5

Dep’t of Justice Guide to the Freedom of Information Act (updated Sept. 4, 2013),
<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf>..... 4, 11, 13, 15

INTRODUCTION

Plaintiff Center for Public Integrity (“CPI”) contests the Federal Election Commission’s (“FEC” or “Commission”) handling of two requests made earlier this year under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, but the FEC has acted lawfully in response to both requests. FOIA establishes a statutory right of public access to documents and records of federal agencies, with various exceptions for privileged or confidential information. In response to the first FOIA request, which asked for communications referencing or pertaining to the Twitter account “@altFEC,” the Commission produced seven pages of records and properly withheld fourteen pages of records pursuant to the deliberative process privilege under FOIA Exemption 5. In response to the second FOIA request, which asked for certain emails from the domain “EOP.gov,” the FEC found fourteen pages of responsive documents, all of which originated with the Office of Management and Budget (“OMB”) and dealt with matters within its area of responsibility. Consistent with the FEC’s reasonable procedure, those documents were referred to OMB for disposition, and the Commission diligently followed up with that agency to ensure that the requester would receive a determination as soon as OMB was able to respond. On September 7, 2017, OMB provided its response to the FEC, including limited suggested redactions pursuant to FOIA Exemptions 5 and 6, and that same day the FEC provided the responsive documents to Levinthal with the redactions OMB had proposed. The government therefore has not improperly withheld any documents. Judgment should be awarded in the Commission’s favor.

BACKGROUND

The FEC is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act (“FECA”), 52 U.S.C. §§ 30101-30146.

I. @altFEC FREEDOM OF INFORMATION REQUEST

On February 1, 2017, the FEC received a FOIA request from Dave Levinthal of plaintiff Center for Public Integrity, seeking the following documents from January 19, 2017 through February 1, 2017:

Any emails, memoranda or other correspondence or communication that discuss, mention, reference or otherwise pertain to the Twitter account “altFEC.” This includes direct mention of the account “@altFEC”, as well as other obvious references to the @altFEC account, which should include, but not be limited to: “alt FEC Twitter,” “alt FEC account” and “fake @FEC account.”

(Def. FEC’s Statement of Material Facts as to Which There Is No Genuine Dispute (“SMF”) ¶

2.) The FEC’s FOIA Service Center sent Levinthal an email on the same day, February 1, 2017, acknowledging receipt of the @altFEC FOIA request. (SMF ¶ 3.)

On May 2, 2017, the FEC’s FOIA Service Center responded to the FOIA request regarding @altFEC, informing Levinthal that the Service Center was granting his request in part and releasing seven non-exempt responsive pages. (SMF ¶ 4.) The letter also notified Levinthal of the Service Center’s determination to deny his request with respect to fourteen pages of responsive emails, which did not contain any reasonably segregable non-exempt information, pursuant to Exemption 5. (*Id.*) The response letter explained that “Exemption 5 protects from disclosure inter- or intra-agency memoranda or letters covered by the attorney work-product, deliberative process, and attorney-client privileges.” (*Id.* (citing 5 U.S.C. § 552(b)(5)).)

On May 9, 2017, Levinthal formally appealed the FEC FOIA Service Center's "decision to withhold 'fourteen (14) pages of responsive emails, which do not contain any reasonably segregable non-exempt information, in their entirety pursuant to Exemption 5.'" (SMF ¶ 5.) In the appeal, Levinthal asserted "that the @alt_FEC Twitter account is a matter of significant public interest, and that the FEC should act to release these 14 pages to me in the spirit of agency transparency." (*Id.*) On June 6, 2017, the Commission unanimously voted to deny Levinthal's appeal. (SMF ¶ 6.) On June 9, 2017, the FEC sent a letter to Levinthal stating that "the Commission has decided to uphold the FOIA Requester Service Center's determination to withhold the 14 pages pursuant to FOIA Exemption 5 based on the deliberative process privilege. 5 U.S.C. § 552(b)(5). Accordingly, the Commission has decided to deny your FOIA appeal." (SMF ¶ 6.)

II. EOP.gov FREEDOM OF INFORMATION REQUEST

Levinthal also made a separate, unrelated FOIA request to the FEC on February 6, 2017. This second request asked for the following documents, dated from January 20, 2017 to February 6, 2017:

- A copy of all emails from the domain "EOP.gov" to senior managers and commissioners encompassed within the required agency system for retaining emails of senior officials. Frequently, this records management policy/system is described by the name Capstone. <https://www.archives.gov/records-mgmt/grs/grs06-1-faqs.html> If the FEC has not yet established National Archives and Records Administration-compliant email retention procedures, then I instead request an electronic search of the mailboxes of agency senior managers and commissioners for all emails that include the "EOP.gov" phrase in the FROM address.
- A copy of all emails/memoranda/letters/correspondence from White House Counsel Don McGahn to senior managers or FEC commissioners. He may also refer to himself as Donald McGahn and/or Donald F. McGahn.

(SMF ¶ 7.)

After searching its records, the Commission was unable to locate any items in response to the second portion of the request, and thus denied that portion. (SMF ¶ 8.) The Commission also identified fourteen pages of documents that were responsive to the request for emails from the Executive Office of the President's EOP.gov domain, all of which originated with the Office of Management and Budget ("OMB") and dealt with that other agency's areas of responsibility. (*Id.*) In an instance such as this where another agency is exclusively or primarily responsible for the subject matter of the requested documents, or a record is one of another agency, Commission regulations direct the FEC to refer the documents to that other agency for disposition or guidance as to disposition. 11 CFR § 4.5(d). The Commission's regulation is consistent with general Department of Justice guidance, and specific guidance FEC staff received from the Department of Justice FOIA personnel here. (*Dep't of Justice Guide to the Freedom of Information Act* ("DOJ Guide"), Procedural Requirements, at 88 (updated Sept. 4, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf> ("If an agency or component locates entire records originating with another agency or component, it should refer those records to their originator for its direct response to the requester."); SMF ¶ 9.) Therefore, on May 4, 2017, the FEC referred the matter to OMB for that agency to provide a direct response to the requester and included the documents as attachments. (SMF ¶ 9.) On May 8, 2017, the Commission informed Levinthal that it had referred the matter to OMB's FOIA Office. (*Id.*)

Also on May 8, Trent Holbrook, an attorney from OMB, sent an email acknowledging that he had received the email from the FEC, stated that OMB would respond soon, and indicated that OMB would be treating the FEC's communication about the documents as a consultation rather than a referral. (SMF ¶ 10 (citing Memorandum from Associate Attorney General

Webster L. Hubbell (Nov. 3, 1993), <https://www.justice.gov/oip/blog/foia-update-foia-memo-white-house-records>.) OMB thus indicated that it would provide guidance but would ultimately ask the FEC to send the responsive materials to the requester. *See, e.g., Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1118 (D.C. Cir. 2007) (distinguishing referrals under FOIA from consultations). The FEC followed up with OMB on several occasions in subsequent months. OMB at one time was unable to locate the referral and at another point an assigned staff person departed the agency, but OMB personnel later confirmed that the agency would review the requested materials. (SMF ¶ 11.) On September 7, 2017, OMB provided its response to the FEC, including limited suggested redactions pursuant to FOIA Exemptions 5 and 6, and on that same date the FEC provided the responsive documents to Levinthal with the redactions OMB had proposed. (SMF ¶ 12.)

ARGUMENT

I. STANDARD OF REVIEW

FOIA matters are typically resolved on motions for summary judgment. *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011). For a claim brought under FOIA seeking to enjoin an agency from withholding an agency record, such as the claim in this case regarding the @altFEC FOIA request, the district court “shall determine the matter de novo.” 5 U.S.C. § 552(a)(4)(B); *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).¹

¹ Both of the FOIA requests at issue here were made by Dave Levinthal, a Senior Reporter with plaintiff CPI. As part of its responsibility to establish the Court’s subject matter jurisdiction, CPI will be required to establish that Levinthal adequately identified that he was making the requests on the organization’s behalf in order for CPI to have standing to pursue the claims it makes here. *See, e.g., SAE Prods., Inc. v. FBI*, 589 F. Supp. 2d 76, 80 (D.D.C. 2008).

If an agency withholds responsive documents, it bears the burden of demonstrating the applicability of the claimed FOIA exemptions. *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). The government meets its burden and merits summary judgment when it submits declarations that demonstrate with adequate specificity the reason for the withholding and that “the information withheld logically falls within the claimed exemption.” *Id.* at 619; *see also Davis v. DOJ*, 970 F. Supp. 2d 10, 14 (D.D.C. 2013) (“Summary judgment in a FOIA case may be based solely on information provided in an agency’s supporting affidavits or declarations if they are relatively detailed and non-conclusory . . . and when they describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record [or] by evidence of agency bad faith.”) (alteration in original) (internal citation and quotation marks omitted). “Under FOIA, [s]ummary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.” *Mobley v. Dep't of Justice*, 870 F. Supp. 2d 61, 65 (D.D.C. 2012) (alteration in original) (quoting *Gallant v. NLRB*, 26 F.3d 168,171 (D.C. Cir. 1994)). “Agency affidavits submitted in the FOIA context are . . . ‘accorded a presumption of good faith.’” *Anguimate v. U.S. Dep't of Homeland Sec.*, 918 F. Supp. 2d 13, 17 (D.D.C. 2013) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).²

² The required showing may be made through a Vaughn index. A Vaughn index is a document that lists all withheld records, the specific FOIA exemptions applicable to each, and the agency’s justifications for nondisclosure. *See Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). However, a Vaughn index is not necessary where, as here, the agency has provided “the reviewing court a reasonable basis to evaluate the claim[s] of privilege.” *Judicial Watch, Inc. v.*

Courts have authority to order the release of the records only if they have been “improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). When an agency is sued for failing to timely produce responsive documents due to a referral to another agency, a referral system is deemed an improper withholding only if the referral system significantly impairs or delays requester access and the agency fails to “offer a reasonable explanation for its procedure.” *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

III. THE @altFEC DOCUMENTS ARE PROPERLY WITHHELD PURSUANT TO FOIA EXEMPTION 5

The withheld @altFEC emails are protected from disclosure by FOIA Exemption 5 pursuant to the deliberative process privilege because they are both predecisional and deliberative. FOIA Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Courts have consistently interpreted this language to prevent disclosure of records that would be privileged in the civil discovery context, including records subject to the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006); *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.* 819 F.2d 1181, 1185 (D.C. Cir. 1987); *Marriott Int’l Resorts, L.P. v. United States*, 437 F.3d 1302, 1305 (Fed. Cir. 2006).

U.S. Postal Serv., 297 F. Supp. 2d 252, 257 (D.D.C. 2004) (internal quotation marks omitted); *see also Gallant*, 26 F.3d at 173 (D.C. Cir. 1994) (holding that “production of a Vaughn Index was not necessary given the adequacy of the government’s affidavits”). This memorandum and its supporting declarations adequately identify and describe the emails at issue here, the FOIA exemptions applicable to those documents, and the Commission’s clear justifications for withholding the documents based on those exemptions. *See infra* pp. 7-10.

The general purpose of the deliberative process privilege incorporated by Exemption 5 is to protect an agency’s decision-making process and thereby “prevent injury to the quality of agency decisions.” *Sears, Roebuck & Co.*, 421 U.S. at 150-51. Three policy rationales have consistently been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. *See, e.g., Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Jordan v. DOJ*, 591 F.2d 753, 772-73 (D.C. Cir. 1978).

There are two requirements for agencies to invoke the deliberative process privilege. *See Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). First, the communication must be predecisional — “antecedent to the adoption of an agency policy.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 513 (D.C. Cir. 2011). Second, the communication must be deliberative — “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Documents qualify as predecisional and deliberative if they “reflect[] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981).

A. The Withheld Documents Are Predecisional

The documents that the Commission withheld here are “predecisional” because they reflect FEC attorneys’ discussion of legal issues raised by the @altFEC Twitter account with a view toward later policy decisions. The deliberative process privilege protects predecisional intra-agency documents to encourage a free and open “administrative reasoning process.”

United States v. Exxon Corp., 87 F.R.D. 624, 636 (D.D.C. 1980). Agencies do not necessarily have to point to a specific final decision corresponding with the withheld document when determining whether a document is predecisional. *See, e.g., Gold Anti-Trust Action Comm. Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 136 (D.D.C. 2011); *Wolfe v. Dep't of HHS*, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc) (protecting records that awaited final decision or approval because the release of that information would have the effect of prematurely disclosing “the recommended outcome of the consultative process . . . as well as the source of any decision”). Agencies need only establish “what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

The withheld emails show attorneys at different levels in the FEC’s Office of General Counsel working to identify and analyze potential legal issues that the @altFEC Twitter account might raise. (SMF ¶ 4.) Such deliberations, even if they do not lead to a formal final policy determination, are protected from disclosure by Exemption 5. *See Wolfe*, 839 F.2d at 775; *see also McKinley v. Fed. Deposit Ins. Corp.*, 744 F. Supp. 2d 128, 140 (D.D.C. 2010) (noting that documents showing “[t]he work of the assistants in separating the wheat from the chaff” and selecting certain data or information for consideration by their superiors from the total mass of data available are protect deliberative material because they are predecisional) (quoting *Montrose Chem. Corp. of Cal. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974)), *aff'd sub nom. McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331 (D.C. Cir. 2011) (alteration in original); *Wolfson v. United States*, 672 F. Supp. 2d 20, 30 (D.D.C. 2009) (finding that Exemption 5 applied to documents revealing the “agency’s deliberations prior to the decision to

seek authorization for continued monitoring of oral communications”). Accordingly, the emails meet the “predecisional” requirement for invoking the deliberative process privilege.

B. The Withheld Documents Are Deliberative

The “altFEC” emails that the FEC withheld are also “deliberative” because they reflect legal discussion and advice in a consultative agency process. To be “deliberative,” a document must “reflect[] the give-and-take of the consultative process,” either by assessing the merits of a particular viewpoint, or by articulating the process used by the agency to formulate a decision. *Coastal States*, 617 F.2d at 866. Recommendations and advice are considered deliberative. *Elec. Frontier Found. v. DOJ*, 892 F. Supp. 2d 95, 102 (D.D.C. 2012) (protecting material that “constitutes advice used by decision-makers at the FBI . . . in the context of their efforts to ensure that any [FBI] information-gathering procedures fully comply with the law”) (internal quotations omitted), *aff’d*, 739 F.3d 1 (D.C. Cir.), *cert. denied*, 135 S. Ct. 356 (2014). Agencies do not have to demonstrate specific harm that would result from disclosure, only that release would reveal “pre-decisional, deliberative processes and thoughts” of agency employees. *Judicial Watch Inc. v. U.S. Dep’t of State*, 650 F. Supp. 2d 28, 34 (D.D.C. 2009).

Here, the withheld emails show personnel in the FEC’s Office of General Counsel taking initial steps in the process of formulating a potential response to legal issues, if any, created by the @altFEC Twitter account. (SMF ¶ 4; *see Coastal States*, 617 F.2d at 866 (holding FOIA Exemption 5 protects from disclosure the “give-and-take of the consultative process”).) These initial steps are protected from disclosure under Exemption 5. *Wolfe*, 839 F.2d at 776 (“[W]hen agency opinions are fluid and tentative,” . . . “disclosure could chill discussion [when] subordinates are reporting to superiors.”). Accordingly, the withheld emails also meet the “deliberative” requirement for invoking the deliberative process privilege.

C. A Perceived Public Interest in the Withheld Documents Is Not Relevant to the Exemption 5 Analysis

In the FOIA appeal before the FEC, plaintiff suggested that the documents should be disclosed because of public interest in the Twitter account, but that is wrong. (SMF ¶ 5.) Courts do not account for a FOIA requester's need for the documents in ruling on a privilege's applicability. *See FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983); *Martin*, 819 F.2d at 1184 (“[T]he needs of a particular plaintiff are not relevant to the exemption's applicability.”). Moreover, Exemption 5 does not require a balancing of the public's interests and government's interests, as do some other FOIA exemptions. *Compare Martin*, 819 F.2d at 1184 with *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (discussing the balancing of public interest under Exemption 6). Thus, any argument by plaintiff here that the privilege does not apply to the emails due to the public's interest in the information would be incorrect.

D. The Withheld Documents Do Not Contain Reasonably Segregable, Non-Exempt Factual Information

The withheld “altFEC” emails contain factual material but they were properly withheld in their entirety because the factual material is inextricably intertwined with exempt deliberative material. Although “[g]enerally, factual information is not covered by the deliberative process privilege because the release of factual information does not expose the deliberations or opinions of agency personnel,” courts have allowed agencies to withhold deliberative information if disclosing factual information would divulge the deliberative process. *See DOJ Guide, Procedural Requirements* at 26. In addition, [f]actual information may also be withheld as deliberative material when it is so thoroughly integrated with deliberative material that its disclosure would expose or cause harm to the agency's deliberations. *See Elec. Frontier Found. v. U.S. DOJ*, 739 F.3d 1, 13 (D.C. Cir.), *cert. denied*, 135 S. Ct. 356 (2014). Thus, when factual

material is so mixed in with deliberative material that it would not be possible to release meaningful portions of a document, the entire document is deliberative. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 892 F. Supp. 2d 28, 49 (D.D.C. 2012); *see also Mapother*, 3 F.3d. at 1539 (finding that “the majority of [the report’s] factual material was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action,” and that it therefore fell within the deliberative process privilege). Reasonable segregation of non-exempt information is impossible if it is “inextricably intertwined” with exempt information. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

The applicability of the deliberative process privilege to the underlying facts turns on whether the disclosure of such information would “indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.” *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d at 254. Factual information should be examined “in light of the policies and goals that underlie” the privilege and in “the context in which the materials are used.” *Wolfe*, 839 F.2d at 774. Thus, facts used in developing recommendations to an agency decision-maker are “precisely the type of pre-decisional documents intended to fall under Exemption 5.” *Brannum v. Dominguez*, 377 F. Supp. 2d 75, 83 (D.D.C. 2005).

As discussed above, the factual material contained in the @altFEC documents is properly withheld because it would reveal the type of predecisional information that is used in developing recommendations to a decision-maker and expose internal deliberations. *See SMF* ¶ 4; *Brannum*, 377 F. Supp. 2d at 83. Any factual material conveyed in these emails would, on its own, expose internal FEC deliberations regarding the @altFEC Twitter account. *See Elec. Frontier Found.*, 739 F.3d at 12-13 (finding that a document, including factual material, “reflects

the full and frank exchange of ideas” such that even the factual portions “could not be released without harming the deliberative processes of the government”); *Elec. Privacy Info. Ctr.*, 892 F. Supp. 2d at 49 (factual material that is so “inextricably intertwined with deliberative portions of the withheld records” can be withheld). Accordingly, since the withheld documents do not contain reasonably segregable, non-exempt factual information that may be released to the requester, they are properly withheld in full.

E. The Withheld Documents Are Not Appropriate for Discretionary Release

Recent amendments to FOIA require agencies to examine responsive documents to determine whether the agency can release them discretionally even if they are protected by a FOIA exemption, but the “altFEC” materials are not appropriate for such a release. FOIA now directs agencies to withhold information only if “the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “when disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A). Agencies consider two “universal factors” in determining whether to make a discretionary release: “the age of the record and the sensitivity of its contents.” DOJ Guide, Discretionary Disclosure, at 6 (posted Dec. 8, 2014), https://www.justice.gov/sites/default/files/oip/pages/attachments/2014/12/08/discretionary_disclosure_sent_for_posting_december_5_2014.pdf. When deciding whether to make a discretionary release of records protected by the deliberative process privilege, agencies should also consider “the nature of the decision at issue, the status of that decision, and the personnel involved.” *Id.*

Here, the documents at issue are very recent and relate to OGC’s response to the still active @altFEC account.³ Consequently, the substance of the documents is also highly sensitive. Discretionary release would thus contradict the policy rationales that are the bases for this

³ The most recent tweet from the “altFEC” Twitter account was on September 6, 2017, the day before this brief was filed.

privilege. *Id.* Release of emails such as these could chill free and open communication of ideas between agency subordinates and superiors, which the deliberative process privilege is intended to protect. Moreover, given the predecisional nature of the emails, discretionary release would prematurely disclose potential policies and relevant analysis which may underpin any subsequent decisions about the @altFEC account. Accordingly, disclosure would be contrary to the rationales for releasing such documents discretionarily.

IV. THE GOVERNMENT NEITHER IMPROPERLY WITHHELD NOR UNREASONABLY DELAYED ITS REVIEW OF THE REQUESTED EOP.GOV EMAILS TO THE FEC

The Commission has also acted lawfully in responding to the second FOIA request at issue in this case, which concerns certain emails from the domain for the Executive Office of the President, “EOP.gov.” (SMF ¶ 7 (quoting email from Dave Levinthal (Feb. 6, 2017).) The FEC diligently conducted a search for records responsive to this request and located four emails, totaling fourteen pages. (SMF ¶ 8.) Because all of the responsive documents originated at OMB and deal with subject matter for which that other agency has responsibility, in May 2017 the FEC referred the documents to OMB for disposition, and the Commission repeatedly followed up with that agency to ensure that the requester would receive a determination as soon as OMB was able to respond. On September 7, 2017, OMB provided its response to the FEC, including limited suggested redactions pursuant to FOIA Exemptions 5 and 6, and on that same day the FEC provided the responsive documents to Levinthal with the redactions OMB had proposed. Plaintiff claims that the previous failure to produce the records was unlawful (Compl. ¶ 15), but this Court only has authority to order the release of the records if they have been “improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). The records were not improperly withheld because the FEC followed a reasonable procedure in referring the matter to OMB,

conscientiously made efforts to obtain a response, and ultimately released them to the requester.

Judgment should be awarded in the Commission's favor.

A. The FEC's Lawful Referral of the Request for EOP.gov Emails Means That the Agency Did Not Improperly Withhold Them

After determining that the responsive documents originated with another agency, namely OMB, the FEC followed its regulations as well as DOJ guidance and referred requests to the agency with responsibility over the subject matter and from which the documents originated. *See* 11 CFR § 4.5(d); *Sussman v. U.S. Marshals Serv.*, 494 F.3d at 1118 (rejecting argument that referrals of FOIA requests are impermissible); *Keys v. Dep't of Homeland Sec.*, 570 F. Supp. 2d 59, 66–67 (D.D.C. 2008) (“[A]n agency may adopt procedures by which documents in the agency's possession, but which did not originate with the agency, may be referred to the originating agency for processing.”) (citing *McGehee*, 697 F.2d at 1110); DOJ Guide, Procedural Requirements, at 88. This referral and the FEC's general referral procedure are reasonable because OMB is the agency in the best position to determine whether these documents can be produced. Courts may order agencies to produce only records that have been “improperly withheld from the complainant,” 5 U.S.C. § 552(a)(4)(B), and the referred documents were not improperly withheld.

Though OMB preferred that the FEC ultimately provide any response to the requester (thereby treating the “referral” as a “consultation” in FOIA parlance), OMB indicated that it wished to be consulted regarding determinations about possible release. (SMF ¶ 10.) OMB thus demonstrated an “intent to control” the documents, an indicator the referral was reasonable. *Keys*, 570 F. Supp. 2d at 67 (citing *McGehee*, 697 F.2d at 1011). The FEC's referral was also reasonable because it was prompt and public, with immediate notification to the requester

Levinthal. SMF ¶ 9; *Keys*, 570 F. Supp. 2d at 67 (describing the “prompt and public” requirement) (quoting *McGehee*, 697 F.2d at 1011).

The Commission has further submitted an explanation of the procedures the FEC follows and how those procedures were followed in this case. SMF ¶ 9; see *Snyder v. Cent. Intelligence Agency*, 230 F. Supp. 2d 17, 24-25 (D.D.C. 2002) (holding that there was no improper withholding because the CIA “submitted declarations articulating with specificity the procedures followed by the CIA when referring or coordinating document requests with third-party agencies”).

FOIA permits agencies to consult with other agencies having a substantial interest in requested documents. See 5 U.S.C. § 552(a)(6)(B)(iii)(III). The FEC was thus permitted by FOIA to consult with OMB before making any determination regarding the emails it had sent. The referral thus did not increase the time by which the FEC could have responded to the request because it would have been permitted to await OMB’s approval through the consultation process anyway; indeed, OMB announced its intention to treat the matter as a consultation. The FEC’s referral to OMB thus has not significantly impaired or delayed the requester’s ability to obtain the documents, and it does not constitute “withholding.” *McGehee*, 697 F.2d at 1110. Permitting OMB the opportunity to make determinations regarding emails it sent involving matters for which it has exclusive or primary jurisdiction also “significantly improves the quality of the process whereby the government determines whether all or portions of responsive documents are exempt from disclosure.” *Id.* And the Commission has offered “a reasonable explanation for its procedure” and shown that the referral was “reasonable under the circumstances”; even if the government could be deemed to be “withholding” the documents at this juncture, the withholding would thus not be “improper.” *Id.*; see *Or. Nat. Desert Ass’n v.*

Gutierrez, 409 F. Supp. 2d 1237, 1250 (D. Or. 2006) (concluding that a referral regulation did “not significantly impair the ability to get records” in part due to a lack of “evidence that consultation with the other agencies, rather than a complete referral, would shorten the response time”); *Gahagan v. U.S. Citizenship and Immigration Servs.*, 111 F. Supp. 3d 754, 763 (E.D. La. 2015) (finding that a “referral [that] has not significantly increased the amount of time” the requester must wait did “not constitute an improper withholding”).

Finally, the FEC did not abandon any obligations to the requester. Once alerted to OMB’s decision to treat the matter as a consultation, and OMB’s misplacement at one point of the identified records the Commission had sent, the Commission repeatedly followed up to ensure that OMB was able to provide guidance as to the disposition of the request for the emails it had sent as soon as possible. (SMF ¶ 11.) And when OMB provided its response to the FEC on September 7, 2017, including limited suggested redactions pursuant to FOIA Exemptions 5 and 6, the FEC provided the responsive documents to Levinthal with the redactions OMB had proposed on the same day. (SMF ¶ 12.)

In light of the FEC’s reasonable procedures in referring the EOP.gov request to OMB and the FEC’s diligent efforts to advance consideration of the request for information, the FEC’s conduct does not constitute an improper withholding under the applicable law.

B. The Government Did Not Unreasonably Delay in Responding to the Request for EOP.gov Emails

The request for emails from the Executive of the President was handled with reasonable dispatch. Approximately seven months elapsed between the time the request was made and the time all of the responsive documents were provided to the requester. As explained above, during that period the Commission completed its search and issued a determination for one portion of the request that has not been challenged, identified the fourteen pages that were responsive to the

other portion of the request, and instigated the process of consideration by OMB, an agency with an extensive volume and substantial backlog of freedom of information requests. That is an acceptable pace for handling of the particular request at issue here.

As an initial matter, production of the records was not unlawfully delayed merely because the production of documents happened after the 20-day FOIA determination period passed. The statutory requirement that an agency has 20 days to make a determination about a FOIA request, 5 U.S.C. § 552(a)(6)(A)(i), is “distinct from the act of *producing* the requested records.” *Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 40–41 (D.D.C. 2014). Furthermore, if an agency fails to make a determination within the statutory period, the law does require the agency to produce the documents immediately, but merely prevents the agency from relying on an administrative exhaustion defense to keep a requester from suing. *Id.* In this case, the FEC has not raised an administrative exhaustion defense, so the fact that the statutory deadline for a determination has passed has no additional significance with respect to this Court’s determination.

Beyond that initial period, the seven months that the requester waited was reasonable under the circumstances. *See Waterkeepers All. v. U.S. Coast Guard*, No. 13-289 (RMC), 2014 WL 5351410, *10 (D.D.C. Sept. 29, 2014) (finding a wait of over two years for a response from the referred agency did not constitute “withholding”); *Gahagan*, 111 F. Supp. 3d at 763 (finding reasonable that 33 pages of referred documents had not been produced five months after a request had been submitted); *Gutierrez*, 409 F. Supp. 2d at 1250 (finding reasonable that referred documents had not been produced more than seven months after submission of the request). Any identified records in response to a request for emails sent from the Executive Office of the President were inevitably going to require the Commission to work with an agency with a

massive FOIA volume. OMB has many other FOIA requests in its queue and the government did not unreasonably delay before responding to the request at issue here.

CONCLUSION

For all the foregoing reasons the Court should grant the Commission's motion and award judgment to the Commission.

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
l Stevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

Respectfully submitted,

/s/ Seth Nesin

Seth Nesin
Attorney
snesin@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

September 7, 2017

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

<hr/>)	
CENTER FOR PUBLIC INTEGRITY,))	
))	
Plaintiff,))	Civ. No. 17-1162 (CRC)
))	
v.))	
))	STATEMENT OF
FEDERAL ELECTION COMMISSION,))	MATERIAL FACTS
))	
Defendant.))	
<hr/>)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Federal Rule of Civil Procedure 56(c) and Local Civil Rule 7(h)(1), the Federal Election Commission (“FEC”) submits the following Statement of Material Facts as to Which There Is No Genuine Dispute:

1. The FEC is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act (“FECA”), 52 U.S.C. §§ 30101-30146.
2. On February 1, 2017, the FEC received a Freedom of Information Act (“FOIA”) request from Dave Levinthal of the Center for Public Integrity (“CPI”), seeking for the period from January 19, 2017 through February 1, 2017 inclusive:

Any emails, memoranda or other correspondence or communication that discuss, mention, reference or otherwise pertain to the Twitter account “altFEC.” This includes direct mention of the account “@altFEC”, as well as other obvious references to the @altFEC account, which should include, but not be limited to: “alt FEC Twitter,” “alt FEC account” and “fake @FEC account.”

(Decl. of Katie A. Higginbothom (“Higginbothom Decl.”) ¶ 2, Sept. 7, 2017; FOIA Request, Email from Dave Levinthal, Center for Public Integrity (Feb. 1, 2017), Exh. A to Higginbothom Decl.; *see also* Complaint (“Compl.”) (Docket No. 1) ¶ 6.)

3. The FEC’s FOIA Service Center sent Levinthal an email on the same day, February 1, 2017, acknowledging receipt of the @altFEC FOIA request. (Higginbothom Decl. ¶ 4; Acknowledgment Email from Christopher Mealy, FEC FOIA Requester Service Center (Feb. 1, 2017), Exh. B to Higginbothom Decl.)

4. On May 2, 2017, the FEC’s FOIA Service Center responded to the “altFEC” FOIA request. The response letter informed Levinthal that the FOIA Service Center was releasing seven non-exempt responsive pages, so his FOIA request was “granted in part.” (Higginbothom Decl. ¶ 7; FOIA Response Email from Patricia Washington, FEC FOIA Requester Service Center (May 2, 2017), Exh. C to Higginbothom Decl.) However, the response also notified Levinthal of the Service Center’s determination to deny the request with respect to fourteen pages of responsive emails, which did not contain any reasonably segregable non-exempt information, pursuant to FOIA Exemption 5. (Higginbothom Decl. ¶ 7; FOIA Response Email from Patricia Washington, FEC FOIA Requester Service Center (May 2, 2017), Exh. C to Higginbothom Decl.; *see also* Compl. ¶ 7.) The 14 pages of withheld emails consisted of communications among attorneys at different levels in the FEC’s Office of General Counsel working to identify and analyze potential legal issues that the “altFEC” Twitter account might raise. (Higginbothom Decl. ¶ 6.) The response letter explained that “Exemption 5 protects from disclosure inter- or intra-agency memoranda or letters covered by the attorney work-product, deliberative process, and attorney-client privileges.” (Higginbothom Decl. ¶ 7; FOIA Response

Email from Patricia Washington, FEC FOIA Requester Service Center (May 2, 2017), Exh. C to Higginbothom Decl. (citing 5 U.S.C. § 552(b)(5).)

5. On May 9, 2017, Levinthal formally appealed the FEC FOIA Service Center's "decision to withhold 'fourteen (14) pages of responsive emails, which do not contain any reasonably segregable non-exempt information, in their entirety pursuant to Exemption 5.'" (Higginbothom Decl. ¶ 8; FOIA Appeal, Email from Dave Levinthal, Center for Public Integrity (May 9, 2017), Exh. D to Higginbothom Decl.; *see also* Compl. ¶ 8.) In the appeal, Levinthal asserted "that the @alt_FEC Twitter account is a matter of significant public interest, and that the FEC should act to release these 14 pages to me in the spirit of agency transparency." (Higginbothom Decl. ¶ 8; FOIA Appeal, Email from Dave Levinthal, Center for Public Integrity (May 9, 2017), Exh. D to Higginbothom Decl.)

6. On June 6, 2017, the Commission unanimously voted to deny Levinthal's appeal. (Higginbothom Decl. ¶ 9; Certification (June 6, 2017), Exh. E to Higginbothom Decl.) The FEC then sent a June 9, 2017 letter to Levinthal stating that "the Commission has decided to uphold the FOIA Requester Service Center's determination to withhold the 14 pages pursuant to FOIA Exemption 5 based on the deliberative process privilege. 5 U.S.C. § 552(b)(5). Accordingly, the Commission has decided to deny your FOIA appeal." (Higginbothom Decl. ¶ 9; Email from Robert M. Kahn, FEC FOIA Requester Service Center (May 9, 2017), Exh. F to Higginbothom Decl.; *see also* Compl. ¶ 8.)

7. Levinthal also made a separate, unrelated FOIA request to the FEC on February 6, 2017. The request asked for the following documents, dated from January 20, 2017 to February 6, 2017:

- A copy of all emails from the domain "EOP.gov" to senior managers and commissioners encompassed within the required agency system for

retaining emails of senior officials. Frequently, this records management policy/system is described by the name Capstone. <https://www.archives.gov/records-mgmt/grs/grs06-1-faqs.html> If the FEC has not yet established National Archives and Records Administration-compliant email retention procedures, then I instead request an electronic search of the mailboxes of agency senior managers and commissioners for all emails that include the “EOP.gov” phrase in the FROM address.

- A copy of all emails/memoranda/letters/correspondence from White House Counsel Don McGahn to senior managers or FEC commissioners. He may also refer to himself as Donald McGahn and/or Donald F. McGahn.

(Higginbothom Decl. ¶ 10; Email from Dave Levinthal (Feb. 6, 2017), Exh. G to Higginbothom Decl.; *see also* Compl. ¶ 11.)

8. After searching FEC records, the FOIA Service Center was unable to locate any items in response to the second portion of Levinthal’s February 6 request, and thus it denied that portion. (Higginbothom Decl. ¶ 11.) The Service Center also identified fourteen pages of documents that were responsive to the request, specifically emails from the Executive Office of the President’s EOP.gov domain, all of which originated with the Office of Management and Budget (“OMB”) and dealt with that other agency’s areas of responsibility. (Higginbothom Decl. ¶ 11.)

9. In an instance where another federal agency is exclusively or primarily responsible for the subject matter of requested documents, or a record is one of another agency, Commission regulations direct the FEC to refer the documents to that other agency for disposition or guidance as to disposition. 11 C.F.R. § 4.5(d). The Commission’s regulation is consistent with general Department of Justice guidance and specific guidance FEC staff received from the Department of Justice FOIA personnel here. (Higginbothom Decl. ¶ 12; *Dep’t of Justice Guide to the Freedom of Information Act* (“DOJ Guide”), Procedural Requirements, at 88 (“If an agency or component locates entire records originating with another agency or

component, it should refer those records to their originator for its direct response to the requester.”.) Therefore, on May 4, 2017, the FEC referred the matter to OMB, with copies of the documents at issue, for that agency to provide a direct response to the requesters. (Higginbothom Decl. ¶ 12; Letter from Katie A. Higginbothom to Sarah Whittle Spooner (May 4, 2017), Exh. H to Higginbothom Decl.) On May 8, 2017, the Commission informed Levinthal that it had referred the matter to OMB’s FOIA Office. (Higginbothom Decl. ¶ 12; Email from Robert Kahn to Dave Levinthal (May 8, 2017), Exh. I to Higginbothom Decl.; *see also* Compl. ¶ 12.)

10. Also on May 8, Trent Holbrook, an attorney from OMB, sent an email acknowledging that he had received the email from the FEC, stated that OMB would respond soon, and indicated that OMB would be treating the FEC’s communication about the documents as a consultation rather than a referral, pursuant to a 1993 memorandum indicating that agencies receiving requests for certain White House-originated records in their files should “respond[] directly to the FOIA requester once these EOP consultations have been completed.” (Higginbothom Decl. ¶ 13; Email from Trent W. Holbrook to FEC (May 8, 2017), Exh. J to Higginbothom Decl. (citing Memorandum from Associate Attorney General Webster L. Hubbell (Nov. 3, 1993) at <https://www.justice.gov/oip/blog/foia-update-foia-memo-white-house-records>.)

11. Attorneys from the FEC followed up with OMB numerous times concerning the status of OMB’s review. A member of the FEC’s Administrative Law team emailed OMB on June 5, 2017 to resend copies of the documents after OMB indicated, in response to requester’s inquiry, that it did not have a record of receiving the material. (Higginbothom Decl. ¶ 13.) FEC’s litigation counsel in this case emailed, left voicemails, or spoke with various OMB FOIA

personnel about this matter on: June 27 and 29; July 26; August 2, 17, 24, and 31; and September 5, 6 and 7, 2017. (Nesin Decl. ¶ 3.) In its responses to these contacts, OMB conveyed that it had not yet completed its response to the request due to an extensive FOIA backlog and staff turnover within the agency's FOIA department, including the departure of the attorney who had originally responded to the FEC, but that the department intended to respond as quickly as possible. (Nesin Decl. ¶ 4.)

12. On September 7, 2017, OMB provided its response to the FEC, including limited suggested redactions pursuant to FOIA Exemptions 5 and 6, and the FEC promptly provided the fourteen pages of responsive documents to Levinthal with the redactions OMB had proposed. (Higginbothom Decl. ¶ 14; Email from Robert M. Kahn to Levinthal (Sept. 7, 2017), Exh. K to Higginbothom Decl.)

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

Respectfully submitted,

/s/ Seth Nesin
Seth Nesin
Attorney
snesin@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

September 7, 2017