IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, and **THE ASSOCIATED PRESS** Plaintiffs, v. **FEDERAL BUREAU OF INVESTIGATION**, and **UNITED STATES DEPARTMENT OF JUSTICE** Defendants.	Civil Action No. 15-cv-01392 (RJL)
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS Plaintiff, v. **FEDERAL BUREAU OF INVESTIGATION**, and **UNITED STATES DEPARTMENT OF JUSTICE** Defendants.	Civil Action No. 18-cv-00345 (RJL)

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7, and in accordance with the Minute Order entered by this Court on April 23, 2019, the Reporters Committee for Freedom of the Press ("Reporters Committee" or "RCFP") and The Associated Press ("AP") (collectively,

"Plaintiffs") respectfully move the Court for summary judgment in their favor and against the Federal Bureau of Investigation ("FBI") and the United States Department of Justice ("DOJ") (collectively, "Defendants") as to Defendants' improper withholding of records in response to requests made by Plaintiffs pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

In support of this Motion for Summary Judgment ("Motion") and in Opposition to Defendants' Motion for Summary Judgment, Plaintiffs submit the following: (1) Memorandum of Law; (2) Statement of Material Facts as to Which There Is No Genuine Issue and Response to Defendants' Statement of Material Facts; and (3) Declaration of Katie Townsend.

This Motion is based on the concurrently filed Memorandum of Law, all pleadings, records, and files in the above-captioned case, and on such argument as may be presented by counsel at any hearing on this Motion. A proposed order is filed concurrently herewith.

Plaintiffs respectfully request an oral hearing on their Motion pursuant to Local Rules 7(f) and 78.1 at a date and time that is convenient for the Court.

Dated: July 25, 2019

Respectfully submitted,

/s/ Katie Townsend
Katie Townsend
DC Bar No. 1026115
Jennifer A. Nelson
DC Bar No. 1011387
Adam A. Marshall
DC Bar No. 1029423
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
E-mail: ktownsend@rcfp.org

E-mail: jnelson@rcfp.org

Counsel for Plaintiffs

Of Counsel for The Associated Press:
Karen Kaiser
Brian Barrett
THE ASSOCIATED PRESS
450 West 33rd Street
New York, NY 10001
Telephone: 212.621.7547
Facsimile: 212.506.6131
E-mail: kkaiser@ap.org
E-mail: bbarrett@ap.org

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MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Pursuant to Fed. R. Civ. P. 56 and Local Rules 7(a), 7(b), 7(h), & 56.1, Plaintiffs Reporters Committee for Freedom of the Press (the "Reporters Committee" or "RCFP") and The Associated Press ("AP") (collectively "Plaintiffs"), by and through their undersigned counsel, hereby submit this Memorandum of Law in Opposition to the Motion for Summary Judgment filed by Defendants U.S. Department of Justice ("DOJ") and Federal Bureau of Investigation ("FBI") (collectively "Defendants") and in support of Plaintiffs' Cross-Motion for Summary Judgment. For the reasons set forth herein, this Court should deny Defendants' Motion for Summary Judgment and enter summary judgment in Plaintiffs' favor.

INTRODUCTION

This consolidated case combines two separate actions concerning four requests submitted by RCFP and the AP under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act"). Plaintiffs' FOIA requests seek records related to a matter of significant public interest: the FBI's practice of impersonating members of the news media.

Plaintiffs submitted the first three FOIA requests in October and November 2014 (the "2014 Requests"), shortly after it came to light that in 2007 the FBI had posed as the AP to successfully deliver malicious software to a criminal suspect in Seattle, Washington (the "Seattle/Timberline Incident"). Having received no response to those requests, Plaintiffs filed suit against Defendants in 2016. After that lawsuit was filed, the FBI searched for, processed, and released records in response to the 2014 Requests. The parties subsequently cross-moved for summary judgment and, on February 23, 2017, the Court granted summary judgment in favor of Defendants. Plaintiffs thereafter successfully appealed this Court's ruling as to the adequacy of the FBI's search for records responsive to their three FOIA requests to the D.C. Circuit.

Shortly before the D.C. Circuit issued its December 2017 ruling remanding the first action to this Court for further proceedings, the Reporters Committee submitted an additional FOIA request to the FBI seeking more recent records that had been created since Plaintiffs' original requests were submitted in 2014, as well as several additional categories of records not sought by the 2014 Requests. The Reporters Committee filed suit against Defendants in February 2018, seeking the records responsive to this FOIA request (the "2017 Request"). Shortly thereafter, Plaintiffs moved to consolidate RCFP's new lawsuit with Plaintiffs' earlier case, which had been remanded by the D.C. Circuit, a request that was granted by the Court.

Having processed the records it deemed responsive to the four FOIA requests at issue, Defendants now move for summary judgment for a second time, asserting that the Third Declaration of David M. Hardy, ECF No. 48-3 at Ex. L (the "Third Hardy Declaration" or "Third Hardy Decl.") and the Declaration of Deborah M. Waller, ECF No. 43-4 (the "Waller Declaration" or "Waller Decl.") establish that the FBI properly withheld 283 pages in their entirety, as well as portions of 244 pages, of the records it located and processed following remand from the D.C. Circuit. Defendants further argue that Plaintiffs should be precluded from challenging withholdings purportedly made pursuant to the same exemptions that Defendants asserted in their prior summary judgment briefing. As detailed herein, Defendants' declarations and arguments are facially inadequate, ignore key changes to FOIA and caselaw interpreting it, and cannot support summary judgment in Defendants' favor.

As an initial matter, the law of the case doctrine and collateral estoppel are wholly inapplicable here. *None* of the supplemental records produced by the FBI to Plaintiffs for the first time following remand—the only records at issue now—were at issue in the prior summary judgment proceedings that were before this Court in 2016; they are completely different records.

The propriety of the FBI's withholding of these records either in whole or in part has never been before this Court, which is bound to review the agency's actions *de novo*. 5 U.S.C. § 552(a)(4)(B). Defendants fail to cite a single case supporting its assertion that a FOIA plaintiff may be precluded from challenging the withholding or redaction of responsive records simply because an agency chose to rely on the same exemptions to withhold material from *different records* in an earlier round of summary judgment briefing. Further, Congress's enactment of the "foreseeable harm" standard in the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, is an intervening change in the law that precludes application of the law of the case or collateral estoppel doctrine.

As to the merits, Defendants fail to provide sufficient information for the Court to make a "responsible *de novo* determination" as to whether the vast majority of records they have withheld fall within one of FOIA's exemptions. *Lesar v. Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980). The declarations filed by Defendants do little more than recite statutory standards and provide conclusory, generic descriptions of withheld records; they make no attempt to provide a "separate," "itemized explanation"—let alone one of "adequate specificity"—for each of the withholdings at issue. *Vaughn v. Rosen*, 484 F. 2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). And, despite the fact that a significant portion of the material identified by Defendants as responsive has been withheld *in full*, Defendants' declarations offer nothing more than the conclusory assertion that no portion of those withheld pages are segregable. *See* 5 U.S.C. § 552(b); *see also Campbell v. Dep't of Justice*, 164 F.3d 20, 31 (D.C. Cir. 1998) (". . . a conclusory assertion that material is exempt and nonsegregable is insufficient to support nondisclosure").

Finally, glaringly absent is any attempt by Defendants to comply with the requirements of the Act's "foreseeable harm" standard, which is applicable to all records responsive to the FOIA request submitted by the Reporters Committee in December 2017. This 2016 addition to the Act sharply curtails an agency's ability to withhold information under FOIA's "discretionary" exemptions, including Exemption 5's carve-out for deliberative materials at issue here. Indeed, the phrase "foreseeable harm" is *nowhere to be found* in Defendants' Memorandum of Law in Support of its Motion for Summary Judgment ("Defs. Br.") or the Waller Declaration, and is only cursorily referenced in the Third Hardy Declaration. *See* Third Hardy Decl. ¶ 86. This, alone, prohibits summary judgment in Defendants' favor.

As demonstrated below, Defendants fail to meet their burden to justify the withholding of material located and processed, for the first time, following remand from the D.C. Circuit. The Court should deny Defendants' motion and enter summary judgment for Plaintiffs as to the propriety of those redactions and withholdings.

BACKGROUND

A. The FBI's impersonation of the AP.

In October 2014, it came to light that the FBI had masqueraded as an AP journalist in 2007 during its investigation of a 15-year-old student suspected of sending anonymous bomb threats to administrators at Timberline High School outside Seattle, Washington. Plaintiffs' Combined Statement of Material Facts as to which there is no Genuine Issue and Response to Defendants' Statement of Material Facts (hereinafter, "SMF") ¶¶ 58–60. Among other things, the FBI crafted a fake AP news story and sent the suspect a link to the article in order to deliver a certain type of malicious computer software, known as a CIPAV, to the suspect's computer. SMF ¶¶ 59–60; *see also* Declaration of Katie Townsend (the "Townsend Decl.") ¶¶ 10–11 & Exs. E–F.

When the FBI's impersonation of the AP came to light, it sparked an outcry from members of the press and the public. SMF ¶¶ 61–62; Townsend Decl. ¶¶ 12–13 & Exs. G–H. The incident also prompted inquiries from high ranking members of Congress. SMF ¶ 63. On November 6, 2014, in response to the public backlash, *The New York Times* published a letter to the editor from then-FBI Director James Comey that acknowledged and defended the FBI's use of media impersonation as an investigative technique. SMF ¶ 64; Townsend Decl. ¶ 6 & Ex. A. In particular, then-Director Comey stated that the FBI's impersonation of an AP journalist "was proper and appropriate under Justice Department and FBI guidelines at the time" and that impersonation of journalists is a "lawful and, in a rare case, appropriate" FBI practice. *Id.*

B. Plaintiffs' FOIA Requests.

The Reporters Committee and the AP submitted three FOIA requests to the FBI in October and November 2014 (the "2014 Requests"), seeking essentially three categories of records: (1) records concerning the Seattle/Timberline incident; (2) records concerning other instances where the FBI has impersonated a member of the news media or used links to news media articles in order to deliver malware to a suspect; and (3) the guidelines and policies governing the FBI's impersonation of the news media (collectively, the "First FOIA Requests"). SMF ¶¶ 1, 7, 9.

The Reporters Committee's First FOIA Requests

On October 31, 2014, the Reporters Committee submitted two separate FOIA requests to the FBI's central FOIA Office. SMF ¶¶ 7, 9. The first request sought:

> all records concerning the FBI's utilization of links to what are or appear to be news media articles or news media websites to install data extraction software, remote access search and surveillance tools, or the 'Computer an Internet Protocol Address Verifier' (CIPAV).

SMF ¶ 9.

The second request sought:

> all records concerning the FBI's guidelines and policies concerning undercover operations or activities in which a person may act as a member of the news media, including, but not limited to, the guidelines and policies relating to the criminal and national security undercover operations review committees and the Sensitive Operations Review Committee; guidelines and policies concerning the use of investigative methods targeting or affecting the news media, including, but not limited to, sensitive Title III applications; and all guidelines and policies concerning sensitive investigative matters involving the activities of the news media or relating to the status, involvement, or impact of an investigation upon the news media.

SMF ¶ 7. The Reporters Committee's First FOIA Requests included a request for a fee benefit as a representative of the news media under 5 U.S.C. § 552(a)(4)(A), as well as a request for a fee waiver. SMF ¶¶ 8, 10.

The AP's FOIA Request

On November 6, 2014, Raphael Satter, a journalist with the AP, submitted a FOIA request to the FBI's central FOIA Office and its Seattle Division seeking:

> (1) Any documents referring to the decision to create the fake AP news article in the Timberline High School case. In particular, I seek correspondence between the FBI's Seattle office and FBI headquarters about the case. I also seek a copy of the internal review carried out by the FBI and a copy of the Web link sent by the FBI to suspect in 2007;
>
> (2) An accounting of the number of times, between Jan. 1, 2000 and Nov. 6, 2014, that the Federal Bureau of Investigation has impersonated media organizations or generated media-style material (including but not limited to emails, webpages or links) to deliver malicious software to suspects or anyone else caught up in an investigation; and
>
> (3) Any documents – including training material, reviews and policy briefings – dealing with the creation and deployment of bogus news stories or media-style material in an investigative context.

SMF ¶ 1. The AP Request asked for a fee benefit as a representative of the news media, a fee waiver, and for expedited processing. SMF ¶ 2.

C. Civil Action No. 15-1392, and the decision on appeal.

No records were produced to either the Reporters Committee or the AP following the submission of the 2014 Requests, and Plaintiffs filed suit on August 27, 2015. *See* Compl., *Reporters Comm. for Freedom of the Press v. FBI*, No. 15-cv-1392 (D.D.C. Aug. 27, 2015) (the "2015 Matter"). After the 2015 Matter was filed, the FBI released 186 pages of responsive records; 59 pages were withheld in their entirety, and 103 pages were released with significant redactions. SMF ¶ 16.

The parties thereafter cross-moved for summary judgment. The Court granted Defendants' motion for summary judgment on February 23, 2017. Memorandum Opinion at 9, 11–15, 2015 Matter, ECF No. 27. The Court concluded, *inter alia*, that the FBI had established that its search for records in response to the 2014 Requests was adequate. *Id*.

Plaintiffs timely appealed, challenging the Court's ruling as to the sufficiency of the FBI's search for records responsive to their 2014 Requests. *Reporters Comm. for Freedom of the Press v. FBI*, 877 F.3d 399 (D.C. Cir. 2017). On December 15, 2017, the D.C. Circuit reversed and remanded, concluding that Defendants had not satisfied their burden to establish that the FBI conducted an adequate search. *Id.* at 408. The D.C. Circuit concluded, *inter alia*, that the record demonstrated that the FBI Director's Office was "intimately involved" in the agency's response to news of the Seattle/Timberline Incident in 2014 and, thus, that the FBI should have, but failed to, search the Director's Office for responsive records. *Id.* at 406–07. The case was remanded to this Court on February 8, 2018. Mandate, *Reporters Comm. for Freedom of the Press v. FBI*, No. 17-5042 (D.C. Cir. Feb. 8, 2018).

D. The report issued by the Office of the Inspector General for the Department of Justice.

While the parties were cross-moving for summary judgment in the 2015 Matter, it became public that the Office of the Inspector General for the Department of Justice ("OIG") had investigated the FBI's impersonation of the AP in the Seattle/Timberline Incident. SMF ¶ 65. The resulting report (the "OIG Report"), released in September 2016, revealed that the FBI had issued new interim guidelines for impersonating members of the news media or a documentary film crew. *Id.*; *see also* Office of the Inspector General, U.S. Department of Justice, *A Review of the FBI's Impersonation of a Journalist in a Criminal Investigation* (2016), https://oig.justice.gov/reports/2016/o1607.pdf. The interim guidelines, referred to as Policy Notice ("PN") 0907N, instructed agents on new procedures they must follow before posing as a member of the news media or documentary film crew. *Id.*

E. Civil Action No. 18-345 and the consolidation of actions.

While Plaintiffs' appeal was pending in the D.C. Circuit, on December 5, 2017, the Reporters Committee submitted an additional FOIA request to the FBI (the "2017 Request"). SMF ¶ 29. The 2017 Request sought:

> all records consisting of, reflecting, referencing, or discussing the FBI's utilization of links to what are or appear to be news media articles or news media websites to install data extraction software, remote access search and surveillance tools, or the "Computer and Internet Protocol Access Verifier" ("CIPAV") since November 1, 2014;
>
> all records consisting of or reflecting the FBI's guidelines and policies concerning undercover operations or activities in which a person may act as a member of the news media, since November 1, 2014;
>
> the FBI's Interim Policy Notice (PN) 0907N, adopted on or about June 7, 2016, and titled "Undercover Activities and Operations – Posing as a Member of the News Media or Documentary Film Crew" (the "Interim Policy Notice");
>
> the "comments" provided by the FBI to the Department of Justice Office of the Inspector General in response to a draft of the IG Report;

> any and all records consisting of, referencing, or discussing FBI efforts to inform its employees about the Interim Policy Notice; and
>
> any and all revisions, updates, or modifications to the Interim Policy Notice since June 8, 2016.

Id. Specifically, the 2017 Request sought more recent records regarding the FBI's impersonation of members of the news media, in order to account for records created since the 2014 Requests were submitted. The 2017 Request also sought several new categories of records not sought by the 2014 Requests, including records concerning the FBI's changes to its guidelines and policies regarding impersonation of members of the news media that were cited in the OIG Report. *Id*.

The Reporters Committee filed suit against Defendants on February 14, 2018, seeking to compel the FBI to process and release records in response to the 2017 Request. SMF ¶ 30; *see also* Compl., *Reporters Comm. for Freedom of the Press v. FBI*, No. 18-cv-345 (D.D.C. Feb. 14, 2018) (the "2018 Matter"), ECF No. 1. The Reporters Committee noticed the 2018 Matter as related to the earlier 2015 Matter, and it was assigned to this Court. SMF ¶ 31. The Reporters Committee thereafter moved to consolidate the two actions, 2018 Matter, ECF No. 33. Defendants opposed consolidation. 2018 Matter, ECF No. 34. This Court consolidated the matters in a February 11, 2019 Minute Order. SMF ¶ 31.

F. The FBI's Post-Remand Withholding of Responsive Information.

Following remand from the D.C. Circuit, the FBI searched for and processed (1) additional records responsive to the 2014 Requests, as mandated by the D.C. Circuit's opinion and (2) records responsive to the 2017 Request. SMF ¶ 32. The FBI made productions on July 13, 2018, August 16, 2018, September 14, 2018, May 10, 2019, and May 30, 2019. SMF ¶ 33. None of the records produced by the FBI were duplicative of records produced previously in response to the 2014 Requests and, thus, none were addressed by the parties' summary judgment

briefing in 2016. SMF ¶ 66. Of the 611 pages identified as responsive by the FBI, 283 pages were withheld in full, 244 pages were produced subject to redactions, and 84 pages were released in full. SMF ¶ 67. To support its redactions and withholdings, the FBI invoked FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E). Defs. Br. at 14–37.

Of the 611 pages of records processed by the FBI, more than half (352 pages) were identified as responsive only to the 2017 Request; 13 pages were identified as responsive only to the 2014 Requests; and 246 pages were identified as responsive to both the 2017 Request and the 2014 Requests. SMF ¶ 68.

LEGAL STANDARDS

The Freedom of Information Act was enacted to create an enforceable right of "access to official information long shielded unnecessarily from public view." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). The "core purpose of FOIA" is ensuring public access to "information material for monitoring the Government's activities[.]" *Arieff v. Dep't of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (citation and internal quotation marks omitted). Courts must thus "bear in mind," "[a]t all times," "that FOIA mandates a 'strong presumption in favor of disclosure.'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (quoting *Dep't. of State v. Ray*, 502 U.S. 164, 173 (1991)).

Under FOIA, agency records must be made "promptly available" upon request unless they fall within one of the Act's nine enumerated exemptions. 5 U.S.C. § 552(a)(3), (b). "Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed[.]"). Under FOIA, courts "'impose a substantial burden on an agency seeking to avoid disclosure'" on the basis of an exemption. *Morley v. Cent. Intelligence Agency*,

508 F.3d 1108, 1114 (D.C. Cir. 2007) (citations omitted); *see also Campbell*, 164 F.3d at 30 ("an agency bears the burden to justify exemptions under FOIA"); 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."). An agency's showing will not avail if it "merely recit[es] statutory standards" or is "too vague or sweeping." *Billington v. Dep't of Justice*, 233 F.3d 581, 584 (D.C. Cir. 2000) (quoting *Campbell*, 164 F.3d at 30).

Congress passed the FOIA Improvement Act in 2016, which amended FOIA and codified the "foreseeable harm" standard established by the Department of Justice in 2009. *See* S. Rep. No. 1114-4, at 3 & n.8. As such, for FOIA requests made after June 30, 2016, "an agency must release a record—even if it falls within a FOIA exemption—if releasing that record would not reasonably harm an exemption-protected interest" and if the law does not prohibit disclosure. *Rosenberg v. U.S. Dep't of Def.*, 342 F. Supp. 3d 62, 73 (D.D.C. 2018) (citation omitted).

Finally, FOIA mandates that any "reasonably segregable portion of a record" be released even if other parts are exempt. 5 U.S.C. § 552(b). Thus, an agency "may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information." *Vaughn*, 484 F.2d at 825.

FOIA cases are frequently decided on motions for summary judgment. *See Defs. of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 87 (D.D.C. 2009); *Bigwood v. U.S. Agency for Int'l Dev.*, 484 F.Supp.2d 68, 73 (D.D.C. 2007). Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the record fails to establish that the agency's withholdings are justified, "summary judgment for the agency is not proper." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The agency's actions are reviewed by the district court *de novo*. 5 U.S.C. § 552(a)(4)(B).

ARGUMENT[1]

I. The doctrines of law of the case and collateral estoppel are inapplicable.

Defendants contend that Plaintiffs are precluded from having the opportunity to challenge the propriety of Defendants' withholdings as to any of the responsive records at issue here—all of which were located and processed by the FBI, for the first time, following remand from the D.C. Circuit. According to Defendants, because Plaintiffs elected not to appeal this Court's 2016 ruling as to the propriety of earlier redactions made by Defendants to different documents, Plaintiffs are now barred from challenging any of Defendants' exemption claims. Defendants' argument is meritless.

To be clear, Plaintiffs do not ask this Court to revisit *any* of the earlier redactions or withholdings that were addressed in the parties' 2016 motion for summary judgment briefing. Plaintiffs challenge only certain redactions and withholdings as to (1) records responsive to the 2014 Requests that were only searched for and processed in response to the D.C. Circuit's ruling that Defendants were required to search the FBI Director's Office for responsive records, *Reporters Comm. for Freedom of the Press*, 877 F.3d at 406–07; and (2) records searched for and processed in response to the 2017 Request. None of these records were at issue in the 2016 proceedings because they had not yet been searched for, processed, or released by the FBI. SMF ¶ 66. The propriety of Defendants' withholdings as to these records has never been addressed by the parties or evaluated by the Court.

Notably, *none* of the cases relied upon by Defendants stand for the novel proposition that Plaintiffs may be deprived of any opportunity to challenge the redaction or withholding of a

[1] Plaintiffs do not challenge the sufficiency of the FBI's search for records responsive to the 2014 Requests on remand from the D.C. Circuit. *See* Defs. Br. at 9–14. Plaintiffs also do not challenge Defendants' assertion that the FBI conducted an adequate search for records in response to the 2017 Request. *Id*.

responsive record in FOIA litigation merely because an agency "most[ly]" relied on similar "criteria and rationales," Defs. Br. at 9, to withhold material from *entirely different records* in a prior round of summary judgment briefing. Further, as detailed *infra* Section III, the "foreseeable harm" standard enacted by Congress as part of the FOIA Improvement Act of 2016, which applies to the 2017 Request, is an undeniable "change in applicable legal context" that precludes the application of either doctrine. *See Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (citations omitted). In short, neither the law of the case doctrine nor collateral estoppel apply here.

A. The law of the case doctrine does not apply.

The law of the case doctrine dictates that a district court cannot consider on remand an issue of law decided by an appellate court. *See Insurance Group Comm. v. Denver & Rio Grande W.R.R.*, 329 U.S. 607, 612 (1947); *Griffin v. United States*, 935 F. Supp. 1, 5 (D.D.C. 1995) (citing J.W. Moore, 1B *Moore's Federal Practice*, ¶ 0.040[1] at § II-3 (2d ed. 1994)). Defendants argue that Plaintiffs, pursuant to this doctrine, are barred from challenging withholdings made to records searched for, processed, and released *after* the D.C. Circuit's ruling in December 2017. Defs. Br. at 9–10. This argument is specious for at least two reasons. *First*, the propriety of Defendants' exemption claims as to newly-released responsive records at this stage of these two consolidated cases has never been before *this Court*, let alone the D.C. Circuit. *Second*, an intervening change in the law (namely, the foreseeable harm standard) bars Defendants from asserting the law of the case doctrine.

As detailed above, Plaintiffs challenge redactions made to records searched for, processed, and produced only *after* the D.C. Circuit issued its December 2017 ruling. Indeed, the 2018 Matter concerns a subsequent FOIA request for different records that were not

encompassed by Plaintiffs' earlier 2014 Requests. SMF ¶ 29. Far from "another bite at the apple," Defs. Br. at 10, this is Plaintiffs' *first* opportunity to address the propriety of any of these new withholdings, none of which have ever been evaluated by this Court. *See* 5 U.S.C. § 552(a)(4)(B) (an agency's actions in response to a FOIA request are reviewed by the district court *de novo*). Defendants offer no case law, whatsoever, to support their theory that this Court's prior summary judgment ruling in the 2015 Matter should now bar Plaintiffs from challenging withholdings as to this distinct set of newly-released records.

The two FOIA decisions cited by Defendants for the proposition that the law of the case doctrine "applies with full force in the FOIA context," Defs. Br. at 10, makes clear that the doctrine had no application here. Both cases concerned renewed motions for summary judgment seeking access to the *very same documents* withheld pursuant to various FOIA exemptions in a prior round of summary judgment briefing. In *Yunes v. Dep't of Justice*, for example, the court initially granted summary judgment as to nearly all the agency's withholdings, but concluded that the agency had not sufficiently justified its withholding of one remaining document; the court thus gave the agency another chance to justify that withholding. 263 F. Supp. 3d 82, 85 (D.D.C. 2017). On the renewed motion for summary judgment, the court declined to revisit an argument in favor of access to that same document that it had already addressed in response to the prior round of briefing. *Id.* at 88. *Charles v. Office of the Armed Forces Med. Examiner* likewise offers no help to Defendants; there, the court had ordered the parties to submit supplemental briefing regarding the non-segregability of a particular record sought by plaintiff; in its opinion, it adopted as "law of the case" its prior rulings and limited its analysis to the issues the court had requested in the supplemental briefing. 979 F. Supp. 2d 35, 41–42 (D.D.C. 2013).

Further, as detailed below, *infra* Section III, the FOIA Improvement Act of 2016 has imposed a "foreseeable harm" requirement on Defendants. *See* 5 U.S.C. § 552(a)(8). The standard, applicable to all FOIA requests made after June 30, 2016, requires agencies to examine "the content of a *particular* record" and determine "whether the agency reasonably foresees that disclosing *that particular document*, given its age, content, and character, would harm an interest protected by the applicable exemption." S. Rep. No. 114–4 (Feb. 23, 2015), at 8 (emphasis added). Of the 611 pages deemed "responsive" by the FBI at this stage of the litigation, 598 pages are subject to the foreseeable harm standard because they were produced in response to the 2017 FOIA Request. *See* SMF ¶ 68. Even if the law of the case doctrine was otherwise applicable here, which it is not, the foreseeable harm requirement is undeniably an "intervening change in the [] law" that bars its application in this case. *See Tompkins v. Wash. Hosp. Ctr.*, 433 A.2d 1093, 1098 (D.C. Cir. 1981).

B. Issue preclusion does not apply.

Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of fact or law that was *actually litigated* and *necessarily decided* is conclusive in a subsequent action between the same parties or their privies. *See Allen v. McCurry*, 449 U.S. 90 (1980); *Yamaha Corp. v. United States*, 961 F.2d 245 (D.C. Cir. 1992). For issue preclusion to apply, "the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case"; "the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case"; and "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007).

Defendants contend that "[c]ourts routinely enforce issue preclusion in the FOIA context." Defs. Br at 12. However, as with their law of the case analysis, every case relied upon by Defendants involves instances in which the requester was attempting to relitigate access to the *same documents* addressed in a prior round of litigation. Defendants' parenthetical descriptions of these decisions, alone, demonstrate how wholly inapplicable these cases are here. *See* Defs. Br. at 12; *see also Martin*, 488 F.3d at 454 (affirming district court's decision precluding plaintiff from relitigating agency's withholding of redacted report); *Roman v. Nat'l Reconnaissance Office*, 952 F. Supp. 2d 159, 164–65 (D.D.C. 2013) (precluding plaintiff from relitigating adequacy of search and withholding of documents *that were identical* to documents at issue in earlier FOIA case); *LaRouche v. U.S. Dep't of Treasury*, 112 F. Supp. 2d 48, 55–56 (D.D.C. 2000) (precluding plaintiff from relitigating applicability of Exemptions 3 and 5 to Special Agent Report and Criminal Reference Letter); *Nat'l Treasury Emps. Union v. IRS*, 765 F.2d 1174 (D.C. Cir. 1985) (enforcing issue preclusion where requests sought access to *same record* in different years); *Landmark Legal Found. v. Dep't of Labor*, 278 F. Supp. 3d 420, 428 (D.D.C. 2017) (issue preclusion applied to FOIA requests for identical records directed to different agencies).

Defendants cite no cases (and Plaintiffs are unaware of any) in which a court has permitted an agency to rely upon claimed exemptions and rationales for withholding records subject to FOIA in later proceedings governing access to entirely different records. This is for good reason; to satisfy its burden under FOIA, an agency "must provide a relatively detailed justification [for its withholding decisions], specifically identifying the reasons why a particular exemption is relevant and *correlating those claims with the particular part of a withheld document to which they apply*." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (internal citations omitted) (emphasis added); *see also Military Audit Project v.*

Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (a defendant agency must "*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 nor by evidence of agency bad faith." (emphasis added)). Put another way, the mere fact that the FBI asserts many of the same exemptions to justify withholding responsive material from these newly-produced records is of no consequence—the propriety of a withholding depends upon the withheld content of the record itself. Defendants cannot take this Court's prior ruling upholding redactions to *other* records and apply it to completely *different* records released at this stage of the litigation. *Mead Data Cent.*, 566 F.2d at 251.

Courts in this District have specifically adopted this sound logic, holding that a requester in a FOIA action is not barred from seeking the release of different records in a later proceeding, even where the plaintiff "already litigated, and lost, prior FOIA requests for [similar records]." *Elec. Frontier Found. v. Dep't of Justice*, 141 F. Supp. 3d 51, 56 (D.D.C. 2015) (requester in FOIA action not collaterally estopped from seeking release of records because records sought in later action differed from those withheld in prior proceeding); *see also Wrenn v. Shalala*, 1995 WL 225234, at *1 (D.C. Cir. Mar. 8, 1995) (in context of *res judicata*, new FOIA claims that "were not and could not have been litigated in [] prior action" not barred in subsequent proceedings).

Defendants' baseless assertion that "issue preclusion would [not] work any kind of unfairness on RCFP," Defs. Br. at 13, is wrong. Certainly Plaintiffs would be prejudiced if deprived of any opportunity to challenge Defendants' withholding or redaction of the records at issue. Defendants must justify their withholdings (which they have failed to do); as such, issue

preclusion is inapplicable. *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 601 (1948) ("[I]f the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.").

Finally, as mentioned above, *supra* Section I.A., and detailed below, *infra* Section III, the intervening change in the law introduced by Congress's recent adoption of the foreseeable harm standard further counsels against issue preclusion in this action. *Tompkins*, 433 A.2d at 1098.

II. Defendants fail to meet their burden to justify withholding responsive records, in whole and in part, from Plaintiffs.

An agency must produce all records responsive to a FOIA request unless they fall within one of FOIA's exemptions, 5 U.S.C. § 552(a)(3), (b), which must be "narrowly construed," *Morley*, 508 F.3d at 1114–15 (citation omitted). Further, agencies are required to segregate and produce any non-exempt records or portions thereof and produce them in response to a request. 5 U.S.C. § 552(b). The burden falls on the agency to prove that a record or portion thereof may be lawfully withheld pursuant to an exemption, 5 U.S.C. § 552(a)(4)(B), and it must adequately justify each withholding in a manner that enables the reviewing court to independently evaluate its propriety. *See, e.g.*, *Mead Data Cent.*, 566 F.2d at 251; *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979); *King v. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987). "To accept an inadequately supported exemption claim would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review." *King*, 830 F.2d at 219 (internal quotation and citation omitted).

Here, Defendants have failed to satisfy their burden of demonstrating that withheld records are exempt in part or in full, or that non-exempt portions of records cannot be segregated and released. As described below, Defendants' motion for summary judgment should be denied because (1) Defendants filed a facially insufficient *Vaughn* index and supporting declarations;

and (2) there are material questions of fact as to the propriety of Defendants' withholding of records on the basis of Exemptions 5, 6, and 7.[2]

A. Defendants' declarations are insufficient to support its withholdings on the basis of Exemptions 5, 6, and 7.

An agency that seeks to withhold information responsive to a FOIA request "must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent.*, 566 F.2d at 25. This showing must be sufficient to allow the district court to review the agency's withholdings, and must necessarily include a "description of each document being withheld" and an adequately specific "explanation of the reason for the agency's nondisclosure." *Oglesby v. United States Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such specificity is necessary to balance the "asymmetrical distribution of knowledge that characterizes FOIA litigation." *King*, 830 F.2d at 218.

The Third Hardy Declaration and the Waller Declaration fail to meet this standard. Instead, the declarations detail Defendants' withholdings in sweeping, categorical terms, and fail to connect the description of withholdings to the specific records they purport to describe. For example, Defendants rely on vague, conclusory assertions that material is "deliberative" and "confidential" in support of its withholding large amounts of material under Exemption 5 in full. Third Hardy Decl. ¶ 46; *see also, e.g.*, Waller Declaration ¶¶ 14–15. Further, the boilerplate assertion in the Third Hardy Declaration that Defendants have withheld "law enforcement techniques and procedures and law enforcement guidelines" under Exemption 7(E) is insufficient. Third Hardy Decl. ¶ 73; *compare Albuquerque Pub. Co. v. Dep't of Justice*, 726 F.

[2] Plaintiffs do not challenge Defendants' withholdings of responsive material pursuant to Exemptions 1 and 3. SMF ¶¶ 37–38.

Supp. 851 (D.D.C. 1989) ("[T]o make a reasoned determination that [Exemption 7(E)] was properly claimed, we must first know more about the techniques at issue . . . Only then will we be in a position to evaluate whether the techniques are generally unknown to the public"); *Reporters Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 369 F. Supp. 3d 212, 223 (D.D.C. 2019) (holding that the FBI's impersonation of documentary filmmakers is "a known law enforcement technique" that precludes application of the *Glomar* doctrine under Exemption 7(E)). Finally, Defendants completely ignore the FBI's duty to release records unless "the agency reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8).

In sum, the Third Hardy Declaration and Waller Declaration cannot support summary judgment on behalf of Defendants because they fail to provide "the kind of detailed, scrupulous description [of the withheld material] that enables [the Court] to perform a *de novo* review." *Brown v. Fed. Bureau of Investigation*, 873 F. Supp. 2d 388, 401 (D.D.C. 2012) (quoting *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 786 (D.C. Cir. 1980)); *see also Judicial Watch, Inc. v. Dep't. of Homeland Sec.*, 841 F. Supp. 2d 142, 154–55 (D.D.C. 2013) (DHS failed to meet its burden to prove the applicability of Exemption 5 where its *Vaughn* index "simply parrots selected elements of the attorney-client privilege"); *Brown*, 873 F. Supp. 2d at 407 (requiring *in camera* review where the FBI's affidavit in support of its invocation of Exemption 7(E) "does nothing but parrot the statutory language"). As discussed below, Defendants' boilerplate assertions of FOIA exemptions cannot support summary judgment in its favor.

B. The Third Hardy Declaration fails to establish that the 82 pages of records withheld in their entirety are exempt from disclosure under FOIA.

An agency seeking to withhold information pursuant to a FOIA exemption "must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption

is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent.*, 566 F.2d at 251. The agency's showing must be sufficiently "full and specific" to create a factual record robust enough for the district court to review the agency's withholdings. *King*, 830 F.2d at 218. "Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment if they are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Id.* at 219 (internal quotation and citation omitted); *see also Hayden*, 608 F.2d at 1397 (discussing same standard). And, as the D.C. Circuit has made clear, "the burden is on [the agency] to establish their right to withhold information from the public and they must supply the courts with sufficient information to allow us to make a reasoned determination that they were correct." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

Defendants have failed to justify their contention that there is no non-exempt information in the 82[3] pages of records withheld in their entirety that is "reasonably segregable." *See* Third Hardy Decl. ¶ 85. "[E]ven where specific exemptions apply, the agency is required to conduct a segregability analysis and determine if any non-exempt portions of the record can be released." *Mead Data Ctr.*, 566 F. 2d at 260. This requirement is so essential that, "before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld" and "[i]f the district court approves withholding without such a finding, remand is required even if the requester did not raise the issue of segregability before the court." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007) (internal citations omitted); *see also Soucie v. David*, 448 F.2d 1067, 1077–78 (D.C. Cir.

[3] The Third Hardy Declaration states that 283 pages were withheld in full. Third Hardy Decl. ¶ 86. Of those 283 pages, 201 were withheld in full as duplicative. SMF ¶ 67.

1971) (non-exempt material may be withheld only if it is "inextricably intertwined" with exempt information). The D.C. Circuit has recognized that a "critical problem of segregability" arises where, as here, an agency offers "multiple exemptions for each withheld document"; under such circumstances the court "should not be required to speculate on the precise relationship between each exemption claim and the contents of the specific document." *Ray v. Turner*, 587 F.2d 1187, 1196 (D.C. Cir. 1978).

"A blanket declaration that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability." *Defs. of Wildlife*, 623 F. Supp. 2d at 90. Defendants' conclusory statement that the withheld, non-exempt information is not segregable, Third Hardy Decl. ¶ 85,[4] therefore fails to meet its burden to justify their withholdings. *See Dorsett v. Dep't of the Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part "[b]ecause of [agency's] inadequate and conclusory segregability explanation"); *Animal Legal Def. Fund v. Dep't of Air Force*, 44 F. Supp. 2d 295, 301 (D.C. Cir. 1999) (conclusory statement regarding segregability is "patently insufficient"). Accordingly, Defendants' motion for summary judgment must be denied as to the 82 pages of records they have withheld in full.

C. Defendants fail to justify their withholdings under Exemption 5's deliberative process privilege.

Exemption 5 permits agencies to withhold "inter-agency or intra-agency memorandums or letters which 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). Exemption 5 incorporates "the executive 'deliberative process' privilege[,]" which

[4] The Waller Declaration does not address segregability. *See generally*, Waller Decl.

> serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's actions.

Coastal States, 617 F.2d at 886.

The deliberative process privilege applies to records that are both "predecisional" and "deliberative." *Id.* A document is "predecisional if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (internal quotations and citation omitted). "[F]actual information generally must be disclosed," *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992), unless it is "inextricably intertwined with the deliberative sections of documents[,]" *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997), or "reflects an exercise of discretion and judgment calls[,]" *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (internal quotation and citation omitted).

An agency seeking to withhold information under the deliberative process privilege is required to provide a particularly specific description in its *Vaughn* index because "the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." *Animal Legal Def. Fund*, 44 F. Supp. at 299 (quoting *Coastal States*, 617 F.2d at 867); *see also, e.g.*, *Nat'l Sec. Counselors v. Cent. Intelligence Agency*, 960 F. Supp. 2d 101, 188 (D.D.C. 2013) (agency must provide "precisely tailored explanations for each withheld record at issue" to sustain its burden under Exemption 5). Specifically, the agency must show, "for *each* contested document withheld in part or in full:

> (1) what deliberative process is involved (2) the role played by the documents in issue in the course of that process, and (3) the nature of the decisionmaking authority vested in

> the office or person issuing the disputed document[s], and the positions in the chain of command of the parties to the documents[.]"

Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 243 F. Supp. 3d 155, 168 (D.D.C. 2017) (internal quotations and citations omitted, emphasis in original). "In light of the FOIA's strong policy in favor of disclosure, … Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" *Petroleum Info. Corp.*, 976 F.2d at 434 (quoting *EPA v. Mink*, 410 U.S. 73, 87, 93 (1973)).

In this case, Defendants assert the deliberative process privilege to withhold, *inter alia*, e-mails discussing the FBI's public response to the Seattle/Timberline Incident and purported comments submitted by the FBI to the OIG in connection with the OIG's investigation into the Seattle/Timberline Incident. Third Hardy Decl. ¶ 50; Waller Decl. ¶¶ 13–15; *see also, e.g.*, *Vaughn* Index, ECF 48-3, at 17 (listing RCFP 609–618, withheld in full); Townsend Decl. ¶ 19, Ex. K. Defendants have not met their burden to demonstrate that this material is properly withheld under the deliberative process privilege because (1) the withheld materials are neither pre-decisional nor deliberative; and (2) Defendants have failed to meet the "foreseeable harm" standard for records released in response to the 2017 Request.

1. The withheld materials are neither predecisional nor deliberative.

Defendants have not met their burden of demonstrating that the withheld materials were generated prior to any particular agency decision. "A document is predecisional [only] if it was 'prepared in order to assist an agency decisionmaker in arriving at his decision,' rather than to support a decision already made." *Petroleum Info. Corp.*, 976 F.2d at 1434 (citations omitted). In other words, the "court must be able 'to pinpoint an agency decision or policy *to which the document contributed*.'" *Senate of the Com. of. P.R. on Behalf of Judiciary Comm. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (emphasis added). Further, documents are

deliberative only if they are "a part of the agency give-and-take of the deliberative process by which the decision itself is made." *Vaughn*, 523 F.3d at 1144.

Defendants fail to identify any deliberative process, whatsoever, let alone establish that any of the materials it has withheld pursuant to Exemption 5 "makes recommendations or expresses opinions on legal or policy matters." *Id.*; *see also, e.g.*, Townsend Decl. ¶ 20, Ex. L (RCFP-344) (withholding list of attachments to an e-mail under the "deliberative process privilege"). Instead, Defendants provide only conclusory statements that the withheld materials are shielded by the deliberative process privilege due to, *inter alia*, their nature as non-final drafts. Third Hardy Decl. ¶ 50. The D.C. Circuit has made clear, however, that an agency must specifically identify a decision-making process. *See Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (agency has "burden of identifying the decisionmaking process"). Drafts are *not* automatically exempt. *See Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004).

Defendants, for example, have withheld material under the deliberative process privilege from a cover memorandum from the Office of the Inspector General to then-Director Comey transmitting the *final* OIG Report to the FBI. Townsend Decl. ¶ 21, Ex. M (RCFP-850). But the deliberative process privilege does not protect records comprising "final opinions" of an agency—those documents that "explain agency action already" taken, "an agency decision already made," nor an agency's "final disposition[]" of a matter. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 133 (1975).

Additionally, Defendants' withholding of intra-agency e-mail exchanges in which officials developed their response to press coverage is improper; such discussions are not addressed to "the wisdom or merits of a particular agency policy." *Petroleum Info. Corp.*, 976

F.2d at 1435. "Deliberations about how to present an already decided policy to the public, or documents designed to explain that policy to—or obscure it from—the public, including in draft form, are at the heart of what should be released under FOIA . . . . The concern of the privilege is to prevent the chilling of internal agency discussions that are necessary to the operation of good government; it is not concerned with chilling agency efforts to obfuscate, which are anathema to the operation of democratic government." *Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency*, 811 F. Supp. 2d 713, 741–42 (S.D.N.Y. 2011). As such, Defendants' withholding of e-mail correspondence regarding drafts of the letter to the editor written by then-Director Comey and published in *The New York Times*, in which he "explain[s] agency action already taken," *N.L.R.B.*, 421 U.S. at 133, and defends long-established FBI practices and procedures, can hardly be described as "predecisional." *See also* Townsend Decl. ¶ 19, Ex. K (RCFP-303 – RCFP-306).

Defendants also "withheld in full copies of blank/fillable forms that FBI personnel used to submit comments on the OIG draft report." Defs. Br. at 21; Third Hardy Decl. ¶ 50. Yet it is unclear how "blank [] forms" purportedly designed to solicit agency comments could possibly "reflect[] the give-and-take of the consultative process," *Coastal States*, 617 F.2d at 866, and Defendants offer nothing more than a cursory explanation as to why these records would need to be withheld in full pursuant to the deliberative process privilege.

Finally, some or all of the records withheld by Defendants under the deliberative process privilege have likely lost their predecisional status due to their adoption. The OIG Report, for example, almost certainly adopted previous deliberative material; without the detailed descriptions Defendants are required, but failed, to provide in their *Vaughn* index, both the Court and Plaintiffs are unable to evaluate whether once-deliberative material was adopted and, thus,

may not now be properly withheld. *N.L.R.B.*, 421 U.S. at 153, n.19 ("The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight."). For all these reasons, Defendants have failed to meet their burden of demonstrating that the withheld materials are subject to the deliberative process privilege.

2. Defendants have not met their burden to show that release of materials withheld under Exemption 5 would cause harm.

Even if this Court were to determine that the materials Defendants seek to withhold pursuant to Exemption 5 are predecisional and deliberative—which they are not—summary judgment may not be granted to Defendants because they have not met their burden to show that it is reasonably foreseeable that release of the materials would harm agency decision-making. "Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *N.L.R.B.*, 421 U.S. at 151. Defendants merely state that release of the withheld materials would cause harm, but "[a]n agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that the disclosure would defeat, rather than further, the purposes of the FOIA." *Mead Data Cent*., 566 F.2d at 258; *see also Formaldehyde Inst. v. Dep't of Health and Human Services*, 889 F.2d 1118, 1123–24 (D.C. Cir. 1989) (overruled on other grounds) ("The pertinent issue here is what harm, if any, the [withheld material's] release would do to [the agency's] deliberative process."); *see also Lee v. FDIC*, 923 F. Supp. 451, 456 (S.D.N.Y. 1996) ("[T]he exemption should only be invoked when the dangers which motivated the enactment of the exemption are present[.]").

One of the rationales for the deliberative process privilege is that it "protects the public from the confusion that would result from *premature* exposure to discussions occurring before

the policies affecting it had actually been settled upon." *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (citation omitted, emphasis added). Here, the FBI attempts to invoke Exemption 5 to withhold discussions of what appear to be matters that occurred years ago, the public disclosure of which would not chill the candor of Defendants' decisionmaking process. Where, as here, any agency "decisions" took place years ago, *see, e.g.*, Townsend Decl. ¶ 19, Ex. K, there is little likelihood that disclosure would harm the quality of the agency's future decisionmaking. *Id.*

For example, RCFP-303 – RCFP-306 contains e-mail communications exchanging drafts of a letter to the editor then-FBI Director Comey submitted to *The New York Times* regarding the Seattle/Timberline Incident, while RCFP-801 – RCFP-802 contains correspondence regarding an inquiry from *USA Today* seeking a letter to the editor from then-Director Comey. Townsend Decl. ¶ 19, Ex. K. This correspondence is neither "highly sensitive" nor "discuss[es] the wisdom or merits of a particular agency policy," *Petroleum Info. Corp.*, 976 F.2d at 1435; the disclosure of these communications is therefore unlikely to inhibit frank and open discussion.

And, as detailed further below, *infra* Section III, the foreseeable harm standard has created a "heightened standard for an agency's withholdings under Exemption 5" which requires that it "do more than 'perfunctorily state that disclosure of all the withheld information . . . would jeopardize the free exchange of information.'" *Judicial Watch, Inc. v. Dep't of Commerce*, 375 F. Supp. 93, 100 (D.D.C. 2019) (quoting *Rosenberg*, 342 F. Supp. 3d at 79). Indeed, Judge Sullivan in *Judicial Watch, Inc. v. Dep't of Commerce* specifically held that the agency's assertion that release of the withheld information would "have a chilling effect on the discussion within the agency in the future" fell short of meeting this heightened standard. *Id.* "If the mere possibility that disclosure discourages a frank and open dialogue was enough for the exemption

to apply, then Exemption 5 would apply whenever the deliberative process privilege was invoked regardless of whether disclosure of the information would harm an interest protected by the exemption." *Id.* at 101. As such, Defendants' bare assertion here that release of the material it has withheld under the deliberative process privilege would "chill full and frank discussions between agency personnel and decision makers regarding a decision," Third Hardy Decl. ¶ 48, simply cannot suffice.

In sum, Defendants have not met their burden to demonstrate that any of this material has been properly withheld pursuant to the "deliberative process privilege" under Exemption 5 of FOIA. 5 U.S.C. § 552(b)(5).

D. Defendants fail to justify their withholdings under Exemptions 6 and 7(C).

Defendants fail to meet their burden to demonstrate that responsive information withheld under FOIA's privacy exemptions, Exemptions 6 and 7(C), is properly withheld. Exemption 6 applies to "personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement" to the extent that their disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

In the context of Exemption 6, the D.C. Circuit has made clear that there is a "presumption in favor of disclosure [that] is as strong as can be found anywhere in the Act." *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citation and internal quotation marks omitted). Given the "presumption of openness inherent in FOIA," *Campbell*, 164 F.3d at 33, Exemption 6 permits withholding only if "disclosure would compromise a substantial, as opposed to a *de minimus*, privacy interest." *Nat'l Ass'n of Retired Fed. Emps. v.*

Horner, 879 F.2d 873, 874 (D.C. Cir. 1989). In determining what constitutes a "substantial" privacy interest, a court must "balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *Norton*, 309 F.3d at 31, 32 (citation and internal quotation marks omitted). If disclosure would implicate a substantial privacy interest, the court "must weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy." *Horner*, 879 F.2d at 874.

Similarly, under Exemption 7(C), "a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 776 (1989).[5] The D.C. Circuit has long held that "[t]he Exemption 7(C) balancing test must be applied to the specific facts of each case." *Stern v. Fed. Bureau of Investigation*, 737 F.2d 84, 91 (D.C. Cir. 1984). "Because the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, *per se* rules of nondisclosure based upon the type of document requested, the type of individual involved, or the type of activity inquired into, are generally disfavored." *Id.* (citation omitted).

The FBI has identified five categories of information it has withheld under these exemptions: (1) names and/or identifying information of FBI Special Agents and support personnel, categorized as (b)(6)-1, (b)(7)(C)-1; (2) names and/or identifying information of non-FBI federal government personnel, categorized as (b)(6)-2, (b)(7)(C)-2; (3) names and/or

[5] The language of the balancing test applicable under Exemption 6 differs from that for Exemption 7(C) in that the latter omits the word "clearly" from the required showing; Plaintiffs nevertheless address both exemptions together because Defendants assert the two exemptions in tandem in their brief, Defs. Br. at 24–30, and because the D.C. Circuit "has deemed the privacy inquiry of Exemptions 6 and 7(C) to be essentially the same." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1125 (D.C. Cir. 2004).

identifying information of third parties of investigative interest, categorized as (b)(6)-3, (b)(7)(C)-3; (4) names and/or identifying information of third parties merely mentioned, categorized as (b)(6)-4, (b)(7)(C)-4;[6] and (5) names and/or identifying information of local law enforcement personnel, categorized as (b)(6)-5, (b)(7)(C)-5. Defs. Br. at 26; *see also* Third Hardy Decl. ¶ 14, Waller Decl. ¶¶ 22–23.

Plaintiffs do not challenge the redaction of the names and e-mail addresses of two lower-level OIG officials, and the e-mail addresses of higher-level OIG officials, from one page of an e-mail record. *See* Defs. Br. at 26–27; *see also* Waller Decl. at ¶¶ 22–23. Plaintiffs also do not seek the "Unique Employee Identification Numbers" or "personal cellular telephone numbers" of FBI special agents and support personnel. *See* Defs. Br. at 27. Instead, Plaintiffs focus their challenge on Defendants' sweeping reliance on Exemption 6 and/or 7(C) for the reflexive redaction of (1) the names of federal and state government personnel, including FBI personnel; (2) the names of non-FBI federal government personnel; and (3) the names of local law enforcement. Defendants have failed to show that these individuals have *any* privacy interest, let alone a substantial one, that would outweigh the significant public interest in access to this information.

At the outset, Exemption 6 "does not categorially exempt individuals' identities." *FDA*, 449 F.3d at 153; *see also News-Press v. Dep't of Homeland Sec.*, 489 F.3d 1173, 1199 (11th Cir. 2007). "The scope of a privacy interest under Exemption 6 will always be dependent on the context in which it has been asserted." *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 581 (D.C. Cir. 1996). Further, "[a] name and work telephone number is not personal or intimate

[6] Plaintiffs do not challenge Defendants' redaction of the names, addresses, email addresses, and telephone numbers of individuals who are not government employees in the following categories: (b)(6)-3, (b)(7)(C)-3, (b)(6)-4, and (b)(7)(C)-4. SMF ¶¶ 43–44.

information, such as a home address or a social security number, that normally would be considered protected information under FOIA Exemption 6." *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005). In *Leadership Conference*, the court rejected the Justice Department's invocation of Exemption 6 to withhold the names and work telephone numbers of agency paralegals. Here, Defendants attempt to redact the same information for virtually all federal and state government employees mentioned in the records. SMF ¶¶ 41–42, 45 (redacting names of FBI Special Agents, support personnel, non-FBI federal government personnel, and local law enforcement personnel). The sweeping assertion that disclosure of their names, alone, would constitute an unwarranted invasion of personal privacy is insufficient. Indeed, Defendants fail to establish that government employees have any privacy interest, whatsoever, in the fact of their employment with a government agency. *See Tokar v. Dep't of Justice*, 304 F. Supp. 3d 81, 102 (D.D.C. 2018) (withholding of government employee names inappropriate under Exemptions 6 and 7(C) where "there is no indication in the record that [plaintiff], or anyone else, will use their knowledge of [DOJ employee identities] . . . for nefarious or harassing purposes").

Defendants' *Vaughn* index, in particular, fails to make any showing that the release of the names—alone—of the federal government employees involved in long-concluded criminal investigations will reveal "intimate details" or "damaging information" that would implicate significant privacy concerns. *Norton*, 309 F. 3d at 33. On the other hand, the public interest in disclosure is significant, and tips the scale in favor of disclosure. *See Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 893–94 (D.C. Cir. 1995). Indeed, the D.C. Circuit has explicitly recognized that "a relevant public interest could exist where [a list of names] might provide leads for an investigative reporter seeking to ferret out what the

government is up to." *Painting & Drywall Work Preservation Fund, Inc. v. Dep't Housing & Urban Dev.*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (internal quotation marks omitted) (quoting *Fed. Labor Relations Auth. v. Dep't of Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1452 (D.C. Cir. 1989)).

Here, the FOIA requests concern a matter of significant public concern: the FBI's impersonation of members of the media for law enforcement investigative purposes. The individuals in these records are, *inter alia*, government officials that assisted in the implementation of the FBI's guidelines for impersonation of members of the news media—a topic of significant interest to the public. *See, e.g.*, Townsend Decl. ¶ 23, Ex. O. The records sought by Plaintiffs will inform the public about the FBI's use of this tactic; the names of agency employees at issue thus represent "a far cry from individual tax returns or applications for public relief." *Steinberg v. Dep't of Justice*, 179 F.R.D. 366, 270 (D.D.C. 1998), *aff'd sub nom. Steinberg v. Dep't of Justice*, No. 98-5465, 1999 WL 1215779 (D.C. Cir. Nov. 5, 1999). It is not information that should be redacted from records under Exemptions 6 or 7(C). Where, as here, "no significant privacy interest is implicated . . . FOIA demands disclosure." *Multi Ag Media LLC*, 515 F.2d at 1229 (quoting *Horner*, 879 F.2d at 874).

E. Defendants fail to justify their withholdings under Exemption 7(E).

Defendants fail to meet their burden to show that they have properly withheld material pursuant to Exemption 7(E). Under FOIA, Exemption 7(E) permits the withholding of material compiled for law enforcement purposes only where its release "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). To justify withholding material

under Exemption 7(E), "the agency must at least provide *some* explanation of what procedures are involved and how they would be disclosed," *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 746 F.3d 1082, 1102 (D.C. Cir. 2014) (citations omitted), and must also show "logically" how release of the requested information will "risk circumvention of the law." *Blackwell v. Fed. Bureau of Investigation*, 646 F.3d 37, 42 (D.C. Cir. 2011) (citations omitted); *see also Elkins v. Fed. Aviation Admin.*, 134 F. Supp. 3d 1, 4 (D.D.C. 2015).

Defendants assert that "courts have differed over whether the risk of circumvention is a prerequisite to both prongs of Exemption 7(E)," but that the "better reasoned decisions" have held that the FBI is not required to show a risk of circumvention of the law to protect techniques and procedures. Defs. Br. at 30–31 (citing *Pub. Emps. For Envtl. Responsibility v. Int'l Boundary Water Comm'n*, 740 F.3d 195, 204 & n.4 (D.C. Cir. 2014)). However, the courts that "differ" on this issue are the Second Circuit and the *D.C. Circuit*. And the D.C. Circuit has expressly held that an agency is required to demonstrate "risk of circumvention of the law" for all withholdings under Exemption 7(E), including those predicated on law enforcement "techniques and procedures." *Blackwell*, 646 F. 3d at 42; *see also Int'l Boundary Water Comm'n*, 740 F.3d at 204 n.4 (explaining that the D.C. Circuit "has applied the 'risk circumvention of the law' requirement both to records containing guidelines and to records containing techniques and procedures"); *PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993). While Defendants may view decisions following the Second Circuit to be "better reasoned," Defs. Br. at 30–31, D.C. Circuit case law is binding on this Court.[7]

[7] Judge Contreras recently rebuked Defendants for making this same, misleading argument. *See Reporters Committee*, 369 F. Supp. 3d at 221 n.5 (observing that Defendants' argument that "better reasoned decisions" follow the Second Circuit "conveniently ignor[es]" the D.C. Circuit's application of the "circumvention of the law" requirement both to guidelines and to

Here, Defendants rely on this provision of Exemption 7(E) to withhold eight broad categories of information: (1) "operational directives," (2) "undercover operation[s]," (3) "identity and/or location of FBI or joint units, squads, divisions; (4) "internal FBI secure fax number[s], phone numbers," (5) "sensitive investigative techniques and procedures, including the deployment of computer and internet protocol address verifier ('CIPAV')," (6) "targets of pen registers/trap and trace devices,"[8] (7) "collection and analysis of information," and (8) "sensitive file numbers and/or subfile names." SMF ¶¶ 46–52.

Plaintiffs do not challenge Defendants' withholding of material related to the "identity and/or location of FBI or joint units, squads, [or] divisions." Defs. Br. at 32. Plaintiffs also do not challenge Defendants' withholding of "internal FBI secure fax number, phone number[s]," "sensitive investigative techniques and procedures, including the deployment of computer and internet protocol address verifier ('CIPAV')," or "sensitive file numbers and/or subfile names." *Id.* Plaintiffs instead focus their challenge on Defendants' reliance on Exemption 7(E) to withhold information from FBI internal guidelines and policies, "undercover operations," and the FBI's collection and analysis of information.

1. Defendants Have Improperly Withheld Information from FBI Internal Guidelines and Policies.

For category (b)(7)(E)-1, Defendants assert that they have withheld information contained in the FBI's internal guides, specifically the Domestic Investigations and Operations Guide, Undercover Sensitive Operations Policy Guide, and Policy Notice 0907N (Undercover

techniques and procedures, and noting that courts in this District are "bound by D.C. Circuit precedent").

[8] Though Defendants list "Targets of Pen Registers / Trap and Trace Devices" as subsection Exemption 7(E)-6, Defendants' *Vaughn* Index indicates that no materials were actually withheld pursuant to this subsection.

Activities and Operations – Posing as a Member of the News Media or a Documentary Film Crew). Third Hardy Decl. ¶ 73.

Exemption 7(E) protects guidelines and policies from disclosure only "if [their] disclosure could reasonably be expected to risk circumvention of the law," *Labow v. Dep't of Justice*, 66 F. Supp. 3d 104, 126 (D.D.C. 2014) (quotation omitted), and its assertions fail to meet that burden here. *PHE, Inc.*, 983 F.2d at 251 (approving FBI's withholdings of portions of law enforcement manuals based on "the specificity of the affidavit and the limited amount of information withheld"). For example, Defendants withhold portions of a June 13, 2016 "employee e-brief" sent to "all [FBI] employees" under Exemption 7(E). Townsend Decl. ¶ 22, Ex. N. Yet Defendants wholly fail to address how information contained within an employee newsletter sent to *all* FBI employees would "risk circumvention of the law." *Labow*, 66 F. Supp. 3d at 126.

Moreover, Defendants cannot assert Exemption 7(E) to shield information related to its use of a technique that is known to the public. *See, e.g.*, *Reporters Committee*, 369 F. Supp. 3d at 223 (explaining that the law enforcement techniques and procedures must be "generally unknown to the public"); *Jaffe v. Cent. Intelligence Agency*, 575 F. Supp. 377, 387 (D.D.C. 1983) (finding that Exemption 7(E) applies to "material which describes *secret* investigative techniques and procedures" (emphasis added)). Indeed, in *Reporters Committee*, Judge Contreras specifically held that the FBI's impersonation of documentary filmmakers is not a technique that is unknown to the public. *Reporters Committee*, 369 F. Supp. 3d at 223. As such, Defendants' contention that releasing these withheld portions of its internal policies that describe the circumstances under which agency employees may impersonate members of the news media or documentary filmmakers would "provide sensitive, unknown investigative techniques" or

"reveal sensitive unknown uses of these specific techniques and procedures," Third Hardy Decl. ¶ 73, is baseless. The FBI has failed to even describe the withheld material in general terms, let alone make a sufficient showing that disclosure would "create a risk of circumvention of the law." As such, Defendants' bald contention that release "might increase the risk that the law will be violated" is insufficient to support summary judgment in their favor. *Int'l Boundary Water Comm'n*, 740 F.3d at 205 (citations and quotation marks omitted).

2. Defendants have not justified their withholding of information pertaining to "Undercover Operations."

Defendants also fail to provide an adequate justification for their withholdings under category (b)(7)(E)-2 ("Undercover Operations"). SMF ¶ 47. The FBI asserts only that all of these withheld materials include "non-public details" the release of which purportedly "could have devastating operational consequences and would jeopardize future use of undercover operations by the FBI in similar cases or under similar circumstances." Third Hardy Decl. ¶ 74. Defendants provide no information specific to any of the pages they have withheld, and nothing to support a finding that any of the so-called "non-public details" they refer to describe "investigative techniques and procedures generally unknown to the public." *See Malloy v. Dep't of Justice*, 457 F. Supp. 543, 545 (D.D.C. 1978); *see also Labow*, 66 F. Supp. 3d at 127 n.15 (discussing cases). Nor could they; as discussed above, at least one court has already determined that FBI impersonation of journalists, specifically, documentary filmmakers, is not an "investigative technique" that is "generally unknown to the public." *See Reporters Committee*, 369 F. Supp. 3d at 223. Defendants' purported reliance on Exemption 7(E) to withhold materials related to the FBI's impersonation of members of the news media in investigations that took

place years ago is unwarranted. *See Vaughn* Index, ECF 48-3, at 75.[9] Further, Defendants make no attempt, whatsoever, to link any particular withheld information to their generalized, speculative claim that release "could have devastating operational consequences" or "jeopardize future use of undercover operations." Third Hardy Decl. ¶ 74. Accordingly, Defendants have failed to meet their burden to show that this category of information is properly exempt under FOIA.

3. Defendants have not justified their withholding of material pertaining to the FBI's collection and analysis of information.

Defendants redacted material in one document, RCFP-630, pursuant to its category (b)(7)(E)-7. SMF ¶ 51; *see also* Townsend Decl. ¶ 23, Ex. O at 17. The Third Hardy Declaration asserts that this withholding is to shield "techniques and procedures the FBI uses to collect and analyze information in connection with both criminal and national security investigations." Third Hardy Decl. ¶ 79. The document appears to contain e-mail correspondence between FBI employees discussing the implementation of the new policy governing the use of media impersonation as an investigatory tactic in criminal investigations. *See* Townsend Decl. ¶ 23, Ex. O at 17. The mere assertion that FBI personnel "were trying to determine whether the undercover investigation would meet the requirements for Deputy-Director approval pursuant to the newly changed approval policy," Defs. Br. at 36, is insufficient to "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell*, 646 F.3d 37, 42 (D.C. Cir. 2011).

[9] *See* Townsend Decl. at ¶ 23, Ex. O (RCFP 270–71; 291–96; 397; 434; 436; 438; 448; 623–24; 629–32; 669).

III. Defendants' discretionary withholdings in response to the 2017 request fail to meet the "foreseeable harm" standard.

Defendants failed to show that any of their discretionary withholdings of material responsive to the Reporters Committee's 2017 Request satisfy the "foreseeable harm" standard added to the Act in the FOIA Improvement Act of 2016. This standard, which applies to all FOIA requests made after June 30, 2016, prohibits agencies from withholding records under one of the Act's discretionary exemptions unless "the agency reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8). In other words, agencies must now examine "the content of a *particular* record" and determine "whether the agency reasonably foresees that disclosing *that particular document*, given its age, content, and character, would harm an interest protected by the applicable exemption." S. Rep. No. 114–4 at 8 (emphasis added).

Defendants fail to specifically address the foreseeable harm standard for any of their discretionary withholdings. This failure is particularly problematic with regards to the material withheld pursuant to the Exemption 5 deliberative process privilege; instead of addressing the change in the law, Defendants continue to rely upon their blanket assertion that disclosure would "inhibit the government's development of policy and stifle its decision-making process." Third Hardy Decl. ¶ 49. This is plainly insufficient.

Congress specifically adopted the foreseeable harm standard in the FOIA Improvement Act of 2016 in response to the "growing and troubling trend" of agencies invoking discretionary exemptions to withhold "large swaths" of government data, even if disclosure would cause no harm. S. Rep. No. 114–4 at 3 (noting that from 2011 to 2012, agencies' use of Exemption 5 increased 41 percent). The Senate Report makes clear that the amendment was intended to tip the balance of discretionary withholding back toward disclosure:

> [FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.

Id. at 8 (quoting President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies*, *Subject: Freedom of Information Act* (Jan. 1, 2009)). "The purpose of [FOIA] was to establish a 'presumption of openness,' and its passing was based on the recognition that 'from the beginning, agencies have taken advantage of these exemptions to withhold any information that might technically fit.'" *Dep't of Commerce*, 375 F. Supp. 3d at 100 (quoting 162 Cong. Rec. H3714-01, H3717162 (2016)).

Since its enactment, courts have recognized the foreseeable harm standard's new requirements for agencies to assert discretionary withholdings. *Id.*; *see also Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, 2017 WL 5972702 at *6 (N.D. Cal. Nov. 30, 2017) ("In failing to provide basic information about the deliberative process at issue and the role played by *each specific document*, [the agency] does not meet its burden of supporting its withholdings with detailed information pursuant to the deliberative process privilege.").

In *Judicial Watch v. Dep't of Commerce*, plaintiffs challenged the agency's assertion of Exemption 5's deliberative process privilege to withhold certain email communications. 375 F. Supp. 3d at 96. The court held that the foreseeable harm standard created a "heightened standard for an agency's withholdings under Exemption 5," and that the agency needed to show *why* "disclosure is likely to discourage frank and open dialogue as to the specific withholdings[.]" *Id.* at 100–101. In other words, the court held that "the question is not whether disclosure would chill speech, but rather if it is reasonably foreseeable that it will chill speech and, if so, what is

the link between this harm and the specific information contained in the material withheld." *Id.* at 100 n.4, 101 (holding that "the Act requires more than speculation").

Similarly, in *Rosenberg v. Department of Defense*, the court rejected the government's assertion that "a more specific foreseeable-harm analysis would be duplicative." 342 F. Supp. 3d 62, 73–74 (D.D.C. 2018). There, the agency asserted Exemption 5's deliberative process privilege to withhold email communications related to a Guantanamo Bay military task force. *Id*. To justify its withholdings, the agency provided a description of the information withheld, and claimed that any harm in disclosure would be "of the same type" across all the withheld records. Finding that this was insufficient, the court held that the agency must make an assertion to *each* withholding and "must do more than perfunctorily state that disclosure of all the withheld information—regardless of category or substance—'would jeopardize the free exchange of information between senior leaders within and outside of the [agency].'" *Id.* at 79; *see also Ecological Rights Found*, 2017 WL 5972702 at *6.

Accordingly, Defendants here were required, at a minimum, to demonstrate foreseeable harm that would reasonably result from the release of *each* discretionary withholding. They have not done so, and this precludes summary judgment in their favor.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied, and the Court should enter summary judgment in favor of Plaintiffs as to Defendants' improper withholding of responsive records from Plaintiffs.

/s/ Katie Townsend
Katie Townsend
DC Bar No. 1026115
Jennifer A. Nelson
DC Bar No. 1011387
Adam A. Marshall
DC Bar No. 1029423

THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
E-mail: ktownsend@rcfp.org
E-mail: jnelson@rcfp.org

Of Counsel for The Associated Press:
Karen Kaiser
Brian Barrett
THE ASSOCIATED PRESS
450 West 33rd Street
New York, NY 10001
Telephone: 212.621.7547
Facsimile: 212.506.6131
E-mail: kkaiser@ap.org
E-mail: bbarrett@ap.org