IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMERICANS FOR PUBLIC TRUST,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES and CENTERS FOR DISEASE CONTROL AND PREVENTION,

Defendants.

Civil Action File

No. 1:21-cv-02834-ELR

BRIEF IN SUPPORT OF PLAINTIFF'S COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On February 12, 2021, the CDC released its long-awaited guidance regarding school reopening. Entitled "Operational Strategy for K-12 Schools Through Phased Mitigation," the guidance recommended continued hybrid or "virtual only" instruction for schools located in parts of the country with a high level of community transmission of COVID-19—a designation applicable, both then and now, to most of America's schools. In sum, the CDC declined to recommend a prompt return to

in-person schooling, intensifying an ongoing debate over the extent to which school attendance contributes to the spread of COVID-19.

Shortly before the release of the CDC's controversial guidance, Plaintiff Americans for Public Trust asked the agency to provide all correspondence pertaining to its guidance for reopening schools. Instead of complying with its obligations under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a), however, the CDC determined that a wide swath of responsive records, spanning thousands of pages, is exempt from disclosure pursuant to the "deliberative process" and "presidential communications" privileges. The CDC is withholding or heavily redacting, inter alia, all records containing drafts or summaries of the guidance, as well as all correspondence relating to its efforts to influence public opinion upon release of the guidance—including an e-mail that it redacted in its production to Plaintiff but later released unredacted to the news media.

The CDC's position is at odds with well-established precedent regarding the limited scope of such privileges, however. The "deliberative process" privilege is designed to protect only "pre-decisional" and "deliberative" communications within, and among, government agencies. The CDC waived the privilege as to drafts or summaries of the guidance by sharing early drafts with powerful special interest groups, including the teachers' unions. Moreover, the privilege is designed to protect

only documents that are part of an agency's *consultative* process and therefore does not protect the CDC's correspondence regarding *public messaging*, which is "merely peripheral" to policy formation. As for the 38 records withheld in their entirety based upon the "presidential communications" privilege, nondisclosure is unjustified because the documents likely did not contribute to presidential decision-making.

Accordingly, the Court should enter summary judgment in favor of Plaintiff and require that the CDC meet its obligations under FOIA by producing all responsive records in their entirety.[1]

BACKGROUND

I. America's Public Schools Failed to Re-Open for In-Person Instruction in 2021 Despite the Availability of Vaccines, Exacerbating the Risks to the Mental and Physical Health of Students and Families.

As fear of the COVID-19 pandemic gripped the nation in the spring of 2020, schools around the country were shuttered and students were dragooned into a massive experiment in "remote learning." The consequences of this now-prolonged disruption in educational access have been devastating for children and families.

Students have experienced severe "learning loss," which has negatively impacted their long-term prospects of graduating from high school and finding a

[1] The CDC redacted certain personal identifying information, such as mobile phone numbers and e-mail addresses. Plaintiff does not object to such redactions and does not seek this personal identifying information.

good job and may have even shortened their life expectancy.[2] Children and adolescents have reported significantly more mental health and behavioral problems since schooling has been disrupted, and reports of young people committing violent crime have also increased.[3]

And the negative impacts of school closures have not been limited to students. Women with young children have had to drop out of the workforce in large numbers, with no sense of when, or if, they might return,[4] and more working parents than ever before have reported "burnout" due to the burden of working full-time while also caring for children who would otherwise be in school.[5]

---

[2] *See* Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N.Y. Times (June 5, 2020), https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html; Dimitri A. Christakis et al., *Estimation of US Children's Educational Attainment and Years of Life Lost Associated With Primary School Closures During the Coronavirus Disease 2019 Pandemic*, JAMA Network (Nov. 12, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2772834.

[3] *See, e.g.*, John Russell, *Report: School Closures Hurting Students', Techers' Mental Health*, Voice of Am. News (Mar. 23, 2021), https://learningenglish.voanews.com/a/report-school-closures-hurting-students-teachers-mental-health/5823856.html.

[4] *See, e.g.*, Megan Cerullo, *Nearly 3 Million U.S. Women Have Dropped Out of the Labor Force in the Past Year*, CBS News (Feb. 5, 2021), https://www.cbsnews.com/news/covid-crisis-3-million-women-labor-force/,

[5] *See* Ruth Igielnik, *A Rising Share of Working Parents in the U.S. Say It's Been Difficult to Handle Child Care During the Pandemic*, Pew Rsch. Ctr. (Jan. 26, 2021), https://www.pewresearch.org/fact-tank/2021/01/26/a-rising-share-of-working-parents-in-the-u-s-say-its-been-difficult-to-handle-child-care-during-the-pandemic/.

Yet even with the widespread availability of vaccines, many public schools throughout the country declined to make a full return to in-person instruction in 2021, thereby exacerbating many of the above-mentioned negative impacts of the pandemic. Such reluctance to re-open schools was, and remains, controversial, however, as the science remains largely unsettled regarding whether in-person classroom instruction contributes to the spread of COVID-19.[6]

Although public schools are locally controlled, the CDC's guidance on school reopening might have accelerated the return to in-person learning. Instead, the CDC's guidance ultimately called for more "hybrid" and "remote" learning for the vast majority of schools.

II. The CDC Withholds or Redacts Records in Response to Plaintiff's Request for Documents Regarding the Agency's School Reopening Guidance.

The CDC's recommendations had the potential to restore educational access for millions of students. For this reason, Plaintiff sent a FOIA request to the agency on February 4, 2021 ("the Request") requesting all "[e]mails, communications, correspondence, and/or talking points describing CDC guidance for the reopening of schools" after January 15, 2021, in possession of key CDC officials. Compl. Ex.

---

[6] *See, e.g.*, Cassandra Willyard, *COVID and Schools: The Evidence for Reopening Safely*, Nature (July 7, 2021), https://www.nature.com/articles/d41586-021-01826-x.

1, ECF No. 1-1. The next day, the agency acknowledged receipt of the Request. Compl. Ex. 2, ECF No. 1-2.

On April 21, 2021, Plaintiff received a response from the CDC determining that it had located 497 pages of responsive records. *See* Compl. Ex. 3, ECF No. 1-3 at 1. Of those, only 63 pages were released in full to Plaintiff—189 of the pages were partially redacted (with many pages significantly redacted), and 148 of the pages were fully withheld. *See id.* The CDC informed Plaintiff that the information was withheld under FOIA Exemption 5, 5 U.S.C. § 552(b)(5) (incorporating the "deliberative process" privilege) and Exemption 6, 5 U.S.C. § 552(b)(6) (personal privacy), *see id.* The CDC also informed Plaintiff that the remaining 97 pages of responsive records were "referred to the Department of Health and Human Services for their direct response to [Plaintiff]." *See* Compl. Ex. 3, ECF No. 1-3 at 1. On May 14, 2021, Plaintiff filed an administrative appeal challenging the CDC's Exemption 5 redactions as improper under FOIA. *See* Compl. Exs. 5 and 7, ECF No. 1-5 and 1-7.

On July 15, 2021, after more than thirty business days had passed since the Plaintiff's administrative appeal was received without a determination, Plaintiff filed suit in this Court. Compl., ECF No. 1. Plaintiff sought a preliminary injunction ordering the CDC to provide all records from its initial production that were

improperly redacted or withheld and ordering HHS to render a determination regarding the outstanding 97 pages of documents that had been referred to it. Mot. for Prelim. Inj., ECF No. 12.

Shortly before the hearing on Plaintiff's motion, HHS produced 47 pages of documents, constituting all responsive documents from the records that it reviewed. Several records were heavily redacted based on the deliberative process privilege. *See Vaughn* Index, ECF No. 37-3, at 120–30.

At the preliminary injunction stage, Plaintiff highlighted that there was an urgent need for the release of the improperly redacted and withheld documents because the initial production revealed that the CDC had cooperated with teachers' unions in formulating its school reopening guidance. *See* ECF No. 12-1 at 19–22. Accordingly, Plaintiff emphasized that school boards would be relying upon the CDC's guidance to craft their school reopening approaches for the fall and that it was imperative to gain access to the documents to provide school boards with complete and accurate information regarding the teachers' unions' unwarranted influence on the CDC's recommendations. *Id.*

The Court declined to grant Plaintiff's motion for preliminary injunction. *See* Order, ECF No. 23. The Court addressed only the issue of irreparable harm, however, and chose not to address the merits of Plaintiff's FOIA claim. *Id.* at 2.

Accordingly, whether the CDC has properly withheld or redacted documents under FOIA remains an open question that the Court must now decide upon summary judgment.

III. The CDC Admits to Having Overlooked Thousands of Pages of Responsive Documents.

Subsequently, as the CDC concedes in its briefing, the agency's internal document review process revealed that its original search for, and production of, documents was inadequate. *See* Br. in Supp. of Mot. for Summ. J., ECF No. 37-1 at 5–6. The agency failed to search the inbox of a key employee; it searched only within the relevant custodians' "sent" mail folders; and it omitted a key term that agency personnel used in correspondence to refer to the draft guidance (of which Plaintiff would not have been aware at the time of its initial FOIA request). *Id.* Only after this lawsuit was filed did the CDC identify 1,291 pages of additional responsive records that were located once the search was rectified. *Id.* The additional records were produced to Plaintiff on October 8, 2021, and the CDC sought an extension of time to submit briefing addressing such documents along with the 414 pages of the original production and the 47 pages of the HHS production.

After the second batch of records was produced, however, the agency revealed *yet another* 1,667 pages of responsive records that had been overlooked. Actual production of such documents to Plaintiff was delayed until November 19, 2021, in

part to allow for White House counsel to review the newly discovered responsive records. In total, CDC and HHS have produced nearly 3,000 pages of responsive documents, including at least 256 discrete records, the large majority of which have been withheld or heavily redacted in violation of FOIA's disclosure requirements. *See Vaughn* Index, ECF No. 37-3.

ARGUMENT

I. Legal Standard on Summary Judgment

Summary judgment is appropriate if the moving party demonstrates that "no genuine dispute [about] any material fact" exists and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When applying this standard, the court must view the evidence and draw reasonable inferences from the underlying facts as established in the record in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587–88 (1986).

An issue of fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on the issue. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Id.*

"When more than one party moves for summary judgment, each party must carry its own burden of proof." *Nat'l Ass'n of Home Builders of the U.S. v. Babbit,*

949 F. Supp. 1, 3 (1996). "On cross-motions for summary judgment, the court shall not grant summary judgment unless one of the parties is entitled to judgment as a matter of law." *Id.* When the unresolved issues are preliminarily legal, however, summary judgment is particularly appropriate. *Id.*

The moving party bears the initial burden on a motion for summary judgment to make a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the moving party will also bear the burden of proof at trial, summary judgment is appropriate against the moving party if it "fails to make a showing sufficient to establish the existence of an element essential to that party's case[.]" *See id.* at 322. In FOIA cases, "[t]he burden [of proof] is, of course, on the agency resisting disclosure." *EPA v. Mink*, 410 U.S. 73, 93 (1973) (citing 5 U.S.C. § 552(a)(3)).

II. The CDC Failed to Perform an Adequate Search for Records in Response to Plaintiff's FOIA Request

To establish the adequacy of a search for responsive documents, a government agency "must show beyond a material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents." *Broward Bulldog, Inc. v. United States Dep't of Just.*, 939 F.3d 1164, 1176 (11th Cir. 2019) (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1248 (11th Cir.

2008)). A plaintiff can rebut an agency declaration supporting the adequacy of a search by raising "substantial doubts as to the reasonableness of the search, especially in light of well-defined requests and positive indications of overlooked materials." *Greenberger v. IRS*, 283 F. Supp. 3d 1354, 1366 (N.D. Ga. 2017) (quoting *Founding Church of Scientology of Washington, D.C. v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979)). Although the "'late production' of documents does not necessarily create an 'adverse' inference[,]" the court must "'evaluate the reasoning behind the delay' to determine 'what inference, if any, can be or should be drawn.'" *Broward Bulldog, Inc.*, 939 F.3d at 1176 (quoting *Miccosukee Tribe*, 516 F.3d at 1257).

Here, the CDC argues that it conducted a reasonable and adequate search because it voluntarily expanded the date range of Plaintiff's request and then supplemented its production twice when it determined that the scope of the search needed to be expanded to obtain responsive documents. The CDC's arguments and supporting affidavits fail to establish the adequacy of its search, however.

First, the fact that the agency needed to supplement its production twice because it overlooked thousands of pages of responsive documents in its original search does not inspire confidence in its methodology. Although the agency's candor in revealing that its original search was too narrow may indeed establish that the

agency acted in good faith, that alone is insufficient for the agency to prevail at summary judgment on the reasonableness and adequacy of its search. That the CDC overlooked thousands of pages of responsive records—not once, but twice—suggests that the scope of the search was, and likely remains, inadequate.

Moreover, it is clear from the unredacted documents currently available to Plaintiff that the agency has overlooked key materials that are responsive to Plaintiff's request. The existing production confirms that the CDC provided drafts of the school reopening guidance to teachers' union officials within the date range of Plaintiff's original request for documents. *See* Ex. A. The CDC's FOIA officer acknowledges that Defendants' awareness of the teachers' union contact prompted the second search for additional records. *See* Andoh Decl., ECF No. 37-2 at ¶ 60. None of Defendants' three searches has uncovered the e-mail to Kelly Trautner of the AFT, however. And, despite Defendants' avowals to the contrary, *cf. id.*, any such e-mail would be responsive to Plaintiff's request.

Additional search terms should be added to the search to locate this record along with other contacts between the CDC and Trautner or other teachers' union officials. Such records are highly likely to exist, given that the unredacted e-mail from Trautner makes clear that AFT provided feedback to CDC staff members on the guidance. *See* Ex. A. Moreover, several other records reference changes

suggested by "school stakeholders and other partners" and pre-date the Trautner e-mail. *See* Ex. B. Such records suggest that additional communications from teachers' union officials to the CDC regarding the guidance occurred.

Accordingly, Defendants are not entitled to summary judgment on the reasonableness and adequacy of their search for documents and should be required to expand their search to uncover the contacts with the teachers' unions, which are responsive to Plaintiff's original request.

III. FOIA's Exemption 5 Does Not Permit the CDC to Withhold or Redact Records Relating to Its School Reopening Guidance

FOIA requires federal agencies to disclose to the public a wide range of information unless the information at issue falls within one of the nine enumerated exemptions listed in 5 U.S.C. § 552(b). *Fla. House of Representatives v. United States Dep't of Com.*, 961 F.2d 941, 944 (11th Cir. 1992). "As [FOIA] is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions." *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 136 (1975). Indeed, "disclosure, not secrecy, is the dominant objective of [FOIA]." *100Reporters LLC v. United States Dep't of Just.*, 248 F. Supp. 3d 115, 131 (D.D.C. 2017) (quoting *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

As a threshold matter, the Eleventh Circuit has emphasized that "[b]ecause FOIA's purpose is to encourage disclosure, its exemptions are to be narrowly construed[,]" *Moye, O'Brien, O'Rourke, Hogan & Pickert v. AMTRAK*, 376 F.3d 1270, 1277 (11th Cir. 2004) (citing *Cochran v. United States*, 770 F.2d 949, 954 (11th Cir. 1985)), and that government agencies "bear[] the burden of proving that a requested document is exempted[,]" *id.* (citing *Mink*, 410 U.S. at 80); *see also United States Dep't of Just. v. Julian,* 486 U.S. 1, 8, (1988) ("The mandate of the FOIA calls for broad disclosure of Government records, and for this reason [the Supreme Court] ha[s] consistently stated that FOIA exemptions are to be narrowly construed.") (internal citations omitted).

Here, the CDC maintains that two types of records are protected by FOIA's Exemption 5, and, in particular, by the "deliberative process" privilege: (1) drafts of the school reopening guidance, including e-mails attaching or summarizing such draft guidance; and (2) e-mails regarding the public messaging surrounding the release of the guidance. In addition, CDC maintains that 38 records, most of which also appear to concern public messaging, are protected by the presidential communications privilege because they were prepared for, and at the request of, White House staff for the purposes of briefing President Biden.

Defendants' withholding of documents under FOIA's Exemption 5 is improper, however, because the asserted privileges do not apply. First, the CDC waived the deliberative process privilege over drafts of the school reopening guidance by sharing early drafts of such guidance with the teachers' unions. Second, the e-mails regarding public messaging are merely peripheral to the policy formation process and therefore fall beyond the privilege's scope. Finally, the presidential communications privilege does not apply to the 38 records identified because they probably did not play any role in presidential decision-making but were likely routine political and PR communications with no broader import for advising the President.

A. The CDC Shared Early Drafts of Its School Reopening Guidance with the Teachers' Unions and Thereby Waived the Deliberative Process Privilege with Respect to Subsequent Drafts and Emails Attaching or Summarizing Such Drafts.

The deliberative process privilege "was created to encourage 'open, frank discussion between subordinate and chief concerning administrative action,' and to 'prevent injury to the quality of agency decisions.'" *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 576 (2012) (quoting *In re United States*, 321 Fed. App'x. 953, 958 (Fed. Cir. 2009)). The privilege is typically available to government agencies in litigation and is therefore incorporated into FOIA's Exemption 5, which exempts from disclosure intra-agency and inter-agency memoranda that the agency

would ordinarily be able to withhold from a discovery request in litigation. *See* 5 U.S.C. § 552(b)(5).

But the deliberative process privilege may be waived by the government's actions. "Where an authorized disclosure is *voluntarily* made to a non-federal party, the government waives any claim that the information is exempt from disclosure under the deliberative process privilege." *Fla. House of Representatives*, 961 F.2d at 946 (quoting *Shell Oil Co. v. IRS,* 772 F. Supp. 202, 211 (D. Del. 1991)).

Here, the CDC shared preliminary drafts of its guidance with special interest groups—including the American Federation of Teachers ("AFT"), a powerful teachers' union—and then modified its guidance in response to specific comments offered by such groups. *See* Ex. A (referencing disclosure of draft guidance to AFT on January 29, 2021); Decl. of Roger Andoh, ECF No. 37-2 ¶ 60.[7]

The sharing of early drafts of the guidance with outside special interest groups precludes the agency from invoking the deliberative process privilege here to withhold subsequent drafts of the guidance, as well as related correspondence attaching, or summarizing, such drafts. *See, e.g.*, *Comm. to Bridge the Gap v. Dep't*

---

[7] *See also* Jon Levine, *Powerful Teachers Union Influenced CDC on School Reopenings, Emails Show*, N.Y. Post (May 1, 2021), https://nypost.com/2021/05/01/teachers-union-collaborated-with-cdc-on-school-reopening-emails/.

of Energy, No. CV 90-3568-ER, 1991 U.S. Dist. LEXIS 15660, at *3–6 (C.D. Cal. Oct. 11, 1991) ("[C]ase law and policy considerations support a broad waiver rule in the particular fact sequence presented here, namely voluntary disclosure of a draft document followed by revisions to create a final draft."); *Shell Oil Co.*, 772 F. Supp. at 209 ("Where an authorized disclosure is voluntarily made to a non-federal party, whether or not that disclosure is denominated 'confidential,' the government waives any claim that the information is exempt from disclosure under the deliberative process privilege.").

Indeed, some courts have emphasized that "[s]elective voluntary disclosure of a draft . . . rule to an interested private party, followed by agency revisions, is offensive to the purposes underlying the FOIA and intolerable as a matter of policy." *Comm. to Bridge the Gap*, 1991 U.S. Dist. LEXIS 15660, at *3. "Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to obviate." *Id.* (citing *Shell Oil Co.*, 772 F. Supp. at 209). "When an agency voluntarily releases a draft document to a specially interested non-Federal party, and then revises the document, it creates the intolerable impression that the document was revised precisely *because* feedback was received from the special interest." *Id.* at *3–4.

Moreover, because "FOIA speaks in terms of disclosure and nondisclosure and does not recognize degrees of disclosure," *id.* at *5 (quoting *Julian v. Dep't of Just.,* 806 F.2d 1411 (9th Cir. 1986) and *Berry v. Dep't of Just.*, 733 F.2d 1343 (9th Cir. 1984)), waiver results even if the agency's disclosure to the "interested private party" was intended to remain confidential. Thus, the CDC's contention that disclosure of early drafts to the AFT (and potentially other teachers' unions or other outside groups) was intended to be part of its confidential policy-making process is inapposite. *See* ECF No. 37-2 ¶ 21. The disclosure to the AFT waives the privilege over that disclosed version and over all subsequent draft versions of the school reopening guidance that included language from the earlier disclosed version, as well as any e-mails attaching, discussing, or summarizing such draft guidance.

CDC does not appear to invoke the "consultant corollary" to the deliberative process privilege to argue that AFT officials were somehow functioning as agency employees, such that correspondence with them should be considered intra-agency memoranda for the purposes of FOIA's Exemption 5. *Cf.* ECF No. 37-1 at 24–26. Nevertheless, it is worth noting that this doctrine is inapplicable to an interested private party, such as the AFT. For the doctrine to apply, the consultant must "not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." *Dep't of Interior v. Klamath Water Users Protective Ass'n*,

532 U.S. 1, 11 (2001). An entity does not qualify as a consultant unless its "only obligations are to truth and [to] its sense of what good judgment calls for . . . [such that the consultant] functions just as an employee would be expected to do." *Id.*; *see also 100Reporters LLC*, 248 F. Supp. 3d at 147 (reaffirming independence and disinterestedness as prerequisites for a non-federal entity to qualify as a consultant).

Here, no reasonable observer would characterize the AFT as a disinterested party with respect to the CDC's school reopening guidance. The AFT is a labor union that exists to advocate for the interests of its members, who are primarily K-12 teachers and other school employees. It takes positions on legislation and other matters of public policy that are highly controversial and frequently partisan.[8] Accordingly, AFT officials are not consultants and the CDC's disclosure of draft guidance documents to them, or receipt of feedback from them, is not covered by the deliberative process privilege.

B. Emails Regarding Public Messaging Are Not Protected by the Deliberative Process Privilege.

1. Scope of the Privilege

To invoke the deliberative process privilege, an agency must demonstrate that a record is both "predecisional" and "deliberative." *Moye*, 376 F.3d at 1277 (citing

[8] *See, e.g.*, Am. Fed'n of Tchrs., *Current AFT Actions*, https://www.aft.org/action.

Klamath, 532 U.S. at 8.). Documents qualifying as "predecisional" must have been "prepared in order to assist an agency decisionmaker in arriving at his decision[.]" *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). These may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Nevertheless, the privilege "does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment. Material which predates a decision chronologically, but did not contribute to that decision, is not predecisional in any meaningful sense." *Moye*, 376 F.3d at 1277–78 (quoting *Grand Cent. P'ship., Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999)).

Courts have interpreted the scope of exempt "deliberative" documents quite narrowly; to be exempt, the document must be "actually . . . related to the process by which policies are formulated." *Jordan v. Dep't of Just.*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc); *Hopkins v. United States Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 84-85 (2d Cir. 1991). Predecisional materials are thus privileged as deliberative *only* "to the extent that they reveal the mental processes of decision-

makers." *Moye*, 376 F.3d at 1278 (internal quotation marks and citation omitted). In sum, records protected by the deliberative process privilege must "(i) form[] an *essential link* in a specified consultative process, (ii) reflect[] the personal opinions of the writer rather than the policy of the agency, and (iii) if released, would inaccurately reflect or prematurely disclose the views of the agency." *Grand Cent. P'Ship, Inc.*, 166 F.3d at 482 (emphasis added) (cleaned up).

Accordingly, the Supreme Court and the Eleventh Circuit have adopted "a distinction between 'factual' and 'opinion data'" for Exemption 5 purposes, holding that "factual information generally must be disclosed" by agencies, while materials "embodying *officials'* opinions are ordinarily exempt from disclosure." *Moye*, 376 F.3d at 1278 (quoting *Mink*, 410 U.S. at 87–91 and *Petroleum Info. Corp. v. United States Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992)) (emphasis added). "[I]n the absence of a claim that disclosure would jeopardize state secrets . . . memoranda consisting only of . . . factual material contained in deliberative memoranda and severable from its context would generally be available for discovery[.]" *Mink*, 410 U.S. at 87–88.

Here, the CDC has invoked the deliberative process privilege to withhold or redact all correspondence relating to its efforts to influence the public response to the release of the school reopening guidance, including e-mails that exchange talking

points and draft press releases. This correspondence falls outside of the narrow scope of FOIA's Exemption 5, however, such that CDC's withholding or redaction of such records violates FOIA's strong presumption of openness and disclosure.

The CDC has withheld or redacted documents that are, at best, peripheral to the policy-making process. For instance, in a February 7, 2021 email included in the CDC's original production, sent from White House Associate Director for Public Engagement William McIntee to the CDC's Chief of Staff Sherri Berger regarding a virtual teachers' roundtable with CDC Director Rochelle Walensky about the CDC Guidance, McIntee states that the National Education Association ("NEA") and AFT separately "had a few comms-related questions," *see* Compl. Ex. 4, ECF No. 1-4 at 122, and asks Berger: "could we please get these answers to these for them?" *Id.* The four bullet points that follow are entirely redacted. *Id.* In a response from CDC's Christopher M. Jones, a full paragraph is then omitted, followed by his statement, "Adding Courtney and Ben to weigh in from WH comms perspective." *Id.* at 121. In other words, consistent with the above-mentioned exchange of early guidance drafts with the AFT, it appears that officials from the White House and CDC also coordinated talking points with the teachers' unions. *See id.* at 127. Yet these four questions from the teachers' unions were all redacted under Exemption 5. *Id.* at 122.

This kind of written communication, presenting questions *from teachers' unions* to the White House about talking points, falls far beyond the scope of the deliberative process privilege. Indeed, these talking points are the epitome of communications that are, if anything, "merely peripheral to actual policy formation," *Grand Cent. P'ship., Inc.*, 166 F.3d at 482, because they are not directly linked to Defendants' formation of policy. Even more fatal to Defendants' assertion of privilege over these communications questions is the fact that they do not "reflect the personal opinions of the writer" of the email at all, *see Moye*, 376 F.3d at 1277; if anything, they reflect the opinions of the teachers' unions asking the questions, which were then forwarded along to officials at the CDC. The teachers' unions certainly do not qualify as "officials" with policymaking authority, and their mental processes are not protected from disclosure by Exemption 5. *Id.* at 1278 (stating that materials are protected as deliberative *only* "to the extent that they reveal the mental processes of *decision-makers*" (emphasis added)).

For similar reasons, redactions from emails coordinating remarks and logistics of White House meetings and calls with the National Governors Association and providing "situational awareness update[s]" on school reopening, Compl. Ex. 4, ECF No. 1-4 at 42–44, 66–67, are not directly connected to the formation of policy, nor would they reveal mental processes of decision-makers (or their subordinates'

opinions, *cf. Schlefer v. United States*, 702 F.2d 233, 238 (D.C. Cir. 1983)), that are "essentially" linked to, for example, development of an agency rule or adjudication. And although officials' thoughts on media coverage and "Twitter feedback" in preparation for the "roll out" of forthcoming school guidance communications, *see* ECF No. 1-4 at 386, perhaps qualify as mental impressions of decision-makers, these kinds of communications were not "prepared in order to assist an agency decisionmaker" in arriving at her decision in *formulating policy* or in the exercise of policy-oriented judgment, *see Renegotiation Bd.*, 421 U.S. at 184. Neither were the contents of "proposed [morning show] tweets." ECF No. 1-4 at 300. Redaction of these communications is inappropriate because they are not the kinds of "deliberative" or "predecisional" information that FOIA exempts from disclosure.

Defendants' numerous other redactions of talking points and other meeting logistics (unrelated to the policymaking process) coordinated between teachers and the CDC regarding school reopening roundtables are likewise not protected by the deliberative process privilege. *See, e.g.*, ECF No. 1-4 at 50, 149–50 (redacting the coordination of scheduling and logistics of "CDC teachers/parents meetings" between Walensky and certain teachers that had been "lined up" by the NEA); *see also id.* at 52–53, 60–61, 77–78, 119–38, 151–53, 161–66, 246–49 (redacting meeting logistics and non-deliberative communications that do not represent policy

formative discussions or mental processes of decisionmakers). Defendants face no risk of harm to an exemption-protected interest from disclosure of these communications. The same is true for apparently routine emails coordinating the scheduling of "teacher union calls" with CDC officials. *Id.* at 331. Likewise, proposed agendas for conversations with members of Congress and their staff, as well as coordination of talking points for media appearances, *see, e.g.*, *id.* at 225, 261, 302, 306, 336–37, and 397, are not deliberative or opinions assisting an agency decision-maker in the formation of actual policy.

Indeed, the CDC recently released a previously redacted e-mail to the news media, and White House Deputy Press Secretary Andrew Bates's comments accompanying that release echoed *Plaintiff's* arguments regarding this category of records and undermined the agency's basis for invoking the deliberative process privilege in this litigation. According to the White House Deputy Press Secretary, "[t]hese are all routine emails about logistics and ensuring that local officials, Members of Congress and outside groups of all kinds could be in touch with the proper officials and quickly informed about guidelines when finalized; none of them concern anything substantive about policy."[9]

---

[9] *See* Joe Schoffstall, *White House Considered Teachers Unions' Labor Disputes Before Releasing Reopening Guidance, Emails Show*, Fox News (Dec. 17, 2021),

If the public messaging e-mails withheld in whole or in part by the CDC here do not "concern anything substantive about policy," then they fall well outside the scope of the deliberative process privilege and FOIA's Exemption 5. The primary purpose of the privilege is to protect records that "bear on the formulation or exercise of policy-oriented judgment," *see Moye*, 376 F.3d at 1278; records that are merely peripheral to actual policy formation are not protected. The White House Deputy Press Secretary's statements fatally undercut the claims made by the CDC in this litigation that disclosure of public messaging-related records would "compromise the deliberative process of the agency" and "result in a chilling effect on intra- and inter-agency communications . . . [that would] reduce the ability of agency officials to deliberate in a meaningful manner on methods of and strategies for communicating and engaging with the public and interested parties on pending agency policies." *Vaughn* Index, ECF No. 37-3 at 78. Accordingly, the public messaging-related records are not covered by the privilege and must be produced.

To support its position, the CDC relies upon the Second Circuit's recent expansion of the deliberative process privilege to include records discussing public messaging with respect to already-finalized agency policy. *See Natural Res. Def.*

---

https://www.foxnews.com/politics/white-house-teachers-unions-labor-disputes-school-reopening-guidance-emails.

Council v. EPA, No. 20-422 (2d Cir. Nov. 29, 2021). The Second Circuit's analysis in that recent case was flawed, however, as it misconstrued precedent and departed from the background interpretive norm that FOIA exemptions are to be construed narrowly. This Court need not follow the Second Circuit's recent, non-binding opinion.

Yet even if the Court finds the Second Circuit's analysis persuasive, the records discussed in that case appear to differ materially from the records that the CDC is trying to withhold here. Whereas the records at stake in *NRDC* apparently involved agency officials strategizing about how to promote agency policy, the public messaging records here are entirely "routine emails about logistics" that do not implicate even the "policy-oriented judgment" of officials considering *how* to respond to public questions and doubts regarding a recently enacted policy. Rather, the records withheld here reflect the efforts of staff members to keep "local officials, Members of Congress, and outside groups . . . quickly informed about guidelines," not a substantial deliberation or debate among officials regarding communications strategy.[10]

[10] Schoffstall, *supra* note 9.

Accordingly, the material withheld by Defendants falls outside the scope of the deliberative process privilege.[11]

2. Subject Matter Waiver

Moreover, the CDC's actions have waived the deliberative process privilege with respect to this entire category of public messaging-related records. After redacting an e-mail as part of their most recent production to Plaintiff, the CDC subsequently disclosed that very e-mail to the news media in its entirety.[12]

Although the agency has certainly waived the privilege with respect to the single e-mail disclosed, at least one court has also found that subject matter waiver applies to the deliberative process privilege. *See Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 577 (2012) (holding that the deliberative process privilege "may be waived if the government produces documents related to the subject matter of the privileged matter or produces the privileged matter in other litigation."); *but see Spadaro v. United States Customs & Border Prot.*, No. 16-cv-16 (RJS), 2019

[11] In any event, even if some of Defendants' redactions fall within the scope of the deliberative process privilege, the agency still "*must* release [the] record . . . if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law." *Rosenberg v. United States Dep't of Def.*, 342 F. Supp. 3d 62, 73 (D.D.C. 2018) (emphasis added). Because Defendants fall far short of demonstrating how releasing the records would harm an exemption-protected interest or that their disclosure is prohibited by law, this Court should order their release.

[12] *See* Schoffstall, *supra* note 9; *cf*. Ex. C.

U.S. Dist. LEXIS 50273, at *18 (S.D.N.Y. Mar. 26, 2019) (collecting several cases indicating that there is no subject matter waiver associated with the deliberative process privilege). If subject matter waiver is applicable, the privilege should be deemed waived with respect to all public messaging-related e-mails.

C. *The Presidential Communications Privilege Does Not Apply Because the Records Identified are Likely Routine Communications About Logistics That Played No Role in Presidential Decision-Making.*

The presidential communications privilege "protects 'communications directly involving and documents actually viewed by the President,' as well as documents 'solicited and received' by the President or his 'immediate White House advisers [with] . . . broad and significant responsibility for investigating and formulating the advice to be given the President.'" *Buzzfeed, Inc. v. FBI*, Civil Action No. 18-cv-2567 (BAH), 2020 U.S. Dist. LEXIS 80640, at *20–21 (D.D.C. May 7, 2020) (quoting *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008)). "The privilege covers documents reflecting 'presidential decisionmaking and deliberations,' regardless of whether the documents are predecisional or not, and it covers the documents in their entirety." *Loving*, at 37–38 (quoting *In re Sealed Case*, 121 F.3d 729, 744–45 (D.C. Cir. 1997)).

The purpose of the privilege is to "preserve[] the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Buzzfeed*, 2020 U.S. Dist. LEXIS 80640, at *20–21 (quoting *Loving* at 37). "As such, the privilege protects 'the need for confidentiality to ensure that presidential decision-making is of the highest caliber,' so that the President may 'effectively and faithfully carry out his Article II duties and 'to protect the effectiveness of the executive decision-making process[.]'" *Id.* (quoting *In re Sealed Case*, 121 F.3d at 750 and *Judicial Watch v. Dep't of Just.*, 365 F.3d 1108, 1115 (D.C. Cir. 2004)).

Nevertheless, the scope of the presidential communications privilege is not as broad as Defendants assert. "[T]he presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected." *Judicial Watch*, 365 F.3d at 1116.

The CDC provides a declaration from Henry Walke, the director of the CDC's Center for Preparedness and Response, to support its position that the 38 documents for which the presidential communications privilege has been invoked consist of materials solicited by Jeffrey Zients and Carole Johnson, senior White House advisors, for the purpose of briefing President Biden on the school reopening

guidance. *See generally* ECF No. 37-23. But the CDC's argument and declaration are belied by the apparent character of most of the communications described in the *Vaughn* index. *See Vaughn* Index, ECF No. 37-3. "Routine emails about logistics" are not covered by the privilege, which applies only to preparatory materials that might be used to aid the President in his decision-making. Given the narrow construction of the privilege required by law, *see Judicial Watch*, 365 F.3d at 1116, the communications at issue here must also be disclosed under FOIA.

IV. Disclosure is Mandatory Because Defendants Have Failed to Identify Any Reasonably Foreseeable Harm From Disclosure

To strengthen FOIA's purpose of promoting openness and disclosure, Congress passed the FOIA Improvement Act of 2015 to address a "growing backlog" of FOIA requests and its concern that "agencies [we]re overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure."[13] Congress aimed in particular to address the "growing and troubling trend towards relying on these discretionary exemptions—*especially Exemption 5*—to withhold large swaths of Government information, even though no harm would result from disclosure." *See Ctr. for Pub. Integrity v. United States Dep't of Def.*, 486 F. Supp. 3d 317, 334 (D.D.C. 2020) (citation omitted) (emphasis added).

---

[13] S. Rep. No. 114-4, at 2 (2015), https://www.congress.gov/114/crpt/srpt4/CRPT-114srpt4.pdf.

The FOIA Improvement Act thus created an explicit "presumption of openness" for FOIA requests, mandating that under discretionary exemptions to disclosure, an agency may withhold information "only if it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law." *Id.* (quoting 5 U.S.C. § 552(a)(8)(A)(i)). "Stated differently, pursuant to the FOIA Improvement Act, an agency *must* release a record—*even if it falls within a FOIA exemption*—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law." *Rosenberg*, 342 F. Supp. 3d at 73 (emphasis added).

Because the materials withheld or redacted by the CDC here largely do not "concern anything substantive about policy," by the government's own admission, there is no harm to the agency that is prevented by the agency's nondisclosure. The records pertain to discussions that are routine and logistical in nature, or that concern feedback from special interest groups, like the teachers' unions, which is not covered by any privilege and must be disclosed.

Moreover, the CDC has amended its guidance on school reopening several times and will likely continue to do so as public health conditions change. There is no danger here of public confusion because of the release of the agency's communications or draft versions of its guidance, as the CDC claims, *see Vaughn*

Index, ECF No. 37-3 at 83, *beyond* the baseline confusion that results when an agency frequently adjusts its policy to shifting circumstances. Accordingly, pursuant to the FOIA Improvement Act, the withheld and redacted records *must* be released in their entirety regardless of the applicability of any FOIA exemption.

V. The Court Should Review the Disputed Documents In Camera

FOIA provides that a district court "may examine the contents of . . . agency records in camera to determine whether such records or any part thereof shall be withheld under any exemptions set forth in [FOIA]." 5 U.S.C. § 552(a)(4)(B). In the Eleventh Circuit, an adequate factual basis for nondisclosure "may be established, depending on the circumstances of the case, through affidavits, a *Vaughn* Index, *in camera* review, or through a combination of these methods." *Miccosukee Tribe*, 516 F.3d at1258.

Whether to conduct an *in camera* review is entirely within the trial court's discretion. *Id. In camera* review of withheld documents may be particularly appropriate "if the affidavits submitted by the parties are conclusory" or not sufficiently detailed to allow for meaningful de novo review, or "if there is evidence of agency bad faith[.]" *Carter v. U.S. Dep't of Com.*, 830 F.2d 388, 392–93 (D.C. Cir. 1987).

Here, Plaintiff requests that the Court conduct an *in camera* review of the withheld and redacted documents to determine the propriety of the agency's nondisclosure. Although the agency has provided an extensive *Vaughn* Index and several affidavits, those materials are conclusory and do not support the agency's reliance on either the deliberative process or presidential communications privileges. Moreover, the White House's own public statements regarding the documents at issue in this litigation undermine the claims advanced by the agency in their affidavits.[14] If the withheld documents are "routine e-mails about logistics" that "do not concern anything substantive about policy," then the agency's nondisclosure here is unjustified.

Given the conclusory and incongruous messages that the agency and the White House have communicated here, the Court should regard the agency's nondisclosure with skepticism and should step in to review the documents directly. It is not unprecedented for a court to utilize all three methods for verifying the basis for disclosure in a particular case, *see, e.g.*, *Miccosukee Tribe*, 516 F.3d at 1259, and the additional safeguard of *in camera* review is warranted under the circumstances.

---

[14] *See* Schoffstall, *supra* note 9.

CONCLUSION

Because neither the deliberative process nor presidential communications privileges apply, Defendants may not withhold or redact documents under FOIA's Exemption 5. Moreover, because disclosure would cause no harm under the circumstances, disclosure is mandatory under the FOIA Improvement Act. Accordingly, the Court must enter summary judgment in favor of Plaintiffs and require the CDC to produce the responsive records in their entirety and without redactions.

Respectfully submitted this 3rd day of January, 2022

/s/ Jason Torchinsky
Jason Torchinsky*
jtorchinsky@holtzmanvogel.com
Kenneth C. Daines*
kdaines@holtzmanvogel.com
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
Phone: (540) 341-8808
**Admitted Pro Hac Vice*

/s/ Bryan P. Tyson
Bryan P. Tyson
Georgia Bar No. 515411
btyson@taylorenglish.com
Loree Anne Paradise
Georgia Bar No. 382202
lparadise@taylorenglish.com

TAYLOR ENGLISH DUMA LLP
1600 Parkwood Circle, Suite 200
Atlanta, Georgia 30339
Phone: 770.434.6868
Counsel for Plaintiff

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum of Points and Authorities in Support of Plaintiff's Combined Cross-Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment have been prepared in 14-point Times New Roman font and comply with LR 5.1, NDGa and LR 7.1(D), NDGa (and the page limit extension approved by this Court [Doc. 34]).

/s/ Jason Torchinsky
Jason Torchinsky*
jtorchinsky@holtzmanvogel.com
Kenneth C. Daines*
kdaines@holtzmanvogel.com
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
Phone: (540) 341-8808
**Admitted Pro Hac Vice*

/s/ Bryan P. Tyson
Bryan P. Tyson
Georgia Bar No. 515411
btyson@taylorenglish.com
Loree Anne Paradise
Georgia Bar No. 382202
lparadise@taylorenglish.com
TAYLOR ENGLISH DUMA LLP
1600 Parkwood Circle, Suite 200
Atlanta, Georgia 30339
Phone: 770.434.6868
Counsel for Plaintiff