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

PLAINTIFF'S REPLY BRIEF
IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

The Supreme Court has consistently reiterated the principle that governs this case: "'[T]he mandate of the FOIA calls for broad disclosure of Government records' . . . and for this reason we have consistently stated that FOIA exemptions are to be narrowly construed[.]" *United States Dep't of Just. v. Julian*, 486 U.S. 1, 8 (1988) (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)).[1] The reason why is straightforward; FOIA was enacted to "permit access to official information long

[1] *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *U.S. Dep't of Just. v. Landano*, 50 U.S. 165, 181 (1993); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 180 (1991); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

shielded unnecessarily from public view" and creates "a judicially enforceable public right to secure such information from possibly unwilling official hands." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quotation omitted). Based on Plaintiff's assertion of the unambiguous right afforded by FOIA, the CDC had an obligation to search for, and produce, *all* responsive records containing its correspondence with teachers' union officials regarding school reopening guidance.

Neither of the exemptions claimed by the CDC conceivably entitles the Agency to shroud its process in secrecy. Because the CDC disclosed an early draft of its school reopening guidance to teachers' union officials, then received feedback from those officials, and *then* incorporated the feedback into subsequent drafts of its guidance, blackletter law (and common sense) compels the conclusion that the CDC waived any right to claim the deliberative-process privilege to withhold any of these communications. Its attempt to claim the presidential communications privilege over public messaging e-mails is even more spurious because such records contain no substantive policy-oriented discussion and thus played no role in presidential decision-making.

The CDC has no meritorious legal basis whatsoever for withholding or redacting any responsive materials (let alone the thousands of pages they are still withholding). Doing so plainly transgresses both the letter and the spirit of FOIA.

Summary judgment in favor of Plaintiff is plainly warranted. At a minimum, however, the Court should examine the documents *in camera* to ascertain whether the CDC's conclusory *Vaughn* Index assertions justify the Agency's non-disclosure decisions.

ARGUMENT

I. BECAUSE DEFENDANTS' SEARCHES OMITTED RESPONSIVE DOCUMENTS, THEY ARE NOT REASONABLE OR ADEQUATE.

"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. U.S. 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)). In its production to Plaintiff, the CDC disclosed e-mails that referenced earlier correspondence between Agency employees and teachers' unions officials. In particular, Kelly Trautner of the American Federation of Teachers, a powerful teachers' union, indicated that her organization had received a draft of the CDC's guidance, and had in turn provided feedback regarding the guidance to the Agency. *See* Pl.'s Cross MSJ, Ex. A, ECF No. 38-2. And in another record, a CDC employee described feedback from school stakeholders and the changes the CDC made to the guidance in response to it. *See* Pl.'s Cross MSJ, Ex. B, ECF No. 38-3.

Although such correspondence is unquestionably responsive to Plaintiff's FOIA request, the Agency has not provided it, nor, apparently, tried to find it. Instead, the Agency argues in its opposition that it is not required to locate all documents that Plaintiff believes may exist, and that, in any event, the existence of additional responsive documents is mere speculation based on a misreading of the aforementioned e-mails. The CDC is mistaken.

As the agency has explained, most CDC staff were working remotely at the time this correspondence was exchanged and e-mail was their primary method of communication, such that any contacts between teacher's union officials and the Agency very likely occurred by e-mail. *See* Def.'s MSJ at 11, ECF No. 37; Andoh Decl. ¶ 12, ECF No. 37-2. And the records already produced support Plaintiff's view that additional e-mails exist. In fact, the agency's FOIA officer, in his declaration, explicitly states that the Agency expanded its search for documents because *he believed* that there were additional e-mails involving teachers' union officials. *See* Andoh Decl. ¶ 60, ECF No. 37-2.

And there is additional evidence that the Agency's omission of responsive documents is more than just a speculative possibility. In a different FOIA matter, the Agency produced, in unredacted form, an e-mail from a teacher's union official to CDC Director Rochelle Walensky—even though no such e-mail appears in the

Vaughn Index or in the production to Plaintiff here. *See* Decl. of Caitlin Sutherland ¶1; Ex. A. This e-mail's existence undermines the Agency's position that it conducted a diligent and adequate search for documents.

Moreover, the Agency's repeated supplementation of its production indicates that its original searches were far too narrow. Although the late and unsolicited production of additional documents does not typically give rise to an adverse inference, the circumstances of the Agency's multiple productions here cast a significant, material doubt on the adequacy of Defendants' searches. Here, the late search for, and production of, documents was undertaken because Defendants recognized errors in their earlier searches (*e.g.*, having searched only Sent Mail folders, *see* Def.'s MSJ, Andoh Decl. ¶ 65, ECF No. 37-2), and because *they believed* that additional correspondence with teacher's union officials existed, *see id.* ¶ 60. The late and self-correcting searches were not merely the result of a backlog of requests or of the pressures of working during a pandemic. Rather, they indicate weaknesses in the Agency's search process that have not been remedied.

The CDC relies upon the Eleventh Circuit's decision in *Broward Bulldog* for the proposition that an agency is not required to conduct a search that turns up every responsive document. Yet that case indicates that an agency has an obligation to investigate questions raised by a FOIA requester regarding "specific missing

documents." *Broward Bulldog*, 939 F.3d at 1177. The Eleventh Circuit noted that the FBI, as part of its search, had responded to such questions by corresponding with Bureau employees likely to have further information and, upon discovering more relevant files stored on a central records system, performed a "document-by-document" review of such files to confirm that they contained only duplicates of documents that had already been produced. *Id.* at 1177. Here, by contrast, the CDC appears to take the position that it has no obligation to take *any* measures to determine whether additional correspondence with teacher's union officials may have been left out of its production. ECF No. 39 at 20-21. *Broward Bulldog* stands for no such thing.

Accordingly, Defendants' searches cannot be deemed reasonable or adequate and Defendants are not entitled to summary judgment on that issue. To the contrary, the Court should enter summary judgment in favor of Plaintiff and should order Defendants to re-run the searches to capture all responsive documents, including the e-mails sharing drafts of the guidance with teachers' union officials, and to produce those documents in their entirety to Plaintiff.

II. DEFENDANTS WAIVED THE DELIBERATIVE PROCESS PRIVILEGE.

"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 Representative v. U.S. Dep't of Com.*, 961 F.2d 941, 946 (11th Cir. 1992) (quoting *Shell Oil Co. v. IRS,* 772 F. Supp. 202, 211 (D. Del. 1991)). In their briefing, Defendants concede that they waived the deliberative process privilege with respect to the materials they shared. Def.'s Reply ISO MSJ at 9, ECF No. 39. Nevertheless, the Agency is still withholding those, arguing instead that it has no obligation to expand its search to locate those records. For the reasons discussed above, the CDC is mistaken.

The Agency's disclosure to the teachers' unions also waives any privilege over subsequent drafts of the school reopening guidance. This rule was set out in *Committee to Bridge the Gap v. Department of Energy*, No. CV 90-3568-ER, 1991 U.S. Dist. LEXIS 15660, at *3–6 (C.D. Cal. Oct. 11, 1991) (Ex. C). Defendants argue that *Committee to Bridge the Gap* is at odds with binding Eleventh Circuit precedent. Def.'s Reply ISO MSJ at 6–7, ECF No. 39. Its position, however, misreads the case on which it relies.

Properly understood, *Committee to Bridge the Gap* harmonizes with the Eleventh Circuit's decision in *Florida House of Representatives*, 961 F.2d 941, which held that voluntary disclosures of one document do not waive the deliberative process privilege as to related documents. *Id.* at 946. Here, though, Plaintiff seeks subsequent *versions* of the *same* document, and only because the Agency selectively

disclosed a draft guidance document to an outside special interest group. For that reason, the Court should find no impediment in *Florida House* to following the rule established in *Committee to Bridge the Gap*.

Although an unpublished decision from another federal district court has only persuasive authority, *Committee to Bridge the Gap* makes sense, given its fealty to FOIA's purpose and the binding precedent construing the Act. *Committee to Bridge the Gap* explicitly discussed *Mobil Oil v. EPA*, 879 F.2d 69 (9th Cir. 1989), the same Ninth Circuit precedent later adopted by the Eleventh Circuit in the opinion invoked by Defendants. *See Fla. House of Representatives*, 961 F.2d at 947 (discussing *Mobil Oil*). Specifically, *Committee to Bridge the Gap* distinguished *Mobil Oil*'s holding that "disclosure of the final version of a document does not operate as a matter of law *backward* in time as a waiver as to *earlier* drafts." *See Committee to Bridge the Gap*, 1991 U.S. Dist. LEXIS 15660, at *4 (citing *Mobil Oil*, 879 F.2d at 703 (emphasis added)). Instead, the district court identified specific policy considerations that apply when addressing the claim that "disclosure of an earlier draft should operate *forward* in time as a waiver as to *later* revisions." *Id.* (emphasis added). The district court reasoned that "[o]perating the waiver backward as to previous drafts would only prevent free and frank discussion within the agency[,]" whereas "not operating the waiver forwards as to subsequent drafts would permit the

[agency] to release draft orders selectively to special interest groups for comment and revision in a secretive process completely hidden from public view or participation." *Id.* at *4-5.

Here, the same policy considerations demonstrate that the CDC waived any deliberative process privilege over subsequent drafts of school reopening guidance by sharing them with the teachers' unions. To hold otherwise would be to permit the CDC to engage in a "secretive process," *see id.* at *5, that grants undue influence to a powerful union in the making of public health policy. Accordingly, the Agency must produce in unredacted form the subsequent drafts of the guidance.

III. PUBLIC MESSAGING E-MAILS ARE NOT EXEMPT.

The CDC has also withheld or redacted many documents pertaining to its public relations campaign regarding its school reopening guidance. Such public messaging e-mails are merely peripheral to policy formation and thus are not covered by the deliberative process privilege. Defendants argue, however, that under the Second Circuit's decision in *Natural Resources Defense Council v. EPA*, 2021 U.S. App. LEXIS 35104 (2d Cir. Nov. 29, 2021) such e-mails are protected by the privilege because they are part of the Agency's deliberations regarding how best to present a policy to the public and therefore necessarily involve the "formulation or exercise of policy-oriented judgment." *Id.* at *10.

A. The Agency's release of an unredacted e-mail to the media undermines its characterization of public messaging records as containing substantive policy-related deliberations.

1. The news article accompanying the release of the unredacted e-mail is not inadmissible hearsay.

In its Cross-motion for Summary Judgment, Plaintiff cited a Fox News article regarding the Agency's release, in unredacted form, of a document that the Agency produced to Plaintiff with substantial redactions.[2] Plaintiff also highlighted comments from the White House Deputy Press Secretary accompanying the Agency's release of the unredacted document, in which he characterized the e-mails at issue in this matter as "routine e-mails about logistics." *See* Pl.'s Cross MSJ at 25, ECF No. 38.

Defendants argue that Plaintiff's reliance on the news article is improper because the article constitutes inadmissible hearsay. The CDC's hearsay objection plainly does not apply to either the Fox News Article (which is offered not for the truth of anything asserted in it but instead to show that the CDC has in fact publicly released materials it is still withholding from Plaintiff) or the unredacted email (which is not a third-party statement). And, to the extent they assert a hearsay

[2] *See* Joe Schoffstall, *White House Considered Teachers Unions' Labor Disputes Before Releasing Reopening Guidance, Emails Show*, Fox News (Dec. 17, 2021), https://www.foxnews.com/politics/white-house-teachers-unions-labor-disputes-school-reopening-guidance-emails.

objection to the statement of the White House Deputy Press Secretary, they are similarly mistaken. The statements contained in the article are not "offered to prove the truth of the matter asserted." Fed. R. Evid. 801(C)(2); *see also United States v. Hawkins*, 905 F.2d 1489, 1494 (11th Cir. 1990) ("A statement is not subject to the hearsay rule, however, unless it is offered 'to prove the truth of the matter asserted.'").

Here, the statements contained in the news article show that even the White House Deputy Press Secretary believes that the messaging e-mails at stake in this matter are not substantive policy-related communications. The White House employee is presumably among those employees whose freedom to engage in frank discussion is purportedly protected by the CDC's invocation of the deliberative process privilege here. Accordingly, that such employee does not view the communications at issue as policy-related is noteworthy, and surely appropriate for the Court to consider.

2. The unredacted text of the e-mail reveals messaging-related correspondence that is not covered by the deliberative process privilege.

Moreover, the unredacted e-mail text disclosed in the news article pertains to messaging and outreach to promote the school reopening guidance—and not to any substantive policy discussions. For example, the Agency redacted a bullet point that

reads "Anne – by 4 pm WH Leg Affairs, Ed Leg Affairs, and HHS Leg Affairs needs a general ranking/prioritization of who on the Hill needs touches."[3] A sub-point reads: "[t]he 4pm cutoff is so that Elizabeth Jurinka (WH Senate), Alicia Molt-West (WH House), Molly Peterson (Ed), and us (HHS) have seen each other's lists before the next meeting tomorrow evening."[4] There is no substantive policy discussion in this portion of the record; instead, this is merely a request to provide a list of elected officials who the recipient believes needs to receive talking points regarding the guidance.

Another redacted bullet point reads similarly: "We will need to begin a tick tock that outlines all of the notifications being made. Hill/stakeholder calls being held, etc. The relative 'go time' seems to be the 11 am WH briefing. Dr. Walensky should be mentioning it there."[5] It would be difficult to characterize such correspondence as anything besides a "routine e-mail[] about logistics." Pl.'s Cross MSJ at 29–31, ECF No. 38-1.

Defendants argue that the unredacted text shows "strategic planning" and "substantive policy wrangling and messaging coordination that the agency is still hashing out." Def.'s Reply ISO MSJ at 16, ECF No. 39. Defendants maintain that

[3] Schoffstall, *supra* note 2.
[4] *Id.*
[5] *Id.*

"[a]gency officials would be less likely to speak candidly and explain their thought processes in this way if they knew it was all subject to disclosure." *Id.* Such a broad rationale would seem to vitiate FOIA's mandate of government transparency, however. Virtually all correspondence between government employees pertains to *some* tasks of the kind discussed in the unredacted e-mail; if it could be characterized as policy-related "planning" and "wrangling," then most such correspondence would be rendered off-limits to the public, which would be inconsistent with FOIA's letter and spirit.

B. The context discernible from the redacted documents indicates that these e-mails were merely peripheral to the policy formation process.

The context visible in the redacted e-mails produced to Plaintiff indicates that most of the withheld public messaging records are similarly divorced from any substantive policy concerns. Defendants maintain, however, that such records reflect coordination of stakeholder meetings, and draft press, and social media releases, each of which allegedly impacts Agency policy in line with the reasoning adopted in the Second Circuit's recent decision in *NRDC*.

The records discussed here appear quite different from the internal communications at issue in *NRDC*, however. As Plaintiff has previously noted, *NRDC* dealt with messaging records that "reflect[] internal . . . deliberations by [agency] staff about how the agency should communicate its policies to people

outside the agency." *NRDC*, 2021 U.S. Dist. App. LEXIS 35104, at *5. By contrast, the messaging records here do not appear to reflect "internal deliberations" over messaging, but rather the details and logistics of a PR campaign—not the *what* or the *why*, but the *how*. Such records are not "informed" by policy considerations except in the most tangential way and are therefore not covered by the deliberative process privilege.[6]

IV. THE COURT SHOULD REVIEW THE DOCUMENTS *IN CAMERA* BECAUSE THE DEFENDANTS' DECLARATIONS AND *VAUGHN* INDEX ARE CONCLUSORY.

At a minimum, Plaintiff requests that the Court review the documents *in camera* to evaluate the Agency's nondisclosure. *See* 5 U.S.C. § 552(a)(4)(B); *Miccosukee Tribe,* 516 F.3d at 1258. *In camera* review is warranted because the

[6] For the same reasons that the agency's public messaging records are beyond the scope of the deliberative process privilege, such records also likely fail to constitute "decisionmaking" or "deliberations" by the President or his immediate advisers so as to fall within the scope of the presidential communications privilege. *See Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008). Although the 38 records for which this privilege has been claimed have been withheld in their entirety, Plaintiff can only conclude that, to the extent that such records are similar in content to the public messaging records that the agency has withheld in part, they are not the kinds of materials that are used to advise the president on matters of substantive policy. Accordingly, these 38 records should also be disclosed in full or, at the very least, reviewed *in camera* to ensure that the non-disclosure is appropriate. Similarly, the agency has not identified a cognizable harm in disclosure of the public messaging e-mails, such that disclosure of such records is required under the FOIA Improvement Act. *See* 5 U.S.C. § 552(a)(8)(A)(i).

declarations and *Vaughn* Index rely in a conclusory fashion on the premise that all messaging e-mails are necessarily policy-related, when the unredacted text of such e-mails does not support that inference.

Moreover, the Agency has now released in unredacted form to the public two responsive e-mails, one of which was not produced to Plaintiff and one of which was substantially redacted at the time of production. While two such oversights may not amount to "bad faith," *cf. Carter v. U.S. Dep't of Com.*, 830 F.2d 388, 392–93 (D.C. Cir. 1987), they sufficiently call into question the Agency's judgment such that the court should provide the additional safeguard of *in camera* review.

CONCLUSION

The Court should enter summary judgment in favor of Plaintiff and should require the Agency to conduct an expanded search for documents and to produce all responsive records in their entirety and without redactions. In the alternative, the Court should conduct *in camera* review of the redacted documents to ensure that the Agency's nondisclosures are proper.

Respectfully submitted this 1st day of February, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief in Support of Cross-Motion for Summary Judgment has been prepared in 14-point Times New Roman font and complies with LR 5.1, NDGa and LR 7.1(D), NDGa (and the page limit extension approved by this Court [Doc. 34]).

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