IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	C. A. No. 08-1468 (EGS)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, plaintiff respectfully moves for summary judgment. The grounds for this motion are set forth in the accompanying memorandum of points and authorities.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking the disclosure of records held by defendant Department of Justice ("DOJ") concerning interviews of Vice President Richard B. Cheney conducted as part of Special Counsel Patrick J. Fitzgerald's investigation into the leak of Valerie Plame Wilson's covert CIA identity. DOJ has moved for summary judgment, asking the Court to sustain its decision to withhold the requested material in its entirety. Because the agency has failed to meet its burden – both procedurally and substantively – the Court should deny DOJ's motion and grant plaintiff's cross-motion for summary judgment.

BACKGROUND

The CIA Leak Investigation and the Role of Vice President Cheney

As part of Special Counsel Fitzgerald's investigation into the leak of the covert CIA identity of Mrs. Wilson, the FBI interviewed I. Lewis Libby, the vice president's chief of staff, on November 26, 2003. During his interview, Mr. Libby stated that it was "possible" he was instructed by someone, including possibly the vice president, to inform a member of the press of the identity and employment of Mrs. Wilson. Complaint, ¶ 19;

Answer, ¶ 19. The leak of Mrs. Wilson's covert identity followed the publication of a *New York Times* op-ed column by her husband, former Ambassador Joseph Wilson, outlining what he found in his trip to Niger to investigate allegations that Iraq had sought uranium from Africa. During the criminal trial of Mr. Libby, Cathie Martin, Assistant to the Vice President for Public Affairs, testified that she, Mr. Libby and Vice President Cheney all participated in a press strategy to discredit Ambassador Wilson's account. Complaint, ¶ 20; Answer, ¶ 20.

Special Counsel Fitzgerald, in his closing remarks to the jury during the criminal prosecution of Mr. Libby, stated that "[t]here is a cloud over what the Vice President did that week. He wrote those columns. He had those meetings. He sent Libby off to Judith Miller at the St. Regis Hotel. At that meeting, the two-hour meeting, the defendant talked about the wife. We didn't put that cloud there. That cloud remains." Complaint, ¶ 21; Answer, ¶ 21.

For more than a year, the House of Representatives Committee on Oversight and Government Reform ("the Committee") has been seeking documents from defendant DOJ as part of the Committee's investigation into the leak of Mrs. Wilson's covert CIA identity. As part of that investigation, DOJ provided the Committee with redacted versions of reports of FBI interviews of White House staff, but has refused to permit any access to the interview reports of the president and vice president. Complaint, ¶ 22; Answer, ¶ 22. Special Counsel Fitzgerald has advised the Committee that as to the FBI's interviews of the president and vice president, "there were no agreements, conditions, and understandings between the Office of Special Counsel or the Federal Bureau of Investigation and either the President or Vice President regarding the conduct and use of

the interview or interviews." Complaint, ¶ 23; Answer, ¶ 23; Letter from Special Counsel Patrick J. Fitzgerald to Hon. Henry A. Waxman, July 3, 2008, attached hereto as Plaintiff's Exhibit ("Pl. Ex.") A, at 2.

On July 15, 2008, Attorney General Michael B. Mukasey requested that the president assert executive privilege in response to a subpoena from the Committee seeking the FBI's reports of the Special Counsel's interviews with the vice president as well as notes prepared during the interviews. On July 17, 2008, the Committee announced that President Bush had invoked executive privilege to block DOJ from providing the Committee with the subpoenaed documents. Complaint, ¶ 24; Answer, ¶ 24; Declaration of Steven G. Bradbury ("Bradbury Decl."), ¶¶ 4-5.[1]

Plaintiff's FOIA Request and DOJ's Decision to Withhold All Responsive Material

On July 17, 2008, plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") sent a FOIA request to defendant DOJ seeking records, regardless of format and including electronic records and information, "relating to any interviews outside the presence of the grand jury of Vice President Richard B. Cheney that are part of Special

[1] On October 14, 2008, the Committee released a draft report summarizing its thwarted efforts to obtain relevant material, including the interview reports at issue here. Significantly, the report notes:

> The central document in this dispute is the report of the FBI interview with the Vice President. Both the Chairman and the Ranking Member are in agreement that the President's assertion of executive privilege over this document was legally unprecedented and an inappropriate use of executive privilege.

Draft Report of the Committee on Oversight and Government Reform, U.S. House of Representatives, Regarding President Bush's Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukasey ("Draft Committee Report"), attached hereto as Pl. Ex. B, at 7.

Counsel Patrick Fitzgerald's investigation into the leak of the identity of Valerie Plame Wilson, a covert CIA officer." CREW explained that its request was coextensive with the subpoena issued by the Committee to the attorney general on June 16, 2008, for the same records concerning Vice President Cheney. CREW's request was directed to the DOJ's Office of Information and Privacy ("OIP"), which is responsible for FOIA requests seeking records of the attorney general, deputy attorney general and associate attorney general. Complaint, ¶ 25; Answer, ¶ 25; Bradbury Decl., ¶ 6. CREW requested that DOJ expedite the processing of its FOIA request, pursuant to the FOIA and DOJ regulations, in view of the particular urgency to inform the public about the role Vice President Cheney played in the leak of Mrs. Wilson's covert CIA identity and the basis for Special Counsel Fitzgerald's decision not to prosecute the vice president. Complaint, ¶ 27; Answer, ¶ 27.

By letter dated July 24, 2008, DOJ acknowledged receipt of CREW's FOIA request and advised CREW that its request for expedited processing had been granted. Notwithstanding that purported decision, DOJ failed to respond to CREW's request within the generally applicable twenty-day deadline for the processing of *any* FOIA request, 5 U.S.C. § 552(a)(6)(A). CREW initiated this action on August 25, 2008, and promptly moved for a preliminary injunction to compel DOJ to respond immediately to CREW's request. Based upon DOJ's representation to plaintiff and the Court that it "expect[ed] to complete processing of [CREW's] request on or before September 12, 2008," the parties agreed that CREW's motion for preliminary relief was moot. Joint Stipulation and Proposed Order [Docket No. 5] at 1. Despite that representation, DOJ did not respond to the request until September 18, 2008, when it advised CREW that it had "identified three

. . . records (totalling 67 pages) that are responsive to your FOIA request," and that all of the responsive material was being withheld. Exhibit E (attached to Bradbury Decl.).[2]

DOJ moved for summary judgment on October 10, 2008, and described the withheld material as follows: 1) "FBI report summarizing interview of Vice President Richard B. Cheney" (28 pages); 2) "FBI handwritten notes summarizing interview of Vice President Richard B. Cheney" (22 pages); and 3) "FBI handwritten notes (annotated on outline of questions to be asked) summarizing interview of Vice President Richard B. Cheney" (17 pages). *Vaughn* Index, Records Withheld by the Office of Legal Counsel, Exhibit E (attached to Bradbury Decl.). In support of its motion, DOJ asserts that all of this material is exempt from disclosure under FOIA in its entirety. For the reasons set forth below, CREW opposes the government's motion.

ARGUMENT

The Freedom of Information Act is intended to safeguard the right of the American people to know "what their Government is up to." *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *Maydak v. Dep't of Justice,* 218 F.3d 760 (D.C. Cir. 2000). As this Court recently noted, "Congress enacted FOIA for the purpose of introducing transparency to government activities." *In Def. of Animals v. NIH*,

[2] DOJ further advised CREW that, notwithstanding the agency's purported decision to "expedite" the processing of CREW's FOIA request, responsive documents were not even referred to the Office of Legal Counsel, the component apparently responsible for the disposition of the material, until September 4, 2008 – more than 40 days after the agency acknowledged its statutory obligation to "expedite" processing. Exhibits D & E (attached to Bradbury Decl.)

543 F. Supp. 2d 83, 93 (D.D.C. 2008) (citation omitted); *see also Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1112 (D.C. Cir. 2004) ("The Supreme Court has long recognized that Congress' intent in enacting FOIA was to implement 'a general philosophy of full agency disclosure.'").

Agency records requested under FOIA must be disclosed unless they squarely fall within one of the statute's nine enumerated exemptions. The exemptions "must be narrowly construed," and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

In reviewing a motion for summary judgment under the FOIA, the Court must conduct a *de novo* review of the record. 5 U.S.C. § 552(a)(4)(B). In the FOIA context, "*de novo* review requires the court to 'ascertain whether the agency has sustained its burden of demonstrating that the documents requested . . . are exempt from disclosure under the FOIA.'" *Assassination Archives & Research Ctr. v. Cent. Intelligence Agency*, 334 F.3d 55, 57 (D.C. Cir. 2003) (quoting *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998)). Under the FOIA, all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester; as such, summary judgment is only appropriate where an agency proves that it has fully discharged its FOIA obligations. *Moore v. Aspin*, 916 F. Supp 32, 35 (D.D.C. 1996) (citing *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983)).

I. DOJ Has Failed to Meet the Procedural Requirements Necessary to Sustain its Burden Under the FOIA

In *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973), the D.C. Circuit established the "procedural requirements" that "an agency seeking to avoid disclosure" must follow in order to carry its burden. *Vaughn* requires that "when an agency seeks to

withhold information it 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., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted).[3]

In *King v. United States Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987), the court of appeals reviewed the caselaw applying *Vaughn* and emphasized that

> [s]pecificity 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." 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."

(footnotes omitted). *See also Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) ("[t]he court has provided repeated instruction on the specificity required of a *Vaughn* index"). As the court concluded in *King*, "[c]ategorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate." 830 F.2d at 224 (footnote omitted).

Here, as we discuss more fully below in the context of DOJ's specific exemption claims, the agency has proferred a classic example of the kind of "conclusory" affidavit that the D.C. Circuit has long rejected. The declaration of Mr. Bradbury is wholly lacking in the requisite "specificity" and, at best, attempts to offer a "categorical indication of anticipated consequences of disclosure." Thus, for instance, Mr. Bradbury states, without

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[3] The *Vaughn* requirements are typically satisfied through an agency's submission of an affidavit describing the basis for its withholdings, and providing justifications for redactions, accompanied by an index listing responsive records and indicating the precise redactions made to the records. We refer to the affidavit and index collectively herein as a "*Vaughn* submission."

any explanation or elaboration, that "DOJ's ability to conduct future law enforcement investigations that might require White House cooperation would be significantly impaired" if *any portion* of the disputed material is disclosed. Bradbury Decl., ¶ 9. Similarly, Mr. Bradbury offers the categorical and conclusory opinion that "[d]isclosing . . . sensitive conversations involving the President, the Vice President, and other senior White House officials could impair effective presidential decisionmaking." *Id*., ¶ 14. The inadequacy of DOJ's *Vaughn* submission is apparent, and that shortcoming – standing alone – compels the Court to find that the agency has failed to carry its burden.

II. Defendant DOJ Has Not Met Its Burden of Showing that the Records Are Exempt From Disclosure Under Exemption 7(A)

Apparently cognizant of the fact that the disputed records do not fall within the scope of any "narrowly construed" FOIA exemption, *Rose*, 425 U.S. at 361, defendant DOJ attempts to expand the reach of the statutory exemptions to lengths never countenanced by this or any other court. DOJ's claim under Exemption 7(A) exemplifies its approach. While devoting the bulk of its argument to assertions that the records were "compiled for law enforcement purposes," and that Congress "relaxed" the government's burden under Exemption 7(A) through amendments in 1986 – assertions that CREW does not dispute – DOJ attempts to gloss over the fatal flaw in its position.

The exemption permits the withholding of "records or information compiled for law enforcement purposes . . . to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The courts have consistently interpreted the exemption to require the existence of an *ongoing* investigation or enforcement proceeding. *See, e.g.*, *Juarez v. Dep't of Justice*, 518 F.3d 54, 58-59 (D.C. Cir. 2008). In light of the

fact that "the Special Counsel's investigation and the Libby prosecution are closed matters," Letter from the Attorney General to the President, July 15, 2008 (attached to Bradbury Decl. as Exhibit B) at 4, DOJ is left to argue merely that "release of the documents could reasonably be expected to interfere with *future enforcement proceedings that can be reasonably anticipated* . . ." Defendant's Memorandum in Support of its Motion for Summary Judgment ("Def. Mem.") at 9 (emphasis added). No court has ever adopted the wildly expansive application of Exemption 7(A) that DOJ asserts here.

In support of its novel assertion, DOJ selectively quotes language from *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003), to the effect that, "Exemption 7(A) does not require a presently pending 'enforcement proceeding.'" Def. Mem. at 8. In that case, which involved the identities of foreign nationals detained in the aftermath of the September 11 terrorist attacks, the court of appeals followed the quoted language with this: "[A]s the district court correctly noted, it is sufficient that the government's ongoing September 11 terrorism investigation is likely to lead to such proceedings." *Id.* (citation omitted). The court approvingly cited the district court's observation that "[a]lthough typically there must be a pending or a specific 'concrete prospective law enforcement proceeding' at issue, Exemption 7A has also been extended to protect information related to ongoing investigations likely to lead to such proceedings, as in this case." *Ctr. for Nat'l Sec. Studies v. United States DOJ*, 215 F. Supp. 2d 94, 101 n.9 (D.D.C. 2002). Lest there be any doubt on the point, the D.C. Circuit noted in *Ctr. for Nat'l Sec. Studies* that "impediments to an *ongoing* law enforcement investigation are precisely what Exemption 7(A) was enacted to preclude." 331 F.3d at 933 (emphasis added).

DOJ also cites *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1541 (D.C. Cir. 1993), to support the proposition that Exemption 7(A) protects against interference with enforcement proceedings that are "pending or *reasonably anticipated*." Def. Mem. at 8, 9 (emphasis in original; citation omitted). In *Mapother*, the D.C. Circuit distinguished between "an enforcement action brought on an agency's own initiative and one that is triggered by the action of a third party," 3 F.3d at 1541. At issue in that case was a Justice Department report that formed the basis for a decision to exclude former Austrian President Kurt Waldheim from entry into the United States as a result of his associations with Nazi activities. The court of appeals explained that its use of the term "reasonably anticipated" was intended to account for the possibility that other aliens excluded from entry on the basis of Nazi associations might initiate challenges to exclusion orders, and that such "reasonably anticipated" proceedings might be hampered by disclosure of the Waldheim report. Here, in contrast, defendant DOJ merely cites the hypothetical possibility that some vague "future Department of Justice criminal investigations involving official White House activities" might be hampered. Def. Mem. at 8, quoting Bradbury Decl., ¶ 9.

It is clear that the circumstances present in this case are a far cry from those the courts confronted in *Ctr. for Nat'l Sec. Studies* and *Mapother*, where the government pointed to concrete and specific enforcement proceedings that could be hampered by disclosure of the disputed records – the "ongoing September 11 terrorism investigation," 331 F.3d at 926; and the "likelihood of a challenge . . . [to] an exclusion order" based upon participation in Nazi activities, 3 F.3d at 1542. Permitting DOJ to withhold the material at issue here solely to protect against hypothetical interference to some vague "future . . .

investigations involving official White House activities" would violate the Supreme Court's longstanding command that FOIA's exemptions "must be narrowly construed." *Rose*, 425 U.S. at 361. The Court should reject the agency's sweeping and unprecedented application of Exemption 7(A).

III. Defendant DOJ Has Not Met Its Burden of Showing that the Records Are Exempt From Disclosure Under Exemption 5

Defendant DOJ next asserts that the requested records fall within the scope of three distinct privileges and are thus subject to withholding under Exemption 5; "law enforcement privilege" (records exempt in their entirety); "deliberative process privilege" (portions exempt); and "presidential communications privilege" (portions exempt). We raise two initial matters in response to DOJ's claims and then address the shortcomings of the three individual assertions of privilege.

First, we note that the utter inadequacy of DOJ's purported *Vaughn* submission, which we have already addressed, leaves both plaintiff and the Court unable to assess the validity of the agency's claim that "portions" of the disputed records are exempt from disclosure under the latter two privileges. DOJ's motion thus runs afoul of the D.C. Circuit's repeated admonition that "when an agency seeks to withhold information, it 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,'" *Morley*, 508 F.3d at 1122 (emphasis added; citations and internal quotation marks omitted). Based upon that failure alone, the Court should reject the government's exemption claims.

Additionally, the latter two claims of privilege ("deliberative process privilege" and "presidential communications privilege") must be rejected because the White House has

waived them.[4] It is a basic tenet of privilege law that "any voluntary disclosure . . . to a third party breaches the [claimed] confidentiality . . . and therefore waives the privilege." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982). Indeed, in a holding that applies with equal force in this case, the D.C. Circuit found in *In re Sealed Case* ("*Espy*"), 121 F.3d 729, 741-742 (D.C. Cir. 1997), that "the White House . . . waived its claims of privilege in regard to the specific documents that it voluntarily revealed to third parties outside the White House."[5]

It is beyond dispute that the information at issue here (the contents of the vice president's interview with the FBI) was "voluntarily revealed to third parties outside the White House." In his July 15, 2008, letter to the president requesting an assertion of executive privilege in response to the Committee's subpoena, Attorney General Mukasey conceded that "[the President], the Vice President and White House staff *cooperated voluntarily* with the Special Counsel's investigation, agreeing to informal interviews . . . ." Exhibit B (attached to Bradbury Decl.) at 4 (emphasis added); *see also* Bradbury Decl., ¶ 3 (the Committee's subpoena "sought the reports of *voluntary* interviews of the Vice President and senior White House staff") (emphasis added).

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[4] We describe the party in interest as "the White House" guardedly, as it is not clear from the government's cursory *Vaughn* submission which entity or individual is actually asserting the privilege claims at issue here. In his declaration, Mr. Bradbury alternately asserts that "the Attorney General requested that the President assert executive privilege in response to the Committee's subpoena," that "the President subsequently asserted executive privilege," and that the documents at issue in this case have been "withheld by OLC." Bradbury Decl., ¶¶ 4, 5, 17.

[5] The court made clear that the White House's waiver applied "to executive privileges generally, [and] to the deliberative process privilege in particular." 121 F.3d 729 at 741.

It is equally clear that the voluntary disclosure of the information contained in the disputed interview reports was provided by the vice president *without* any "agreements, conditions and understandings between the Office of Special Counsel or the Federal Bureau of Investigation' and either the President or Vice President 'regarding the conduct and use of the interview or interviews.'" Letter from Special Counsel Patrick J. Fitzgerald to Hon. Henry A. Waxman, July 3, 2008 (attached hereto as Pl. Ex. A), at 2.[6] Under these circumstances, it is beyond dispute that the White House has "waive[d] [the asserted] privileges for the . . . information specifically released" to the FBI and the Special Counsel. *Espy*, 121 F.3d at 741.[7]

A. The Records Are Not Properly Withheld Under "The Law Enforcement Privilege"

Consistent with its attempt to overreach and distort the applicable caselaw in support of its decision to withhold the requested records, defendant DOJ invites the Court to validate the agency's novel invention – a "law enforcement privilege" that supposedly trumps FOIA's disclosure requirements and permits the disputed material to be withheld *in its entirety*. No court has ever recognized such a privilege within the context of Exemption 5, and the only court that appears to have considered it expressly rejected the notion.

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[6] The actions of previous high-level White House officials demonstrate that "agreements, conditions [or] understandings" are, in fact, necessary to preserve privilege claims of the kind at issue here. Thus, "C. Boyden Gray, White House Counsel during the [first] Bush Administration, and his deputy, John Schmitz, refused to be interviewed by the Independent Counsel investigating the Iran-Contra affair and only produced documents subject to an agreement that 'any privilege against disclosure . . . []' was not waived." *In re Lindsay*, 148 F.3d 1100, 1111 (D.C. Cir. 1998) (citation omitted).

[7] In the absence of an assurance to the contrary, individuals providing information to the FBI do so recognizing the likelihood that the information may be used in a variety of ways. *See, e.g.*, *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 174 (U.S. 1993) ("at the time an interview is conducted, neither the source nor the FBI agent ordinarily knows whether the communication will be disclosed").

DOJ cites just one case in support of its proposition that "DOJ and other law enforcement agencies possess a law enforcement privilege" that somehow justifies the withholding of records sought under FOIA. Def. Mem. at 10, *citing Singh v. S. Asian Soc'y*, 2007 WL 1556669, at *3 (D.D.C. 2007). Significantly, *Singh* was not a FOIA case, but rather involved a motion to compel enforcement of a subpoena *duces tecum* issued in a wrongful death action. DOJ's failure to cite any authority holding that FOIA's Exemption 5 encompasses a "law enforcement privilege" is not surprising; plaintiff's research has similarly failed to locate any such authority.

The only case that appears to address the issue is *Dean v. FDIC*, 389 F. Supp. 2d 780 (E.D. Ky. 2005), in which the district court rejected the novel proposition DOJ asserts here:

> The defendants also argue that Exemption 5 encompasses something referred to as the "law enforcement privilege," which exists to prevent harm to law enforcement efforts that might arise from public disclosure of investigatory files. The defendants acknowledge that the Sixth Circuit has not ruled on the existence of the law enforcement privilege, but assert that two sister courts within the Sixth Circuit have recognized its existence . . . .
>
> The Court is unwilling to recognize the "law enforcement privilege" in the present case. Neither of the cases cited by the defendants were FOIA cases and a number of the factors to be considered in whether to apply the privilege are already covered in other FOIA exemptions . . . . Further, the Court is of the opinion that if this privilege were to be recognized at all, it should be recognized under Exemption 7, not Exemption 5.

Id. at 791-792 (citations omitted). Indeed, this Court has likewise noted that any "privilege" of the sort DOJ seeks to raise here is incorporated into Exemption 7. *See*, *e.g.*, *Dow Jones & Co. v. U.S. Dep't of Justice*, 724 F. Supp. 985, 989 (D.D.C. 1989) (referencing "the law enforcement privileges of exemption 7"). As we have shown, the government's attempt to rely upon Exemption 7(A) cannot be sustained, and the illusory

"law enforcement" interests it seeks to invoke fare no better masquerading as Exemption 5 claims.[8]

B. No Portions of The Records Are Properly Withheld Under The Deliberative Process Privilege

Defendant DOJ next argues that certain unspecified "portions" of the requested records "fall within the deliberative process privilege" and are thus exempt from disclosure. Def. Mem. at 12. The agency's claim fails for two distinct reasons: 1) the withheld portions appear merely to state or explain decisions that had been previously rendered; and 2) the withheld portions appear to include purely factual material. We address each of these issues in turn.

1. The Withheld Material Is Not "Predecisional"

The D.C. Circuit has made clear that "[m]aterials that are 'predecisional' and 'deliberative' are protected, while those that 'simply state or explain a decision the government has already made . . .' are not." *Judicial Watch*, 365 F.3d at 1113, *quoting Espy*, 121 F.3d at 737. Here, there is no question that the information contained in reports of the vice president's FBI interview relates to "decision[s] the government ha[d] already made" by the time the interview was conducted. DOJ's declarant states in support of the government's privilege claim:

> Portions of the withheld documents reflect or describe frank and candid deliberations involving, among others, the Vice President, the White House Chief of Staff, the National Security Advisor, the Director of the Central Intelligence Agency, and the White House Press Secretary. These deliberations concern, among other things, the preparation of the President's January 2003 State of the Union Address, possible responses to media

[8] DOJ's declarant concedes that "[t]he reasons supporting the applicability to these documents of Exemption Five by virtue of the law enforcement privilege are the same reasons that are set forth . . . to support the applicability of Exemption Seven." Bradbury Decl., ¶ 12.

> inquiries about the accuracy of statement in the President's address and the decision to send Ambassador Joseph Wilson on a fact-finding mission to Niger in 2002, the decision to declassify portions of the October 2002 National Intelligence Estimate, and the assessment of the performance of senior White House staff.

Bradbury Decl., ¶ 13. All of the referenced matters pre-dated the vice president's FBI interview by more than one year.[9]

As the D.C. Circuit has explained, while such material might be deemed "deliberative," it may not be withheld under Exemption 5 because it fails to meet the requirement of being "predecisional." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991).

> [A]n agency's . . . *after-the-fact explanation* of a decision will often be "deliberative" as the word is used in common parlance, in that it carefully weighs the arguments for and against various outcomes before announcing a winner. Because the courts have determined that Congress did not intend to exempt such explanatory documents from FOIA's disclosure requirements, they have denied the privilege in these circumstances by finding that the documents are not "predecisional."

Id. (emphasis added). The court of appeals noted that "[t]he Supreme Court took this approach" in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), and had expressly stated that it is "difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached." 926 F.2d at 1194, *quoting Sears*, 421 U.S. at 151.

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[9] Although DOJ's submissions are silent on the date of the interview, it appears to have been conducted in June 2004. *See* Susan Schmidt, *Bush Aide Testifies in Leak Probe; Gonzales Appears Before Grand Jury*, Washington Post, June 19, 2004; Page A07 ("Vice President Cheney was recently interviewed by Fitzgerald's staff") (*available at* http://www.washingtonpost.com/wp-dyn/articles/A53351-2004Jun18.html).

Given that the withheld information was created more than a year "after the decision[s] [at issue were] finally reached," it is not properly subject to a claim of deliberative process privilege and must be disclosed.[10]

2. The Withheld Material Is "Purely Factual"

The deliberative process privilege may not be invoked to "protect material that is purely factual." *Judicial Watch*, 365 F.3d at 1113, *quoting Espy*, 121 F.3d at 737; *see also Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) ("[u]nder the deliberative process privilege, factual information generally must be disclosed").

Given that the information at issue here was developed during a fact-finding process – the Special Counsel's investigation into the unauthorized disclosure of Mrs. Plame's covert identity – it is obvious that the vast bulk, if not the entirety, of the withheld material is "purely factual." *See, e.g.*, Department of Justice Press Conference, "Appointment of Special Prosecutor to Oversee Investigation Into Alleged Leak of CIA Agent Identity and Recusal of Attorney General Ashcroft from the Investigation," December 30, 2003 (attached hereto as Pl. Ex. C), at 9-10 ("Fitzgerald has been told [to]

[10] Defendant DOJ cites two decisions in support of the proposition that "a document created after the decision at issue, can still be 'predecisional' if it memorializes protected predecisional information." Def. Mem. at 11. In *Appleton v. FDA*, 451 F. Supp. 2d 129, 144 n.9 (D.D.C. 2006), the court mentioned, in the footnote DOJ cites, "memorializations of discussions"). The text of the decision, however, makes plain that "[a]ll of the[] documents [at issue] are predecisional because they were made 'antecedent to the adoption of an agency policy.'" *Id.* at 143 (citation omitted). In *Electronic Privacy Info. Ctr. v. DHS*, No. 04-1625, 2006 U.S. Dist. LEXIS 94615 (D.D.C. Dec. 22, 2006), an unreported magistrate's decision, the magistrate applied Exemption 5 to an e-mail that "recounted" past deliberations over a prior decision. In light of the clear Supreme Court and D.C. Circuit authority on the question, which the magistrate did not address, plaintiff respectfully submits that the case was wrongly decided.

. . . [f]ollow the facts . . .); ("I'm confident that the facts will be found professionally . . . by someone with impeccable judgment and impartiality, and that is Mr. Fitzgerald."). Indeed, it is difficult to imagine how the information illicited during an interview conducted in the course of a criminal investigation could be anything but "purely factual." As such, it may not properly be withheld under Exemption 5.

C. No Portions of the Records Are Properly Withheld Under the Presidential Communications Privilege

Defendant DOJ's failure to meet its burden of justifying the withholding of the requested information is seen most starkly in its invocation of the presidential communications privilege to withhold unspecified "portions" of the disputed records. Review of DOJ's cursory "justification" leads to the inescapable conclusion that the agency has failed either to "specifically identify[] the reasons why [the presidential communications privilege] is relevant," or to "correlat[e] those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc.*, 566 F.2d at 251. DOJ's showing with respect to the presidential communications privilege is, in its entirety, as follows:

> [P]ortions of each of the withheld documents are also protected by the presidential communications privilege, which protects communications with the President and confidential communications that relate to possible presidential decisionmaking and that involve the President, his senior advisors, or staff working for senior presidential advisors. Portions of the withheld documents summarize communications among the Vice President and senior presidential advisers in the course of preparing information or advice for potential presentation to the President. In addition, some portions explicitly reference a conversation between the President and the Vice President. Disclosing such sensitive conversations involving the President, the Vice President, and other senior White House officials could impair effective Executive Branch decisionmaking.

Bradbury Decl., ¶ 14.

In considering DOJ's claims, the Court must "proceed on the basis that 'the 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, *quoting Espy*, 121 F.3d at 752. Guided by the mandate to narrowly construe the privilege, in cases such as this where the disputed material involves the communications of *advisors*, rather than the President himself, the D.C. Circuit has "recognized that the need for the presidential communications privilege becomes more attenuated the further away the advisers are from the President." *Id.*, 365 F.3d at 1123; *see also id.* at 1115 ("there is, in effect, a hierarchy of presidential advisers such that the demands of the privilege become more attenuated the further away the advisers are from the President operationally"), *citing Espy*, 121 F.3d at 752.

An advisor's proximity to the President is not the only relevant factor in assessing the propriety of a privilege claim. In *Espy*, the court of appeals described the "dual hat" problem that places additional importance on the identity of the advisors whose communications are being withheld.

> Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters. This restriction is particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President . . . . *The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President*. If the government seeks to assert the presidential communications privilege in regard to particular communications of these "dual hat" presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.

121 F.3d at 752 (emphasis added; citation omitted).

Here, DOJ has failed not only to identify the advisors and the responsibilities that they exercise, but has also failed to assert that the "governmental operations" involved in the protected communications "call[ed] ultimately for direct decisionmaking by the President." Indeed, in asserting that the withheld material summarizes "communications among the Vice President and senior presidential advisers in the course of preparing information or advice for *potential* presentation to the President," Bradbury Decl., ¶ 14 (emphasis added), DOJ does not even come close to establishing the required nexus to presidential decisionmaking.[11] The agency clearly has failed to carry its burden of showing that "portions" of the requested records are exempt from disclosure under the presidential communications privilege.

IV. Defendant DOJ Has Not Met Its Burden of Showing that Portions of the Records Are Exempt From Disclosure Under Exemptions 6 and 7(C)

Defendant DOJ correctly notes that invocations of Exemptions 6 and 7(C) require the Court to "balance the individual's right to privacy against the public's interest in disclosure." Def. Mem. at 15 (citation omitted); *see, e.g.*, *Rose*, 425 U.S. 352 (Exemption 6); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (Exemption 7(C)). Under the circumstances of this case, however, there is reason to question DOJ's conclusory assertion that "[t]here is no legitimate public interest" in the withheld information, and that "its disclosure would shed no light on official government

[11] The participation of the vice president in the "communications" adds nothing to DOJ's claims. As this Court has recognized, there is no authority "to suggest that the privilege extends to documents prepared for the purpose of advising the Vice President alone." *United States v. Philip Morris United States, F/K/A Philip Morris*, 2004 U.S. Dist. LEXIS 24517, 21-22 (D.D.C. Sept. 9, 2004).

activities." Bradbury Decl., ¶ 15.

The information at issue is contained in notes of an FBI interview of the Vice President of the United States conducted in the course of a high-profile and controversial criminal investigation. That investigation resulted in the conviction of the Vice President's former chief of staff. The information collected by the FBI and the Special Counsel focused on questions of alleged illegal activity within the White House. It is well-established that personal information may be withheld under Exemptions 6 and 7(C) "unless disclosure is 'necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity.'" *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003), *quoting SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). DOJ's bald assertion of "no legitimate public interest" does not even attempt to show that disclosure is not appropriate in the face of the undisputed illegal activity that gave rise to the underlying FBI interview.

Likewise, the agency's boilerplate exemption claim does not address the fact that a large amount of information concerning the Plame leak investigation – including the identities of many individuals – came into the public domain as a result of Mr. Libby's public trial and has been made available to congressional investigators. *See* Draft Committee Report at 3 (Special Counsel produced documents consisting of "FBI interviews of federal officials who did not work in the White House, as well as interviews of relevant private individuals."). Such previous "public disclosures" of personal information vitiate the privacy interests DOJ asserts. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995). Under the unique circumstances surrounding the

disputed material, DOJ's generic and non-specific claims of exemption do not suffice.[12]

V. Defendant DOJ Has Not Met Its Burden of Showing that Portions of the Records Are Exempt From Disclosure Under Exemptions 1 and 3

Finally, DOJ seeks to withhold unspecified "portions" of the requested records on "national security" grounds under Exemptions 1 and 3. In opposing DOJ's motion, we note that the agency's claims are not "made on personal knowledge," Fed. R. Civ. P. 56(e), and for that reason alone must be rejected. In his declaration, Mr. Bradbury asserts that "a number of paragraphs in the FBI interview report and portions of the notes" contain information "currently classified at the SECRET level *by the Central Intelligence Agency* and exempted from disclosure by the National Security Act of 1947." He goes on to relate that "*the CIA has determined* that the documents contain information concerning intelligence sources and methods that is properly classified pursuant to section 1.4(c) of Executive Order 12958." Bradbury Decl., ¶ 16 (emphasis added).[13]

Under similar circumstances, the district court for the Eastern District of Virginia rejected an agency's classification claims:

> [The agency's declarant] does not have classification authority. Moreover, the declaration fails to even name the official who does have the authority to classify these documents as "Secret." . . . The [agency] has not provided

[12] Plaintiff does not seek the disclosure of "social security numbers, addresses, [or] phone numbers," Def. Mem. at 17, and thus, to the extent that DOJ has withheld such information, plaintiff does not challenge such withholdings.

[13] It is not clear whether Mr. Bradbury attributes to the CIA the determination that the material is "exempted from disclosure by the National Security Act of 1947." In any event, DOJ, in its invocation of Exemption 3, seeks to rely upon the Intelligence Reform and Terrorism Prevention Act of 2004, which, as DOJ explains, "requires *the Director of National Intelligence* ["DNI"] to 'protect intelligence sources and methods from unauthorized disclosure.'" Def. Mem. at 20 (emphasis added; citation omitted). There is no indication in the record that the DNI has made any determination with respect to the material at issue here.

> the Court with sufficient information from which it can conclude that an official with classification authority determined that these documents were "secret."

Wickwire Gavin, P.C. v. Def. Intelligence Agency, 330 F. Supp. 2d 592, 601 (E.D. Va. 2004); *see also Wolf v. CIA*, 473 F.3d 370, 375 n.5 (D.C. Cir. 2007) (CIA affidavit adequate where it "reflects personal knowledge, obtained in [affiant's] official capacity [as CIA Information and Privacy Coordinator], regarding the classified nature of [the] information"); *Londrigan v. FBI*, 670 F.2d 1164, 1174-75 (D.C. Cir. 1981) (FOIA affidavit not based on personal knowledge should have been disregarded); *Grand Central Partnership Inc. v. Cuomo*, 166 F.3d 473, 480 (2d Cir. 1999) (FOIA affidavit on use of records rejected where affiant was not shown to have had personal knowledge of the use of the records). This Court should likewise find that DOJ has failed to establish that the withheld material was properly classified.[14]

Mr. Bradbury's lack of personal knowledge concerning the CIA's determination to classify "portions" of the material is particularly troubling under the circumstances of this case, where the material at issue was developed during the course of a criminal investigation involving a breach of CIA security and the disclosure of a covert operative's identity. Executive Order 12958, under which Mr. Bradbury asserts that the CIA "determined" to classify the material, expressly provided that "[i]n no case shall information be classified in order to: (1) conceal violations of law, inefficiency, or

[14] DOJ asserts that "[t]he issue for the Court is whether 'on the whole record, the Agency's judgment objectively survives the test of reasonableness, good faith, specificity and plausibility in the field of foreign intelligence in which (the agency) is expert and (has been) given by Congress a special role.'" Def. Mem. at 18 (citation omitted). Here, the "judgment" of the agency that classified the material – the CIA – is not even before the Court.

administrative error; [or] (2) prevent embarrassment to a person, organization, or agency." *Id*., § 1.8(a); *see, generally, American Civil Liberties Union v. Dep't of Defense*, 2008 U.S. App. LEXIS 20074, at *30 (2d Cir. Sept. 22, 2008) ("Congress has greatly reduced the possibility of abuse [of Exemption 1] by providing that the classification must *be proper under criteria established by Executive order*.") (emphasis in original; citation omitted).

Given the subject matter of the material at issue in this case, there exists a "possibility of abuse" and the potentially improper classification of information to "conceal violations of law, inefficiency, or administrative error" or to "prevent embarrassment to a person, organization, or agency." Because DOJ's declarant has not attested to the propriety of the purported decision classification – and, indeed, cannot – the agency has clearly failed to meet its burden of showing that the withheld "portions" are exempt from disclosure under Exemptions 1 and 3.[15]

CONCLUSION

For the foregoing reasons, DOJ's motion for summary judgment should be denied, and CREW's cross-motion for summary judgment should be granted.

Respectfully submitted,

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[15] It should be noted that there is no indication in the record that Attorney General Mukasey, Special Counsel Fitzgerald, or any other executive branch official at any time suggested to the House Committee that material concerning the FBI's interview with Vice President Cheney was classified. *See, e.g.*, Draft Committee Report. Serious questions thus exist as to when, and for what purposes, the determination to classify the material was made.

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