IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, Plaintiff, v. DEPARTMENT OF ENERGY, Defendant.	)	Civil Action No. 1:24-cv-1829 (RDM)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT & CROSS-MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff, Government Accountability & Oversight, and submits the following Memorandum of Law in Opposition to the Motion for Summary Judgment filed by the Department of Energy ("DoE"). ECF No. 33. Plaintiff also cross-moves for summary judgment, and respectfully submits that for the same reasons that the Court should deny the Defendant's Motion, it should grant summary judgment to the Plaintiff.

INTRODUCTION

On January 26, 2024, the Department of Energy announced "DOE *Will Initiate a Process* to Update Economic & Environmental Analyses Used to Review LNG Export Applications," and "Today's action *will begin an update* of this analysis." ECF No. 36-3 (*emphases added*). Department sub-agencies periodically produce, and DoE releases, such macroeconomic analyses of LNG [or liquified natural gas] exports. ECF No 1-1 at 2. On June 7, 2024, Plaintiff filed a FOIA request seeking a 2023 update of the Department's analysis, specifically one produced and transmitted to DoE in the first ten months of 2023, as well as any transmitting emails. *Id*. at 1. Logically, indeed inherently, an updated analysis produced and sent to DoE in 2023 cannot be a draft version of an updated analysis DoE initiated on or after January 26, 2024.

Without explaining how the agency has mastered the finer points of time travel such that documents in 2023 are actually drafts of a study not initiated until January 2024, DoE's Motion for Summary Judgment argues precisely that in an exercise in misdirection. DoE would have this Court disregard the January 26, 2024 announcement that it *would begin* a new update, and similarly cast aside the DoE's December 17, 2024 announcement that the study which it initiated on January 26, 2024 had finally been completed, in favor of DoE's declarant's insistence that, somehow, documents generated in 2023 were "early drafts" and "early versions" of a study that was not even initiated until months later. Respectively ECF Nos. 33-3 at 9, ¶ 27, and 33-4 at pp. 6, 8, 10, 11, 13, 15, 16, 19, 21-24, 26, 28, 29, 31, *accord*. Exhibit A.

Plaintiff respectfully submits that Defendant's position taken prior to and outside of this litigation make its position taken for purposes of this litigation untenable. Putting aside for the moment the pretense that past positions can be disclaimed when they prove inconvenient to shielding agency work from the public, should the Court accept the Shakespearean formulation for these purposes that all that is past is (deliberative) prologue, that for FOIA purposes all prior agency work informs that which follows, Exemption 5 would consume the statute and render it meaningless. At the very least, there are disputed material facts in this case, such as "which of DoE's positions is the truth?" The Court must decide whether to cast aside the Department's longstanding and publicly held position in order to accept DoE's declarant, with the former directly contradicting the narrative crafted by the latter about when the 2024 "update" of an LNG export study began. Alternatively, because DoE's in-court narrative contradicts DoE's out-of-court statements, this Court should hold that DoE has failed to carry its burden of proof relating to Plaintiff's FOIA requests and that such a failure results in a victory for the Plaintiff as the party which does not shoulder such a burden.

STANDARD OF REVIEW

The Freedom of Information Act requires "disclosure of documents held by a federal agency unless the documents fall within one of nine enumerated exemptions, which are listed at 5 U.S.C. § 552(b)." *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc*., 141 S. Ct. 777, 785, 209 L. Ed. 2d 78 (2021). Although the "vast majority" of FOIA cases can be resolved on summary judgment, *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527, 395 U.S. App. D.C. 155 (D.C. Cir. 2011), "[a] court may grant summary judgment only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See also Coffey v. BLM*, 277 F. Supp. 3d 1, 6 (D.D.C. 2017).

The burden of proof remains upon the agency on all issues in a FOIA case, and never shifts to the plaintiff on any issue. See *Hardy v. Bureau of Alcohol*, 243 F. Supp. 3d 155, 162 (D.D.C. 2017). "[T]he Court has an independent duty to determine whether the government has met its FOIA obligations.," *Ctr. for Biological Diversity v. United States Army Corps of Eng'rs*, 405 F. Supp. 3d 127, 139 (D.D.C. 2019), and the Court must independently satisfy itself both that the search for records was adequate, *Greenspan v. Bd. of Governors of the Fed. Rsrv. Sys*., 643 F. Supp. 3d 176, 186 n.2 (D.D.C. 2022) and that the redactions are no broader than possible, with all segregable and producible information being produced by the agency. *Trans-Pacific Policing Agreement v. United States Customs Serv*., 336 U.S. App. D.C. 189, 177 F.3d 1022, 1028 (1999) ('the District Court had an affirmative duty to consider the segregability issue *sua sponte*.").

In order to meet its burden, an agency may rely on declarations. See *Shapiro v. DOJ*, 893 F.3d 796, 799, 436 U.S. App. D.C. 295 (D.C. Cir. 2018). Although those declarations receive "a presumption of good faith," *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991), the declarations are not conclusive and must be examined carefully in light of the entire record of the case. The Court may grant summary judgment based solely on the

agency's declarations *only* if they fully carry the agency's burden of proof and are unimpeached by contrary record evidence or by evidence of the agency's bad faith. See *Aguiar v. DEA*, 865 F.3d 730, 734-35, 431 U.S. App. D.C. 383 (D.C. Cir. 2017). When the same agency has "offer[ed] two contradictory versions of the facts… summary judgment is not appropriate." *Pinson v. United States DOJ*, 79 F. Supp. 3d 250, 257 (D.D.C. 2015). Similarly, the Court cannot enter summary judgment when there is a genuine material fact in dispute as to whether an agency has "fully responded" to a Plaintiff's request by identifying all responsive records. *Jarkesy v. SEC*, No. 3:22-cv-405, 2024 U.S. Dist. LEXIS 162113, at *12 (S.D. Tex. July 3, 2024) (finding a "genuine issue of material fact as to whether the SEC has fully responded to subpart 3" when all the agency could point to in support of SEC's position was a subjective "understanding" of Plaintiff's request which was not rooted in the text).

ARGUMENT

DoE has consistently taken every available avenue to delay this case, ECF No. 31 ("Here we go again… the Department of Energy has gone to great lengths to postpone the date that the Plaintiff will have an opportunity to view records…), and DoE now takes every available avenue to prevent release of politically embarrassing documents which the former administration preferred to keep hidden.

DoE has thrown in the kitchen sink in terms of its arguments, but none of its serial maneuvers to prevent release withstand even the most basic of analytical scrutiny:

First, DoE argues that numerous documents it previously identified as "potentially responsive" are not responsive at all, and that DoE has no records at all responsive to Plaintiff's June 7, 2024 FOIA request. ECF No. 33 at 16 *et seq*. But DoE makes this risible assertion, rewriting its own position, because it subsequently and unilaterally rewrote the Plaintiff's FOIA request to one limiting its scope to only a "final" study which was "ready for public release by the

Department." ECF No. 33-1, ¶ 33 (DoE's assertion that it "interpreted" the request to seek only a final study), *contra*. ECF No. 24 (Plaintiff explaining in the context of a Motion to Dismiss that DoE had not responded to Plaintiff's FOIA request as written) and ECF No. 24-1 (Plaintiff's immediate objection to Defendant's reimagination of Plaintiff's FOIA request upon being made aware of it). But all of the cases DoE cites for this remarkable proposition actually support the Plaintiff's case and demonstrate that DoE's unilateral reimagination of Plaintiff's request was anything but reasonable.

Second, DoE argues that its redactions under Exemption 5 were proper. But some of these redactions are not even properly before the Court, because DoE has not produced, even in redacted form, the allegedly "non-responsive" records which it argues in the alternative would be both responsive and withheld. And even assuming DoE's arguments were properly presented, DoE's assertions to this Court as to Exemption 5 directly contradict its public statements. DoE wanted the public to believe that it began an LNG export study (which was a periodic "update" of its macroeconomic analysis of LNG exports) on or after January 26, 2024, and concluded that study on December 17, 2024. But DoE wants this Court to believe an entirely different story, and implicitly confesses that its public messaging (and also its December 17, 2024 announcement in the federal register) was, for some unstated reason, a lie. As DoE now tells it, documents generated in mid-2023, long before DoE even began its vaunted "update" in January of 2024, were actually "early drafts" of the study "initiated" in January 2024, ECF Nos. 33-3 at 9, ¶ 27, and 33-4 at pp. 6, 8, 10, 11, 13, 15, 16, 19, 21-24, 26, 28, 29, 31 (also styled elsewhere as "precursor drafts", see ECF No. 33-1 at 14, ¶84), and contained detailed substantive additions by an entire team of reviewers, notwithstanding that there are only 466 words of overlap between the December 17, 2024 study (began on January 26, 2024) and the alleged "precursor draft" dated at some point prior to October 2023. *Id*. at 11-12, ¶ 69.

Third, DoE argues that it released all "segregable" information, largely because it alleges that any factual information was intertwined with deliberative information such that true segregation was impossible. ECF No. 33 at 43 *et seq*. But DoE's own declarants fail to support the idea that factual information was "inextricably intertwined" with deliberative information, ECF No. 33 at 45, stating in certain instances that the factual information was only "generally intertwined" with deliberations and offering no further explanation. ECF No. 33-3 at 10, ¶27. DoE cursorily argues that there would be a burden from redacting records to release passages that have already been identified and released verbatim by DoE, ECF No. 33 at 45, but the agency offers no explanation as to why redactions which have already been identified as possible are particularly burdensome in this case or why redactions cannot be accomplished with the click of a mouse. *Minges v. State*, 192 N.E.3d 893, 901 (Ind. 2022) ("although redacting [sensitive documents] may have been a burden in 1985 before the widespread use of computers, it is hardly true today."). And to the extent this Court holds that DoE has contradicted itself in the public record as to the true nature and timing of any "deliberations" and therefore failed to carry its burden to establish that the deliberative process privilege applies at *all*, it necessarily cannot have established that the deliberative process privilege applies to entire documents, or that there is no factual material that can be produced from within those documents.

I. DoE improperly argues that numerous documents are non-responsive to Plaintiff's request.

DoE's most creative argument in this case is that there now are no responsive documents at all to the Plaintiff's June 7, 2024 request (as reimagined by Defendant, even from its own initial, more appropriate reading). ECF No. 33 at 12. Because DoE previously identified 97 responsive records totaling over 4,300 pages ECF No. 33-2 at 5, ¶ 20, DoE's sudden reversal required some fancy legal footwork, or at least rhetorical gymnastics. As DoE now tells it, Plaintiff's request should not be examined on its own terms, but should be interpreted to add words and context.

Specifically, DoE decided to disregard Plaintiff's language seeking "any LNG export study," because Plaintiff did not expressly declare that that phrase included "drafts." ECF No. 33-2 at 5, ¶ 22. And DoE went a step further, deciding that what Plaintiff really sought were documents that were "finally approved or released," *id*., even though Plaintiff's request expressly sought a study that "senior political officials… buried, keeping it from the public's view as the current administration sought to engineer a 'pause' of liquified natural gas (LNG) exports, which it did as part of a major media rollout in January 2024." ECF No 1-1 at 2.

That Defendant initially read the request properly, by reading it as written, which informs any assessment of the reasonableness of its sudden unilateral and radical reimagining of the request. It is well-established that Plaintiff is the "master" of its FOIA request, *People for Am. Way Found. v. United States DOJ*, 451 F. Supp. 2d 6, 12 (D.D.C. 2006), and that the agency cannot narrow or re-write the request without the express consent of the Plaintiff. *Citizens for Responsibility & Ethics in Wash. v. GSA*, Civil Action No. 18-2071 (CKK), 2019 U.S. Dist. LEXIS 125415, at *12 (D.D.C. July 29, 2019). To the extent that the agency seeks to rely on "context" from Plaintiff's Motion for Judgment on the pleadings, the agency mis-states the relevant context, because Plaintiff never contradicted the terms of its original request and in fact expressly referenced that request in both its Complaint and in its Motion for Judgment on the pleadings. The agency also misses the legal mark, because FOIA requests are to be processed according to information available to the agency "at the time of the FOIA request" and not according to information that later becomes available. *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 66 (D.D.C. 2003).

None of the agency's cited cases support the agency's behavior in this case, and in fact all of them support the Plaintiff's view that the agency's decision to unilaterally declare that the Plaintiff somehow sought a study that was final and ready for release despite Plaintiff's express

language that it sought a study that the agency had "buried" or "suppressed" because it reached politically disfavored conclusions was unreasonable. For example, the agency cites *Canning v. Dep't of State*, 134 F. Supp. 3d 490, 517 (D.D.C. 2015), for the proposition that DoE "is not obligated to rewrite the request to ask for more than the requester did." ECF No. 33 at 17. But here, the agency expressly re-wrote the request to seek less than the requester did, over Plaintiff's objection, by unilaterally deciding that the requester did not seek "any LNG study" but only a "final" study. The agency acknowledges that *Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) stands for the proposition that FOIA requests are to be broadly and liberally construed, but the agency fails to grapple with *Citizens for Responsibility & Ethics in Wash. v. GSA*, Civil Action No. 18-2071 (CKK), 2019 U.S. Dist. LEXIS 125415, at *12 (D.D.C. July 29, 2019), which explains that in the absence of an express and on-the-record agreement to narrow, the Court must accept that "as the 'master' of the request, Plaintiff insists that the request was never narrowed." *Id*. at *12 (D.D.C. July 29, 2019). In short, DoE re-wrote Plaintiff's request in a manifestly unreasonable way.

Even accepting Defendant's assertions at face value, however, and disregarding the possibility of time-travel by agency staff who appear to have exchanged drafts of a report long before the drafting began, the agency's logic in this Court contradicts its public statements. As set forth above, the agency announced in January 2024 that it would begin an LNG export study, and it announced in December 2024 that it had completed that study. Plaintiff expressly sought documented dated from January through October *of 2023*. ECF No 1-1. It is not at all clear how documents generated in 2023 can be "precursor drafts" to, let alone "early drafts" of, a study that had not yet been initiated. Plaintiff respectfully submits that the 2023 documents instead meet the description of "any LNG study" as requested by Plaintiff, and Defendant's efforts to ignore its own publicly announced timeline in arguing otherwise, in order to shield these records from the

public, are nothing more than misdirection.

The implausibility and failures of logical reasoning, and DoE's feigned ignorance about the Department's prior public statements, are compounded by the Department's own declarants explaining that there are at most 466 words – possibly fewer in certain iterations of the "early draft" – overlapping between the alleged mid-2023 "drafts" of a late-2024 study, ECF No. 33-1 at 11-12. Yet the December 2024 document which, again, the Department previously admitted had not even begun at any time prior to 2024, is itself over 215,000 words in length. *Id*. Putting the timeline to the side, mathematically this means that there is a 0.002% overlap between what the Department illogically asserts is a "draft" and what the Department has asserted is the final product. Plaintiff respectfully submits in light of the agency's declarations and the agency's public statements that it is much more plausible to believe that the 2023 study Plaintiff requested is an entirely different document from the 2024 study the Department eventually produced, and that the 2023 study is not in any meaningful sense a draft of the later study which was not even "initiated" or "begun" — by DoE's own voluntary and highly public admission — until months later. The Department simply cannot have it both ways.

II. DOE's Proposed Redactions Pursuant to Exemption 5 are Improper or Overbroad.

FOIA's Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Commonly known as the "deliberative-process privilege," exemption 5 has been called the "most abused," and "withhold it because you want to" exemption.[1] DOE relies in

[1] See, e.g., Nick Schwellenbach and Sean Moulton, *The 'Most Abused' Freedom of Information Act Exemption Still Needs to Be Reined In*, Project on Government Oversight, February 6, 2020, https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in (last visited October 13, 2024).

this matter on sweeping applications of Exemption 5, which the agency asserts shield enormous quantities of responsive information.

As a preliminary matter, the agency in this case has not produced the records responsive to Plaintiff's June 7, 2024, FOIA request *at all*, even in redacted form. The agency's primary argument, rebutted in the previous section, is that it possesses no responsive records at all. Because the agency has not produced these records at all, Plaintiff necessarily has no basis upon which to analyze discrete redactions, including redactions of purely factual information such as the date, subject line, or parties on an email. To the extent that the agency has elected not to even attempt redactions of these emails, or to produce them to Plaintiff in any form, the agency cannot be permitted to benefit from its own decision to hamstring effective briefing related to potential redactions which neither Plaintiff nor the Court can analyze at this late stage of the case.

a) DoE Does Not Support its Claims that the Records are Deliberative in Nature.

Exemption 5 covers records "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB. v. Sears, Roebuck & Co*., 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975) (citation omitted), *cf. Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, No. 21-5113, 2022 U.S. App. LEXIS 23202, at *5 (D.C. Cir. Aug. 19, 2022). "[R]ecommendations from subordinates to superiors lie at the core of the deliberative-process privilege." Machado *Amadis v. United States Dep't of State*, 971 F.3d 364, 370 (2020)

As the D.C. Circuit recently held in *Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, No. 21-5113, 2022 U.S. App. LEXIS 23202, at *17-18 (D.C. Cir. Aug. 19, 2022), citing numerous binding precedents:

> To properly invoke the privilege, an agency must show that the records at issue are both pre-decisional and deliberative. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc*., 141 S. Ct. 777, 785-86, 209 L. Ed. 2d 78 (2021). A record is pre-decisional if it was "prepared in order to assist an agency decisionmaker in arriving

> at his decision, rather than to support a decision already made." *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434, 298 U.S. App. D.C. 125 (D.C. Cir. 1992) (internal quotation marks and citations omitted). And a record is deliberative if it "reflects the give-and-take of the consultative process." *Jud. Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quotation marks omitted) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866, 199 U.S. App. D.C. 272 (D.C. Cir. 1980)).
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> Assessing whether a record is pre-decisional or deliberative necessarily requires identifying the decision (and the associated decisional process) to which the record pertains. An agency invoking the deliberative-process privilege thus must "establish what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Senate of the Commonwealth of Puerto Rico ex rel. Judiciary Comm. v. DOJ*, 823 F.2d 574, 585-86, 262 U.S. App. D.C. 166 (D.C. Cir. 1987) (internal quotation marks and citation omitted). The agency, that is, "bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Paisley v. CIA*, 712 F.2d 686, 698, 229 U.S. App. D.C. 372 (D.C. Cir. 1983), vacated in part on other grounds, 724 F.2d 201, 233 U.S. App. D.C. 69 (D.C. Cir. 1984).
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> To be sure, the deliberative-process privilege may apply even when the agency never reaches a final decision. That could happen, for instance, if an idea "dies on the vine" or meets a "dead-end." *Sierra Club*, 141 S. Ct. at 786. But to carry its burden in such a situation, the agency still must tie the withheld records to a decision-making process, even if that process did not ultimately result in a decision. *Coastal States*, 617 F.2d at 868.

When an agency presents the Court with a Vaughn Index in support of claimed withholdings, "[t]he description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection." *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1176, 316 U.S. App. D.C. 372 (D.C. Cir. 1996). When an agency makes a claim that a record is exempt pursuant to Exemption 5, binding precedent instructs that a record is predecisional only if it was "generated before the adoption of agency policy," *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir 1980), and "if it was prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made," *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434, 298 U.S. App. D.C. 125 (D.C. Cir. 1992) (cleaned up). DoE must therefore identify the final agency decision that the purported deliberations predate(d). *See, e.g.,*

Trea Senior Citizens League v. United States Dep't of State, 994 F. Supp. 2d 23, 34 (D.D.C. 2013) (holding that a decision can be "final" and nonexempt even though additional action remains to be taken), citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (holding that the key question in an Exemption 5 analysis is whether the document "was generated before the adoption of an agency policy.").

Furthermore, to invoke Exemption 5, "the agency must describe 'the nature of the decisionmaking authority vested in the office or person issuing the disputed document(s), and the positions in the chain of command of the parties to the documents." *Judicial Watch, Inc. v. United States DOJ*, 20 F. Supp. 3d 260, 271 (D.D.C. 2014)(internal citations and quotations omitted). The agency must show that every individual involved in generating the record is in a position that has some role in the formation or implementation of the policy being deliberated. *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 679, 207 U.S. App. D.C. 331 (D.C. Cir. 1981) (one "factor to be considered in determinations with respect to . . . the deliberative process privilege is the nature of the decisionmaking authority vested in the office or person issuing the disputed document."). The agency must also show that the relationship between the deliberators is such that advice is reasonably being sought or received. "[C]ourts look to the relationship between the author and recipient of the document to determine whether a person in the author's position, particularly a subordinate, would typically provide advice to a person in the recipient's position as part of the decision-making process." *Judicial Watch, Inc. v. United States DOJ*, 20 F. Supp. 3d 260, 270 (D.D.C. 2014), citing See *Schlefer v. United States*, 702 F.2d 233, 238, 226 U.S. App. D.C. 254 (D.C. Cir. 1983).

In this case, DOE has not shown (and cannot show) that the deliberative process privilege applies to all of the content withheld and at issue. DoE has at best attempted to point to an agency decision that was being made, but it has done so in a way that is inscrutable. To the extent that the

"final decision" the agency attempts to point to is the December 17, 2024 study which the Department released, the agency must show that its earlier documentation contained deliberations regarding that 2024 study. But as set forth above, the Department has repeatedly insisted that it did not order commencement of that latest updated LNG-export analysis until late January, 2024. It is thus difficult to conceive of how the agency could have been deliberating in any meaningful way with respect to its December 2024 final decision before deliberations began, or how documents dated between January and October 2023 play into any deliberations that had not yet begun. This failure in the agency's logic does not only apply to "any LNG study," but also to the other documents the Defendant has acknowledged in its Motion for Summary Judgment. For example, Document 6, identified in the agency's Vaughn Log at ECF No. 33-4 at 1, is an email from "White House Officials…regarding internal procedures for delegations of authority." But the agency has not explained that there was deliberation involved in an email from the White House, nor can it: the White House has no deliberative role at the Department of Energy. Moreover, the Vaughn log appears to indicate that the White House was issuing an order, setting forth "appropriate delegation authorities and proper protocols for future agency engagement," rather than engaging in "the 'give-and-take' of the 'consultative process.'" *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 364 (D.C. Cir 2021). Certainly, an email from the White House to an agency official cannot be a recommendation from a subordinate officer to a superior, which is "the core of the deliberative-process privilege." *Machado Amadis* 971 F.3d at 370.

b) The Agency Has Not Established "Foreseeable Harm" From Release of These Records.

Even assuming, *arguendo*, that the agency had somehow established the applicability of Exemption 5 as a general matter, the agency nevertheless runs headlong into the FOIA Improvement Act of 2016. It is not enough to establish that Exemption 5 applies (which Plaintiff disputes), but the agency must also establish that harm would come from release of the documents

at issue. *Reporters Comm. for Freedom of the Press*, 3 F.4th at 361 ("To carry its burden at summary judgment, the government must demonstrate that (A) the materials at issue are covered by the deliberative process privilege, and (B) it is reasonably foreseeable that release of those materials would cause harm to an interest protected by that privilege.").

Plaintiff points to the Vaughn index in this case, which contains verbatim or boilerplate entries relating to the purported harm from release of the information at issue in this case. The entry for Document 86, emblematic of DoE's assertions of foreseeable harm, states that "The withheld materials… do not represent final agency action, and their release would foreseeably harm DOE's decision-making process because it would result in a chilling effect on the ability of DOE staff to have open and frank discussions and to make decisions on how to process potential, ongoing, and future agency actions." But the agency's declarations do not contain any concrete worried; instead, the agency merely suggests that *if*, hypothetically, staff were "too worried," ECF No. 33-1 at 15, ¶ 86, or "concerned," *id*. at ¶ 90, then the agency might be impaired in its deliberations. But the D.C. Circuit has held that "boilerplate, unparticularized, and hypothesized assertion[s] of harm" are insufficient. *Reporters Comm. for Freedom of the* Press, 3 F.4th at 371.

Where the agency is not speculating about its own harms, it expresses touching concern for the public, which might be "confused" if the facts were to emerge resolving the conflict between the Department's previous, public narrative about its LNG study and "pause" and its current position brought about by this litigation. *See, e.g.*, ECF No. 33-1 at 15, ¶ 87. The agency isn't merely concerned that the public might be confused by the agency's policy discussions, however: the agency also suggests that the public would be confused by "obsolete" or arguably inaccurate factual information, *id*. notwithstanding that the D.C. Circuit has already expressly held that factual information which is disputed or arguably inaccurate is releasable. *Reporters Comm. for Freedom of the Press*, 3 F.4th at 365 (2021) (ordering that "factual accuracy comments" be

released).

This Court has expressed deep skepticism of "public confusion" harms, even when they are not boilerplate or used in an effort to shield purely factual information which the agency now asserts is "obsolete" or "outdated." ECF No. 33-3 at 10, ¶ 27.

> "When an agency asserts a concern about public confusion, courts should proceed with caution. They must consider whether the agency is merely attempting to avoid the public vetting of 'information marred by errors,'… or information that could cause 'embarrassment,' ... The Court must also bear in mind that Congress adopted the foreseeable harm requirement, in significant part, to address 'increasing agency overuse and abuse of Exemption 5 and the deliberative process privilege.'"

Juul Labs, Inc. v. FDA, 731 F. Supp. 3d 46, 72 (D.D.C. 2024).

Because the agency has not established that there will be foreseeable harm from release of these records, and especially in light of the agency's decision, effective January 21, 2025, to entirely retract its previous regulatory position, ECF No. 36-3, the Court should order that all of the records withheld under Exemption 5 should be released.

III. Defendant Has Not Produced Reasonably Segregable Information.

DOE admits in its Vaughn Index, affidavits, and brief that it is withholding numerous records *in full*. See, *e.g.,* ECF No. 33-3 at 11, ¶ 30 (noting that it would produce transmittal emails in full but for its decision to deem such records non-responsive, even as the agency simultaneously filed an Answer in a related case, ECF No. 35, that did not confess that Plaintiff is entitled to any relief). DoE has also withheld additional documents in full even though it admits those documents contain factual information on the mere grounds that the factual information is "outdated" or "obsolete." ECF No. 33-4 (document nos. 14, 22, 25, 30, 33, 54, 55, 58, 59, 61, 64, 77, 78, 86, 88, 93, 94). And even when the agency has claimed – with respect to a few documents – that there is factual information which is "intertwined" with deliberative information, it has hedged as to whether the information is "inextricably intertwined" or just "generally intertwined." ECF No. 33 at 31, cf. ECF No. 33-3 at 10, ¶ 27, contra. id. at 18, ¶ 42.

With respect to other documents, the agency asserts that redaction of already-identified passages is somehow burdensome, or that redactions would render the resulting document of no informational value. ECF No. 33-1 at 12, ¶ 72. But the agency does not explain what its burden is other than the burden of clicking a mouse to cover up already-identified portions of documents. *Minges*, 192 N.E.3d at 901 ("although redacting [sensitive documents] may have been a burden in 1985 before the widespread use of computers, it is hardly true today."). And the agency does not explain why it feels there is no "informational value" in knowing 466 words, approximately the information contained on one page of written text.[2]

Under FOIA, however, this will not do. Even if an exemption properly applies to some information, it is nevertheless the agency's obligation not to withhold every jot and tittle of every page or to apply redactions in a haphazard and overbroad manner. "[E]ven if some fragments of an agency record may be properly withheld, the government must turn over other portions that do not qualify for an exemption and are reasonably segregable." *Cause of Action Inst. v. Exp.-Import Bank of the United States*, 521 F. Supp. 3d 64, 83 (D.D.C. 2021), quoting *Roth v. United States DOJ*, 642 F.3d 1161, 1167, 395 U.S. App. D.C. 340 (D.C. Cir. 2011). Indeed, this Court has expressly cautioned against withholding purely factual information of the type that appears to be redacted in this case. For example, in *Cause of Action*, this Court "caution[ed] Defendant that its current redactions appear overbroad" and stated that "It is doubtful, for instance, that dates, attendees, titles, and subject-matter descriptions in meeting minutes and agendas properly qualify as predecisional and deliberative." *Id*.

The Court should hold that DoE has failed to produce all segregable, factual information.

[2] Exclusive of this footnote, this page contains 334 words of text. Plaintiff respectfully submits that if the entire page were excised from the brief, however, much "informational value" would be lost.

CONCLUSION

This Court should deny DOE's Motion for Summary Judgment, and because the agency has not carried its burden of proof this Court also should therefore order the identified records at issue in this case to be released in full. To the extent that the Court concludes that DOE has not carried or cannot carry its burden of proof and that questions relating to the records cannot be resolved based upon the briefing alone, the Court may order the records to be submitted *in camera* and either order the withheld information released following such review or give the parties a further opportunity to address any questions that arise in the context of *in camera* review.[3]

Respectfully submitted this the 22nd day of January, 2025

Government Accountability & Oversight

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[3] Plaintiff notes that its complaint seeks an award of attorney's fees. Insofar as DoE has not addressed the fees issue and it appears premature to do so prior to a judicial determination that this case is at its end, Plaintiff merely notes here that it anticipates seeking fees at the appropriate juncture. Fed. R Civ. P. 54 (d).