

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL LAW CENTER ON)
HOMELESSNESS & POVERTY,)
)
Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
HOUSING AND URBAN)
DEVELOPMENT,)
)
Defendant.)
_____)

C.A. No. 18-cv-00998 (APM)

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff National Law Center on Homelessness & Poverty (NLCHP) hereby moves for summary judgment in this Freedom of Information Act case against defendant U.S. Department of Housing and Urban Development on the ground that there is no genuine issue of disputed material fact and plaintiff is entitled to judgment as a matter of law.

In support of this motion, plaintiff submits the accompanying Memorandum in Support of Plaintiff’s Motion for Summary Judgment and in Opposition to Defendant’s Motion for Summary Judgment; Plaintiff’s Response to Defendant’s Statement of Material Facts as to Which There Is No Genuine Issue and Plaintiff’s Statement of Additional Material Facts as to Which There Is No Genuine Issue; Declaration of Eric S. Tars; Declaration of Rebecca Smullin; and a proposed order.

Dated: January 11, 2019

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

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INTRODUCTION

Plaintiff National Law Center on Homelessness & Poverty (NLCHP) filed this lawsuit under the Freedom of Information Act (FOIA) seeking the production of records that NLCHP had requested nearly a year earlier and the waiver of fees for such production. Defendant U.S. Department of Housing and Urban Development (HUD) initially withheld the records responsive to NLCHP's FOIA request and denied the organization's fee waiver request. After NLCHP filed this lawsuit, HUD granted NLCHP's request in part, producing some records to NLCHP and agreeing to waive fees. Asserting the deliberative process privilege, however, HUD continued to withhold material containing the scores the agency assigned to entities' responses to specific questions on 2015 and 2016 grant applications. That material is responsive to the third part of NLCHP's FOIA request, which sought certain records related to a large federal grant program. Because HUD's withholdings are improper, the Court should deny HUD's motion, enter summary judgment for NLCHP, and order HUD to produce the withheld materials. Further, to the extent that the records that HUD withheld in full do not link each response-specific score to the particular response and entity to which HUD assigned such a score, HUD's search was inadequate, and the Court should order HUD to conduct a new, adequate search.

BACKGROUND

I. The Continuum of Care Program Competition

A. Overview

The Continuum of Care (CoC) program is a HUD-administered grant program that distributes federal funds through a national competition to local communities to aid homeless individuals or families. *See* 42 U.S.C. §§ 11382 (regarding applicants and grants), 11383(a) (listing eligible activities), 11386a (establishing competition between different "geographic areas"). Created by statute in 2009, the CoC program aims, among other things, "to provide funding for

efforts ... to quickly rehouse homeless individuals and families.” 42 U.S.C. § 11381(2); *see also* Homeless Emergency Assistance and Rapid Transition to Housing: Continuum of Care Program, 77 Fed. Reg. 45,422, 45,422 (July 31, 2012) (history of the program); Decl. of Norman A. Suchar ¶ 20, ECF No. 17-2 (Suchar Decl.) (regarding purpose). In addition to directly funding housing efforts and services, the CoC program covers certain administrative costs and provides for community-based planning, collaboration, and fund-distribution activities. *See* 42 U.S.C. § 11383(a)(8)-(12).

In the CoC program, the term “Continuum of Care” both describes the program and refers to a type of entity—a “community-based homeless assistance program planning network[,]” 77 Fed. Reg. at 45,422—through which the program operates, *see* 24 C.F.R. § 578.3. “[O]rganized to carry out” various local planning and other responsibilities under the relevant statute and its implementing regulations, a CoC can include nonprofit service providers, government organizations, and other entities. *Id.*; *see also id.* § 578.7 (responsibilities of CoCs).

Each year, HUD conducts a national competition to select projects for CoC program funding. *See* 42 U.S.C. § 11386a; 24 C.F.R. §§ 578.17, 578.19. The competition is based on a Notice of Funding Availability that HUD publishes for that year’s competition and that sets out the applicable policy priorities, guidelines, and procedures. *See* 42 U.S.C. § 11382(b); 24 C.F.R. §§ 578.17(a)(ii), 578.19, 578.21. In general, it is the CoCs that respond to HUD’s Notices of Funding Availability; through an entity called a “collaborative applicant,” each CoC submits to HUD a combined application that reflects, for the CoC’s geographic area, all the applicants and all of those applicants’ projects that a CoC has selected to apply for HUD funding. *See* 24 C.F.R. §§ 578.9 (explaining CoC role in consolidating applications), 578.15 (regarding eligible applicants). *But see* 42 U.S.C. § 11382(i) (permitting solo applicants in certain exceptional

circumstances). HUD then awards grants to specific projects “based on selection criteria” that the agency establishes in accordance with statutory and regulatory requirements. 24 C.F.R. § 578.21; *see also* 42 U.S.C. §§ 11386a(a) (similar), 11386a(b) (listing required criteria, which HUD can supplement). When HUD first announces the grants based on its selection criteria, the awards are termed “conditional” because HUD executes the actual grant agreements with awardees after they satisfy applicable conditions, such as establishing control over relevant sites. *See* 42 U.S.C. § 11382(c)(2), (d)(1)-(2); 24 C.F.R. § 578.21.

The CoC program and the competition are significant in size and scale. In the 2015 and 2016 CoC program competitions that NLCHP’s FOIA request addresses, HUD awarded nearly \$2 billion in grant funds to more than 7,500 projects each year. *See* HUD, *HUD’s 2015 Continuum of Care Program Funding Awards* (June 27, 2016), https://www.hudexchange.info/resource/reportmanagement/published/CoC_AwardComp_NatlTerrDC_2015.pdf; HUD, *HUD’s 2016 Continuum of Care Program Funding Awards* (Apr. 19, 2017), https://www.hudexchange.info/resource/reportmanagement/published/CoC_AwardComp_Natlu_TerrDC_2016.pdf.

B. HUD’s use of CoC scores to select projects for funding

In the 2015 and 2016 CoC program competitions, each CoC submitted a consolidated application that included an application for the CoC itself and applications for each project under that CoC (including any new project, renewal project, “CoC Planning” project, or—if the CoC were eligible—a particular type of planning project, called a UFA Costs project, *see* 24 C.F.R. § 578.41). *See* HUD, *Notice of Funding Availability for the 2015 Continuum of Care Program Competition*, FR-5900-N-25 §§ I.C.2-3, VI.C.1-3 (Sept. 17, 2015), <https://www.hudexchange.info/resources/documents/Revised-FY-2015-CoC-Program-NOFA.pdf> (2015 NOFA); HUD, *Notice of Funding Availability (NOFA) for the Fiscal Year (FY) 2016 Continuum of Care Program Competition*, TECHNICAL CORRECTION, FR-6000-N-25-TC §§ I.C.2-3, VI.C.1-3, <https://www.>

hudexchange.info/resources/documents/FY-2016-CoC-Program-NOFA.pdf (last visited Dec. 3, 2018) (2016 NOFA).¹

In these two years' competitions, HUD also required each CoC to categorize and rank by priority all of its projects, other than CoC Planning or UFA Costs projects. *See* 2015 NOFA §§ I.C.2-3, II.B.14-15; 2016 NOFA §§ I.C.2-3, II.B.15-16. CoCs designated their higher priority projects as "Tier 1" projects, which meant they were eligible for a pool of money that included the bulk of available grant funds. *See* 2015 NOFA §§ I.C.2, II.B.15; 2016 NOFA §§ I.C.2, II.B.16. A CoC's other projects, "Tier 2" projects, were eligible for a separate, smaller pool of funds. *See* 2015 NOFA §§ I.C.2, II.B.15; 2016 NOFA §§ I.C.2, II.B.16.

HUD reviewed the consolidated CoC applications in two primary ways, to select projects for conditional funding awards. First, for each project, HUD assessed whether the project and applicant met threshold criteria. *See* 2015 NOFA § VIII.A; 2016 NOFA § VIII.A. HUD rejected any projects that did not meet those threshold criteria, and conditionally funded all of the CoC Planning projects, UFA Costs projects, and certain 2016 renewal grants that did satisfy such criteria. *See* 2015 NOFA § VIII.A.2.a-b; 2016 NOFA § VIII.A.2.a-c. Second, HUD scored each CoC consolidated application according to another set of criteria described in the Notice of Funding Availability, to derive a CoC score. *See* 2015 NOFA §§ VII, VIII.A; 2016 NOFA §§ VII, VIII.A.

HUD then used the CoC scores to determine which other projects it would fund. Regarding the Tier 1 projects that satisfied threshold criteria, HUD's Notices of Funding Availability established that the agency would select projects for funding "based on CoC score beginning with

¹ HUD uses the website www.hudexchange.info to communicate CoC program competition materials to the CoC community. *See* Suchar Decl. ¶ 37 & nn. 4-7; 2015 NOFA § Overview.

the highest scoring CoC to the lowest scoring CoC.” 2015 NOFA § VIII.A.2.c; *see also* 2016 NOFA § VIII.A.2.d (same). Regarding Tier 2 projects that satisfied threshold criteria, HUD used CoC scores and other factors to conduct an additional scoring exercise and selected projects in order of their point values until available funds were gone. *See* 2015 NOFA § VIII.A.2.d; 2016 NOFA § VIII.A.2.e.

Under these rubrics, the HUD-assigned scores were essential to the agency’s determination of which Tier 2 projects to fund in the 2015 and 2016 CoC program competitions. Although the agency ended up having funds to cover all Tier 1 projects that satisfied threshold criteria in those two years, HUD was only able to fund Tier 2 projects whose scores exceeded a certain value, because the available funds could not cover all the eligible Tier 2 projects. In the 2015 competition, HUD funded about half of the Tier 2 projects, and in the 2016 competition, it funded about two-thirds of the Tier 2 projects. *See 2016-05-25 16.02 FY 2015 Continuum of Care Competition Debrief 2, 5*, <https://www.hudexchange.info/trainings/courses/fy-2015-coc-competition-debrief1/> (at link titled “transcript”) (last visited Dec. 13, 2018) (2015 Debrief Transcript) (transcript of HUD 2015 CoC program competition debrief webinar); *see also 2017-02-09 10.32 FY2016 CoC NOFA Debriefings 1-2, 6*, <https://www.hudexchange.info/trainings/courses/fy2016-coc-nofa-debriefings/1833/> (at link titled “transcript”) (last visited Dec. 13, 2018) (2016 Debrief Transcript) (transcript of HUD 2016 CoC program competition debrief webinar).

In these two years’ competitions, the CoC score itself was especially integral to HUD’s Tier 2 funding decisions. *See generally* 2015 Debrief Transcript 3 (describing the CoC score as the “most important factor in determining whether tier two projects were funded or not”); 2016 Debrief Transcript 2 (similar). In both competitions, HUD evaluated each Tier 2 project against a 100-point scale, divided into four categories of available points. CoC scores were critical to this

scoring exercise; within the agency’s 100-point scale, the largest category of available points—up to 60 points in 2015 and up to 50 points in 2016—was calculated in “direct proportion to” the CoC score. 2015 NOFA § II.B.16; 2016 NOFA § II.B.17.² HUD also used CoC scores to break any tie between two Tier 2 projects with the same project score; the project whose CoC had received the higher CoC score was funded first. *See* 2015 NOFA § VIII.A.2.d; 2016 NOFA § VIII.A.2.e.³

C. HUD’s calculation of CoC scores

Each year, HUD uses its CoC Notice of Funding Availability to explain, in general terms, how it will score COCs’ consolidated applications to derive the CoC scores that it uses to select projects for funding. *See generally* 24 C.F.R. § 578.21; Suchar Decl. ¶ 37. The CoC Notices of Funding Availability for the 2015 and 2016 competitions listed the maximum points available to a CoC, the categories (or subcategories) in which HUD would assess points that would sum to a total CoC score, and the maximum points available in each category (or subcategory). *See* 2015 NOFA § VII; 2016 NOFA § VII. In 2015, for example, the Notice explained that a CoC could earn up to 200 points, plus a bonus of three points for submitting the application by a certain time. *See* 2015 NOFA § VII.A, VII.A.7. It showed that HUD would award up to 49 of the total 200 points for “CoC Coordination and Engagement,” described 13 subcategories of “CoC Coordination and

² Thus, in the relevant point category, if a CoC received half of the available points on its CoC score, its Tier 2 projects received 30 (half of 60) points in 2015 and 25 (half of 50) points in 2016. HUD additionally scored each Tier 2 project according to how the associated CoC had ranked that project, the type of project, and the project’s commitment to certain policy priorities. A Tier 2 project’s total score was the sum of its points in each of the four point categories. *See* 2015 NOFA § II.B.16; 2016 NOFA § II.B.17.

³ HUD also reserved the right to make certain limited adjustments. If a state or territory did not have any funded CoC, the agency could fund an eligible project. It could also reduce a grant amount to ensure that no more than 10 percent of available assistance went to one local government unit or one CoC’s geographic area. *See* 2015 NOFA § VIII.B; 2016 NOFA § VIII.B.

Engagement,” and listed the maximum number of points that a CoC could earn in each subcategory (which, combined, summed to the 49 points available for the category). *Id.* § VII.A.1.

In the 2015 and 2016 CoC program competitions, however, HUD scored CoCs’ consolidated applications by assessing them at a level more granular than that described in the Notices of Funding Availability. The agency linked each of the categories and subcategories of points listed in the Notices to particular questions on the CoC application. *See* Suchar Decl. ¶¶ 26, 28.⁴ For each CoC application, HUD assigned response-specific scores to the CoC’s responses to particular questions, and it added those scores to determine a score for each Notice of Funding Availability category or subcategory. *See id.* ¶ 26 (giving example of how two response-specific scores can sum to the score for one NOFA scoring subcategory). Then, HUD tallied *those* scores to reach the total CoC score. *See* 2015 NOFA § VII (showing that NOFA scoring categories sum to the total available CoC score); 2016 NOFA § VII (similar).

Within this system, HUD scored the individual responses to the CoC application questions in one of two ways, depending on the question. For some questions, HUD used a computer to score responses automatically. *See* Suchar Decl. ¶ 28. For other questions, HUD used a human process to evaluate CoCs’ responses. *See id.* ¶¶ 25, 27. Desk officers applied “scoring guidance,” *id.* ¶ 23, to review and evaluate the relevant CoC response, and then the agency reconciled those individuals’ assessments into one HUD-assigned score, *see id.* ¶¶ 26-27.

⁴ HUD also tied at least one of the scoring subcategories to the project applications submitted by a CoC. *See* 2015 NOFA § VII.A.1.i (describing how HUD would assess the extent to which a CoC application and that CoC’s project applications reflected use of a certain model for transitional housing projects). HUD’s motion and supporting materials do not, however, suggest that this scoring method was used for the portions of the Notices of Funding Availability relevant here.

D. HUD's use of scores and guidance to encourage CoCs to take certain actions

HUD routinely provides guidance to CoCs related to how they can maximize (or could have maximized) their CoC scores. In general, the agency “recognizes the value for applicants in understanding the application questions and providing general insight into how questions are scored,” and provides guidance “so applicants can be clear and informed about the intent of the [CoC] application questions and how each question is weighted in the determination of the overall [CoC] score.” *Id.* ¶ 37. Thus, the 2015 and 2016 Notices of Funding Availability not only stated the maximum points available for each scoring category or subcategory but also included a brief description of the relevant considerations. *See* 2015 NOFA § VII; 2016 NOFA § VII. In its most recent Notice of Funding Availability, issued for the 2018 CoC program competition, HUD provided even more detailed guidance by listing, for each scoring category, the “rating factor[s],” the maximum points available for each factor, and what a CoC must do “to receive maximum points” for that factor. HUD, *Notice of Funding Availability (NOFA) for the Fiscal Year (FY) 2018 Continuum of Care Program Competition, FR-6200-N-25* § VII.B, <https://www.hudexchange.info/resources/documents/FY-2018-CoC-Program-Competition-NOFA.pdf> (last visited Dec. 3, 2018) (2018 NOFA).

HUD provides additional guidance to CoCs through its post-competition debriefs and other formats. In webinars following the 2015 and 2016 CoC program competitions, for example, HUD summarized and discussed the project selection process, the competition results, and some of the factors that led certain CoCs to receive higher scores and/or more projects funded and others to receive lower scores and/or fewer projects funded. *See* 2015 Debrief Transcript; 2016 Debrief Transcript. Additionally, after the 2015 and 2016 CoC program competitions, HUD gave each CoC a debrief document that included that CoC's CoC score, its response-specific scores for key questions on the CoC application, and other information. *See* 2015 Debrief Transcript 1, 7

(discussing debrief document); 2016 Debrief Transcript 3 (similar); *Continuum of Care Program Competition Debriefing, FY 2015*, <http://helpingtohousevt.org/wp-content/uploads/2016/06/HUD-VT-BoS-CoC-Debriefing-Scores-FY2015-NOFA.pdf> (last visited Jan. 3, 2019) (Exhibit A to Decl. of Rebecca Smullin) (example of debrief for 2015 competition); *CoC Name: Vermont Balance of State CoC*, <http://helpingtohousevt.org/wp-content/uploads/2016/07/FY16-VT-BoS-CoC-Debrief.pdf> (last visited Dec. 14, 2018) (Exhibit B to Decl. of Rebecca Smullin) (example of debrief for 2016 competition). Moreover, after the 2015 CoC program competition, any CoC could request a debrief that would include the “final score for each rating factor.” HUD, *General Section to the Fiscal Year 2015 NOFAs for Discretionary Programs, FR-5900-N-01* § VI.A.9 (Oct. 10, 2014), <https://www.hudexchange.info/resources/documents/FY2015-NOFA-Policy-Requirements-and-General-Section.pdf> (2015 NOFA General Section); *see generally* 2015 NOFA § Overview G (recognizing that General Section applies to CoC program competition). More recently, HUD published an explanation of why, in the 2017 competition, a CoC might not have received the maximum score for its response to a particular question on the CoC application. *See HUD, We Increased the Number of Successful Permanent Housing Placements From Emergency Shelter (ES), Safe Havens (SH), Transitional Housing (TH), and Rapid Rehousing (RRH). Why Didn't We Receive the Maximum Score for Question 3A-3?* (June 2018), <https://www.hudexchange.info/faqs/3385/we-increased-the-number-of-successful-permanent-housing-placements-from/>.

As HUD’s motion explains, *see* Memo. ISO of Def’s Mot. for Summ. J. 7-8, ECF No. 17 (Def.’s S.J. Memo.), HUD also provides guidance regarding the CoC application questions and the agency’s scoring practices through its detailed application instructions and by publishing Frequently Asked Questions (FAQs) “for new concepts introduced in the CoC application,”

answering “questions from applicants” submitted online through HUD Exchange (a HUD website), including links to the HUD Exchange in the CoC Notice of Funding Availability, and communicating updates through the HUD Exchange website and listserv. Suchar Decl. ¶ 37.

Through HUD’s guidance, CoCs and their partners might learn how to prepare effective applications. Indeed, HUD’s CoC program regulation specifically contemplates the provision of technical assistance to help entities “improve their capacity to prepare applications” for the CoC program competition. 24 C.F.R. § 578.101 (allowing HUD to fund such assistance). And during the most recent program competition, HUD alerted the CoC community that detailed instructions for the application “contain[ed] information that is necessary to fully complete the CoC Application questions and maximize scoring potential.” HUD, *Continuum of Care (CoC) Application, e-snaps Instructional Guide, Version 1*, at 1, <https://www.hudexchange.info/resources/documents/FY-2018-CoC-Application-Navigational-Guide.pdf> (visited Dec. 17, 2018).

Through HUD’s scoring rubric and its related guidance, HUD has also encouraged CoCs to change their actual activities, strategies, and results, not simply the way they complete the required forms. The agency has used its flexibility over the CoC scoring methodology to develop criteria that reflect the agency’s goals and the CoC actions or results that it wants to encourage. *See generally* 42 U.S.C. § 11386a (giving HUD discretion over scoring criteria); *compare, e.g.,* 2015 NOFA § VII *with* 2016 NOFA § VII (showing changes in scoring criteria, from one year to the next). In 2015, for example, HUD assigned up to two points for a CoC’s commitment to goals in *Opening Doors*, an administration strategic plan that matched HUD’s own goals. *See* 2015 NOFA §§ II.A (discussing *Opening Doors*), VII.A.1.b (scoring criteria addressing commitment to *Opening Doors*). As the agency explained in a debrief webinar following that year’s competition, it had made the *Opening Doors* goals “key” to HUD’s decisions about “how the competition was

structured” and “how [it] ma[de] resource allocation decisions” as part of HUD’s “attempt to try and meet” the goals. 2015 Debrief Transcript 1. Similarly, because “reducing homelessness” was “something [HUD was] really focused on,” it made “reducing homelessness ... a really important factor throughout the [2015 CoC] application”; as a result, “CoCs that did well” in that year’s CoC program competition were those that “had managed to reduce homelessness.” *Id.* at 4; *see also* 2016 Debrief Transcript 3 (similar, regarding 2016 CoC program competition). And in the 2016 CoC program competition, the agency assigned “a lot of points” to a CoC’s use of “performance criteria to rate and rank projects,” as that was “a big priority” for HUD. 2016 Debrief Transcript 3.

II. NLCHP’s FOIA Request and Subsequent Litigation

NLCHP is a national nonprofit dedicated to ending and preventing homelessness. Established in 1989, it works to expand access to affordable housing, meet the needs of those who are homeless or at risk of being so, and strengthen the social safety-net through policy advocacy, public education, advocacy training, and other mechanisms. Decl. of Eric S. Tars ¶ 2 (Tars Decl.).

On or about May 8, 2017, NLCHP submitted a FOIA request to HUD for three sets of documents related to the 2015 and 2016 CoC program competitions: (1) all applicants’ responses to a particular subcategory of the 2015 CoC scoring criteria listed in that year’s Notice of Funding Availability; (2) all applicants’ responses to a particular subcategory of the 2016 CoC scoring criteria listed in that year’s Notice of Funding Availability, and (3) “[t]he points awarded by HUD to each applicant’s corresponding responses to each of the [identified] questions.” Tars Decl., Ex. A at 1-2 (FOIA Request). NLCHP also sought a fee waiver. *See id.* at 2-3.

The FOIA request quoted the relevant subcategories from the two Notices of Funding Availability. For the 2015 CoC program competition, the identified subcategory was:

Outreach. Up to 2 points to CoCs that demonstrate recipients have implemented specific strategies that prevent criminalization of homelessness, affirmatively further fair housing as detailed in 24 CFR 578.93(c), and ensure that outreach is conducted to homeless individuals and families who are least likely to request housing or services in the absence of special outreach. Maximum points will be awarded to CoCs that provide information that demonstrates that 100 percent of the geographic area is covered by the strategies and that describes the specific outreach procedures in place that are used by the homeless service organizations to identify and engage homeless individuals and families, including their efforts to provide meaningful outreach to persons with disabilities and persons with limited English proficiency. Applicants must describe how they are reducing criminalization of homelessness and the procedures they will use to market their housing and supportive services to eligible persons regardless of race, color, national origin, religion, sex, age, familial status, or disability who are least likely to apply in the absence of special outreach.

Id. at 1; *see also* 2015 NOFA § VII.A.1.j (including this text).

For the 2016 CoC program competition, the identified subcategory was:

Criminalization. Up to 2 points to CoCs that implemented specific strategies to prevent criminalization of homelessness within the CoC’s geographic area. Maximum points will be awarded to CoCs that indicate specific strategies to ensure homelessness in [sic] not criminalized such as engaging or educating local policy makers, engaging or educating law enforcement, implementing community plans, or engaging or educating businesses.

FOIA Request 2; *see also* 2016 NOFA § VII.A.1.i (including this text).

NLCHP sought the requested records as part of its ongoing efforts to combat the “criminalization of homelessness”: measures that punish people for behaviors such as eating, sleeping, and sheltering oneself in public, despite the lack of alternatives. Tars Decl. ¶¶ 3-4. For many years, NLCHP had urged HUD to add a question to its CoC application about entities’ efforts to end and prevent such measures. *See id.* ¶ 4. Because HUD’s scoring of CoC applications can encourage CoCs to adopt certain strategies, NLCHP believed that adding a question about the criminalization of homelessness to the CoC application would advance action in this area. *See id.* NLCHP’s efforts appeared to pay off when HUD released its 2015 CoC Notice of Funding Availability; in that Notice, HUD addressed the criminalization of homelessness in its CoC scoring criteria for the first time. *Id.* ¶ 5. NLCHP submitted the FOIA request in May 2017 to enable it to

learn how HUD had applied the addition to the Notice of Funding Availability and evaluate whether the change had persuaded local communities to take additional steps against the criminalization of homelessness and to otherwise address the needs of homeless families and individuals. *See id.* ¶ 7. NLCHP also planned to share the information it received; NLCHP hoped that by helping CoCs learn about others' strategies and the points HUD had awarded them for their work, NLCHP could show more about how HUD had valued such efforts and inspire CoCs to take even more action against the criminalization of homelessness. *See id.*

In September 2017, after HUD failed to respond to either NLCHP's request or an email asking about the status of the request, NLCHP wrote to HUD's FOIA office requesting a response. *See id.* ¶¶ 8-9. Following this correspondence, HUD sent NLCHP an email and a letter acknowledging the FOIA request, but HUD offered no substantive response. *See id.* ¶¶ 10-11, 15. On October 2, 2017, HUD denied NLCHP's fee waiver request, *id.* ¶ 12, and after an administrative appeal, HUD affirmed that denial, *id.* ¶¶ 13-14.

Nearly a year after submitting its FOIA request, having still received no substantive response, NLCHP filed suit, challenging both HUD's failure to release responsive records and its denial of NLCHP's fee waiver request. *See Compl.*, ECF No. 1; *Tars Decl.* ¶ 15. HUD then began to produce records without charge, thus mooted NLCHP's fee-related claim and resolving NLCHP's request for CoCs' responses to the identified portions of the 2015 and 2016 CoC Notices of Funding Availability. *See Joint Status Report* dated June 14, 2018, at 1, ECF No. 9; *Joint Status Report* dated Aug, 27, 2018, at 1, ECF No. 11; *Joint Status Report* dated Oct. 5, 2018, at 2, ECF No. 12; *see also Tars Decl.* ¶¶ 16-19.

But HUD continues to withhold records responsive to the third part of NLCHP's request. Specifically, in its first production of documents to NLCHP in June 2018, HUD provided charts

containing CoCs' responses to one question in the 2015 CoC application and one question in the 2016 CoC application, as well as the scores HUD assigned to those responses. HUD redacted the response-specific scores, however, claiming that the information is deliberative material within the scope of FOIA exemption 5. *See* Tars Decl. ¶¶ 16-17 & Exs. B, C; Suchar Decl. ¶ 13 & Exs. B, D, ECF No. 17-3. In its second production to NLCHP in September 2018, HUD provided charts with CoCs' multi-part responses to two questions in the 2015 CoC application—those numbered 1C-6 and 4B-3. *See* Tars Decl. ¶ 19 & Exs. D, E; Suchar Decl. ¶ 16 & Ex. C. But HUD again asserted exemption 5 and the deliberative process privilege, and in that later production, withheld documents in full that it asserts contain the scores associated with responses to questions 1C-6 and 4B-3 in the 2015 CoC application. *See* Suchar Decl. ¶ 17 & Exs. C, D.

Accordingly, records responsive to the third part of NLCHP's request—"[t]he points awarded by HUD to each applicant's corresponding responses to each of the [identified] questions," FOIA Request 1-2—remain at issue.

LEGAL STANDARD

Summary judgment is appropriate when "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). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991); *see also* 5 U.S.C. § 552(a)(4)(B). Thus, "the Government ultimately has the onus of proving that the [withheld material is] exempt from disclosure," *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999) (internal quotation marks, brackets, and citation omitted), and the Court reviews the agency's withholdings *de novo*, 5 U.S.C. § 552(a)(4)(B). If

the government cannot “carry its burden of convincing the court that one of the statutory exemptions appl[ies],” the agency must release the requested records. *Goldberg v. Dep’t of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). The agency also must release a requested record “even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law.” *Rosenberg v. DOJ*, ___ F. Supp. 3d ___, No. 17-cv-00437 (APM), 2018 WL 4637363, *2 (D.D.C. Sept. 27, 2018) (discussing 5 U.S.C. § 552(a)(8)(A)(i)).

Where the adequacy of the search is disputed, the agency must prove it “conducted a search reasonably calculated to uncover all relevant documents.” *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal quotation marks and citation omitted). Where the undisputed material facts establish that the agency conducted an inadequate search, the agency must “conduct a new search ... that is adequate in scope, manner and location, and [must] produce any additional responsive records to” NLCHP. *Rodriguez v. Dep’t of Def.*, 236 F. Supp. 3d 26, 41 (D.D.C. 2017).

ARGUMENT

I. HUD’s Scores Are Not Exempt from Disclosure Under Exemption 5.

FOIA is intended to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). It ensures “that the public has access to all government documents, subject to only nine specific limitations, to be narrowly interpreted.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

FOIA exemption 5 allows agencies to withhold certain “inter-agency or intra-agency memorandums or letters that would not be available by law” to a non-agency party in litigation. 5 U.S.C. § 552(b)(5). Here, HUD claims that exemption 5 applies to the withheld records based solely on the deliberative process privilege, which serves “to prevent injury to the quality of agency

decisions,” *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting *NLRB v. Sears*, 421 U.S. 132, 151 (1975)). Both the D.C. Circuit and the Supreme Court have made clear that exemption 5 must “be construed ‘as narrowly as consistent with efficient government operation.’” *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)). Moreover, as with other FOIA exemptions, HUD cannot properly invoke exemption 5 unless it can show that the agency “reasonably foresees that disclosure would harm an interest protected by” that exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I); *see generally Rosenberg*, 2018 WL 4637363, *2 (discussing the legislative history of this provision).⁵

Here, the requested records do not fall within the scope of the deliberative process privilege, and, in any event, HUD has not shown that disclosure will cause foreseeable harm to the agency’s deliberative process. Therefore, NLCHP should prevail as a matter of law, and the Court should order HUD to disclose the withheld material containing the scores it assigned to individual CoCs’ responses to certain application questions during the 2015 and 2016 CoC program competitions.

A. The requested records do not fall under the deliberative process privilege.

For the deliberative process privilege to apply, the information at issue must be “both ‘predecisional’ and ‘deliberative.’” *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2010). The privilege “encompasses documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, as well as other subjective documents that reflect the personal opinions of the writer prior to the agency’s adoption of a policy.” *Tax Analysts v. IRS*, 294 F.3d 71, 80 (D.C. Cir. 2002) (internal quotation marks and citation omitted). HUD’s response-specific scores are plainly none

⁵ The foreseeable harm requirement does not apply to documents whose disclosure is prohibited by law, *see* 5 U.S.C. § 552(a)(8)(A)(i)(II), but that is not the case here.

of these, and thus HUD's withholdings of records and portions of records containing those scores are improper.

Deliberative documents are those that "reflect[] the give-and-take of the consultative process." *Pub. Citizen*, 598 F.3d at 874 (citation omitted). To satisfy this standard, a document must "be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters," *id.* at 876 (citation omitted), through "candid or evaluative commentary," *id.* (requiring release of portions of documents that do not provide such commentary). The records at issue here are not such documents, as they include only HUD's actual decisions, not any recommendations, opinions, or commentary. *See* Suchar Decl. Ex. D. Though HUD argues that the withheld scores "reflect staff members' preliminary assessment," Def.'s S.J. Memo. 6, these scores are not (and do not include) the assessments by individual HUD desk officers that the agency uses to develop its response-specific scores, *see* Suchar Decl. ¶ 26. Rather, the withheld material consists of the final response-specific scores that the agency assigned automatically, by computer, *see id.* ¶ 28, or after reconciling individual desk officers' assessments and recommendations into a single, final HUD score, *see id.* ¶ 27. *See id.* Ex. D (stating that the withheld material reflects the "[p]oints awarded by HUD" to applicants' responses).

Notably, HUD's suggestion that the response-specific scores that NLCHP requested are deliberative is at odds with its past practice with similar material. The deliberative process privilege protects only "confidential" intra-agency documents, *Tax Analysts v. IRS*, 294 F.3d at 80 (citation omitted). Yet in the past, HUD has shared certain response-specific scores externally, in debrief documents provided to CoCs. *See* 2015 Debrief Transcript 1, 7; 2016 Debrief Transcript 3; *Continuum of Care Program Competition Debriefing, FY 2015*, <http://helpingtohousevt.org/wp-content/uploads/2016/06/HUD-VT-BoS-CoC-Debriefing-Scores-FY2015-NOFA.pdf> (last visited

Jan. 3, 2019) (Exhibit A to Decl. of Rebecca Smullin); *CoC Name: Vermont Balance of State CoC*, <http://helpingtohousevt.org/wp-content/uploads/2016/07/FY16-VT-BoS-CoC-Debrief.pdf> (last visited Dec. 14, 2018) (Exhibit B to Decl. of Rebecca Smullin). HUD offers no reason to distinguish the response-specific scores at issue here, which it claims are deliberative, from those it previously disclosed to CoCs. *Cf. Rosenberg*, 2018 WL 4637363, at *8 (in denying summary judgment for agency on its claim that documents were covered by the deliberative process privilege, noting that the government redacted certain statements in some records and left similar statements unredacted in other records).

HUD's response-specific scores also are not predecisional because they represent the agency's actual decisions about what scores to assign to CoCs' responses to particular application questions, *see* Suchar Decl. ¶¶ 27-28 & Ex. D. Although HUD contends that "the individual scores Plaintiff requested represented only a step on the path toward the decision to fund projects," Def.'s S.J. Memo. 7, "[c]haracterizing ... documents as 'predecisional' simply because they play into an ongoing ... process would be a serious warping of the meaning of the word." *Coastal States*, 617 F.2d. at 868 (holding that documents used in an ongoing audit process were not predecisional). Here, the withheld scores are the agency's *final* position on CoCs' responses to particular application questions, *see* Suchar Decl. ¶¶ 27-28 & Ex. D, even though they also preceded other calculations and the agency's funding decisions. *See Pub. Citizen*, 598 F.3d at 875 (holding that "an agency's application of a policy to guide further decision-making does not render the policy itself predecisional"); *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (holding that documents that represent the IRS's "legal position" are not predecisional, even though those documents "may precede [a] field office's decision in a particular taxpayer's case"). Moreover, as described above, *supra* pp. 4-7, HUD used the response-specific scores at issue to derive CoC

scores and the Tier 2 funding decisions that the agency based on those CoC scores. *See* Suchar Decl. ¶¶ 26, 28 (describing role of response-specific scores in calculating scores that correspond to Notice of Funding Availability categories); 2015 NOFA § VII (showing how Notice categories sum to total CoC score); 2016 NOFA § VII (similar); *see also* 2015 NOFA §§ II.B.16, VIII.A.2.d (showing role of CoC score in Tier 2 funding); 2016 NOFA §§ II.B.17, VIII.A.2.e (similar). Because HUD has thus adopted and used the response-specific scores, any claim that they were predecisional no longer applies. *See Coastal States*, 617 F.2d at 866 (holding that a document is not predecisional if it “is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public”). Indeed, this Court has recognized that when the government states a figure “with numerical specificity,” such as a CoC score, *Am. Soc. of Pension Actuaries v. IRS*, 746 F. Supp. 188, 192 (D.D.C. 1990), the “analytical backup”—here, the response-specific scores summing to that CoC score—“embod[ies] the agency’s effective law and policy” and is not protected by the deliberative process privilege, *id.* at 191 (citation omitted) (requiring disclosure of the “assumptions and calculations that yield” an estimate of government revenue, because “the estimate they produced became part of the President’s Budget”). And importantly, HUD has not suggested that either CoC scores or the agency’s Tier 2 funding decisions are subject to the deliberative process privilege. HUD has disclosed both CoC scores and its Tier 2 project selections externally, *see* HUD, *HUD Awards and Allocations*, <https://www.hudexchange.info/grantees/allocations-awards> (last visited Jan. 7, 2019); 24 C.F.R. § 578.21(b) (requiring announcement of conditional funding awards); *supra* pp. 8-9 (explaining that HUD disclosed CoC scores to the CoCs), a fact that would undermine any deliberative process privilege claim regarding these decisions. *See Levy v. U.S. Postal Serv.*, 567 F. Supp. 2d 162, 166 (D.D.C. 2008) (explaining that information that “is no longer secret” is “not deliberative in

nature”); *see also Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 257-58 (D.C. Cir. 1977) (holding that deliberative process privilege does not cover information regarding external negotiations that “has already been fully disclosed to at least one party outside the” agency).

For all of these reasons, the two cases on which HUD relies, *see* Def.’s S.J. Memo. 6, are inapposite. *Brannum v. Dominguez*, 377 F. Supp. 2d 75 (D.D.C. 2005), involved a request for records related to the Air Force’s determination of the highest grade an individual had served. *See id.* at 77. The final determination was made by one decisionmaker, who “relie[d] on information and recommendations from others” but to whom the “final decision [was] left.” *Id.* at 83. The agency in that case withheld portions of a “vote sheet” that were termed “remarks” and “board rationale,” and that reflected the information that non-decisionmaking individuals considered “in arriving at their recommendation.” *Id.* at 82-83. Similarly, in *Casad v. HHS*, No. 01-1911 (RMC), 2003 U.S. Dist. LEXIS 13007 (D.D.C. June 20, 2003), *aff’d* 96 F. App’x 724 (D.C. Cir. 2004), the agency withheld “summary statements” that included “candid evaluations of [grant] applications,” *id.* at *9, and represented the recommendation of one of two groups involved in a dual review process, *id.* at *6. By contrast, the response-specific scores that HUD has withheld are not “remarks,” “recommendations” or “candid evaluations”; they are final agency decisions. *See* Suchar Decl. Ex. D.

B. Disclosure of HUD’s response-specific scores will not foreseeably harm the agency’s deliberative process.

HUD’s withholdings are also improper because the agency fails to satisfy FOIA’s foreseeable harm requirement, 5 U.S.C. § 552(a)(8)(A)(i)(I), which requires that HUD “explain how a particular Exemption 5 withholding would harm the agency’s deliberative process.” *Rosenberg*, 2018 WL 4637363, at *7. Although HUD makes conclusory assertions about the

impact of disclosing its response-specific scores, the agency has not shown, and could not show, foreseeable harm to its deliberative process. HUD's inability to show foreseeable harm is an independent reason to grant summary judgment to NLCHP and deny HUD's motion. *See id.* at *2.⁶

First, the agency's speculation that disclosure "could" chill agency deliberations and "pose[s] a risk of fostering" insincere responses that could harm the "the competitiveness of the competition," Def.'s S.J. Memo. 7, rests solely on conclusory assertions in its declaration, Suchar Decl. ¶¶ 34, 36. These are insufficient to carry HUD's summary judgment burden. To satisfy the foreseeable harm standard, the "government must do more than perfunctorily state that disclosure ... would jeopardize" the deliberative process. *Rosenberg*, 2018 WL 4637363, at *8 (internal quotation marks and citation omitted); *cf. Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999) (denying agency summary judgment in FOIA case when "its claim that release would impair government interests" was based on one declarant's "speculative opinion" and another's "terse and self-serving statement"). Moreover, mere possibilities do not satisfy the FOIA. The statute requires agencies to support their withholding with a stronger showing, of reasonable foreseeability. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I).

⁶ Even before Congress added section 552(a)(8)(A)(i)(I) to FOIA, the D.C. Circuit applied a similar standard in determining whether the deliberative process privilege applies. It held that under FOIA, "[a] ruling that the [deliberative process] privilege applies should ... rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency." *Tax Analysts v. IRS*, 117 F.3d at 618 (internal quotation marks and citation omitted). Similarly, it instructed that the "standard for review of agency claims under Exemption 5" itself requires this Court to "test whether disclosure of a document is likely to adversely affect the purposes of the privilege" by "ask[ing] ... whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (quoting *Coastal States*, 617 F.2d at 866).

Second, HUD's own declaration and other evidence dispel any concern about a chilling of deliberations. HUD's declaration shows that the agency scores some questions automatically, by computer. *See* Suchar Decl. ¶ 28. Because computer-generated scores do not involve staff deliberation, disclosure will not "chill" such activity. Even for questions scored by staff, HUD's evidence negates its own speculation. HUD assigns human-generated scores after reconciling the qualitative assessments of individuals (who assigned terms "such as fully, mostly, somewhat, or none") into one final, numeric score. *See id.* ¶¶ 26-27. These final, response-specific scores that NLCHP requested and that HUD has withheld are thus not "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication," *Morley*, 508 F.3d at 1126 (citation omitted). Indeed, the material that HUD has withheld does not reveal who was involved in scoring a response, let alone the opinions or views of any such person. *See* Suchar Decl. Ex. D (stating that the withheld material only includes scores); *see also id.* ¶¶ 26-28 (explaining scoring process). Moreover, HUD's description of the scoring process shows no opportunity for staff to engage in the "censor[ing]" that defendant's summary judgment memorandum references, Def.'s S.J. Memo. 7. *See* Suchar Decl. ¶¶ 26-28.

Third, HUD's concern about the "competitiveness of the competition," Def.'s S.J. Memo. 7, is both unsupported and unrelated to "an interest protected by" exemption 5, 5 U.S.C. § 552(a)(8)(A)(i)(I). To begin with, the evidence belies HUD's suggestion that the agency will suffer harm if disclosure allows CoCs to learn more about the agency's practice and tailor their application responses to maximize their scores, *see* Def.'s S.J. Memo. 7. HUD's own practice shows that its interest is in informing CoCs about how to maximize their scores, not in keeping CoCs in the dark. The agency has chosen to use a wide variety of tools—webinars, application instructions, debrief materials, and FAQs, as well as its Notices of Funding Availability—to

instruct CoCs on the agency's goals, its scoring practices, how its CoC scoring criteria reflect the agency goals, and how CoCs can maximize their scores. *See* Suchar Decl. ¶ 37 (discussing agency efforts to inform CoCs about the CoC application and the agency's scoring practices); *supra* pp. 8-10 (discussing other efforts). HUD's most recent Notice of Funding Availability even directly instructs CoCs how they can maximize their scores. *See* 2018 NOFA § VII.B. And when CoCs do maximize their scores, that result should generally serve HUD's interests. Because the agency uses its scoring system to encourage CoCs to adopt desired strategies or achieve desired results, a higher CoC score generally means that a CoC has shown that it is doing *more* of what HUD wants. *See supra* pp. 10-11; 2015 Debrief Transcript 1, 4; 2016 Debrief Transcript 3.

Moreover, HUD offers no reason that disclosure of the scores at issues would lead CoCs to change their practices and be "disingenuous," Def.'s S.J. Memo. 7, when responding to applications in the future. Indeed, by expressly tying funding decisions to CoC scores, *see* 2015 NOFA § VIII.A; 2016 NOFA § VIII.A, and by providing CoCs with guidance on maximizing their scores, *see* 2018 NOFA § VII.B, *supra* pp. 8-10 (regarding other guidance), HUD already provides CoCs plenty of good reasons to "tailor" their responses to receive the most points possible, Def.'s S.J. Memo. 7, and to do so honestly. *See, e.g., HUD, CoC Registration and CoC Review, HUD Detailed Instructions and Navigational Steps FY 2018, Version 1*, at 46, <https://www.hudexchange.info/resources/documents/CoC-Program-Registration-and-CoC-Review-Instructions.pdf> (last visited Dec. 17, 2018) (explaining certification of true and accurate responses that HUD requires during registration process connected to CoC application); 2015 NOFA General Section § IV.G.3 (regarding requirement for certification of material representations); *see generally* 18 U.S.C. § 1001 (regarding false statements to the government). At the same time, the response-specific scores that HUD awarded to particular CoCs based on their individualized

circumstances in 2015 and 2016 do not provide a certain formula for CoCs seeking to tailor their responses to the questions in future years' applications; this is especially true because HUD's scoring rubric changes from year to year and can include reducing complex, multi-part answers to a single score. *Compare* 2015 NOFA § VII, *with* 2016 NOFA § VII, *and* 2018 NOFA § VII (showing changes in scoring criteria); *see also* Tars Decl. Ex. C (showing that one response-specific score was based on a multi-part answer that included check-box responses and free-text fields).

Finally, the consequences for its grant competition that HUD fears are unrelated to the deliberative process privilege incorporated in FOIA exemption 5. That privilege protects only the flow of information *within* and *among* agencies. *See* 5 U.S.C. § 552(b)(5) (applying only to intra- and inter-agency documents); *Levy*, 567 F. Supp. 2d at 166 (holding that the privilege does not apply to documents disclosed to external parties). Its purpose is to “assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism,” and to protect against “premature disclosure of proposed policies” and “confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.” *Pub. Citizen*, 598 F.3d at 874 (quoting *Coastal States*, 617 F.2d at 866). HUD’s concern, about the quality of information the agency will receive from external CoCs, is entirely distinct, and thus does not evidence any deliberative process harm. *See Mead Data Cent.*, 566 F.2d at 257-58 (holding that the “policy objectives which exemption five is designed to serve” are not “relevant to a claim of secrecy for a proceeding between an agency and an outside party”).

Indeed, HUD's argument that it should be able to withhold scores because they will provide "insight" into agency practice that the CoCs will use, Def.'s S.J. Memo. 7, reflects a lack of appreciation of a fundamental FOIA principle. Insight into agency practices is precisely what FOIA aims to promote. It is "the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Coastal States*, 617 F.2d at 868. "[D]isclosure, not secrecy, is the dominant objective of the Act." *Rosenberg*, 2018 WL 4637363, at *1 (citation omitted).

Because disclosure of the withheld material will not cause a foreseeable deliberative-process harm to HUD, the Court should deny defendant's summary judgment motion, grant summary judgment to plaintiff, and order HUD to disclose the withheld material.

II. HUD's Search Was Inadequate.

"It is axiomatic that an inadequate search for records constitutes an improper withholding under FOIA." *Rodriguez*, 236 F. Supp. 3d at 34 (internal quotation marks, citation, and brackets omitted). Although HUD claims that the adequacy of its search is not in dispute in this case, *see* Def.'s S.J. Memo. 3, NLCHP disputes the adequacy of the agency's search for certain materials responsive to the third part of its FOIA request because HUD's *Vaughn* index implies that this aspect of the agency's search was inadequate. Specifically, HUD's *Vaughn* index suggests that the 17 pages that HUD withheld in full include only the scores that HUD assigned to CoCs' responses to certain application questions, *see* Suchar Decl. Ex. D, which the agency earlier identified as questions 1C-6 and 4B-3 on the 2015 CoC application, *see id.* Ex. C. The index does not state that the withheld-in-full pages include any other content.

To the extent that the 17 pages that HUD withheld in full contain only its response-specific scores, and do not link each score to a specific CoC and the relevant responses from that CoC, HUD has not conducted an adequate search. NLCHP's request encompasses records that reflect each relevant score *with* identification of the CoC and the relevant response (or responses) to which

such score applies. *See* FOIA Request at 1-2 (requesting “points awarded by HUD to each applicant’s corresponding responses to each of the above questions”). HUD “is not permitted to deny [NLCHP] information by narrowing the scope of its search to exclude relevant information.” *Nat’l Sec. Counselors v. CIA*, 849 F. Supp. 2d 6, 12 (D.D.C. 2012). Moreover, HUD has already indicated that such records exist; the documents it disclosed in June 2018 link each score to an individual CoC and the relevant response (or responses) submitted by that CoC. *See* Tars Decl. ¶¶ 16-17 & Exs. B, C. Indeed, such linkages would be expected in light of HUD’s use of the response-specific scores to evaluate individual CoCs and their projects. *See supra* pp. 6-7; Suchar Decl. ¶¶ 26-28. These “positive indications of overlooked materials,” *Aguiar v. DEA*, 865 F.3d 730, 738 (D.C. Cir. 2017) (citation omitted), establish the inadequacy of HUD’s search for material responsive to the third part of NLCHP’s request.

NLCHP reiterates that its challenge to the adequacy of HUD’s search is based on the *Vaughn* index, which NLCHP assumes contains a complete and accurate description of the material that HUD has withheld. Moreover, NLCHP’s challenge to the adequacy of HUD’s search is confined to the scores associated with the material that HUD produced in September 2018: CoCs’ responses to questions 1C-6 and 4B-3 on the 2015 CoC application.

III. HUD Did Not Properly Segregate the Disputed Scores from Other Material.

Because HUD’s response-specific scores do not fall under exemption 5 and their disclosure will not cause any foreseeable harm to the agency’s deliberative process, HUD must disclose the withheld material in full. If the Court concludes, however, that HUD’s response-specific scores are exempt from disclosure, it should deny HUD’s motion for summary judgment to the extent that the pages that HUD withheld in full include material in addition to the response-specific scores that HUD argues are exempt from disclosure.

As explained above, HUD's *Vaughn* index suggests that the withheld documents do *not* include material in addition to the response-specific scores. But if they do, then HUD has not shown that it complied with the requirement that it provide NLCHP "[a]ny reasonably segregable portion of a record ... after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Although HUD makes a conclusory assertion that it has complied with this requirement, *see* Def.'s S.J. Memo. 9; Suchar Decl. ¶¶ 19, 38, such a conclusory statement does not meet HUD's burden to show that any additional material is not "reasonably segregable," 5 U.S.C. § 552(b). *See Goldstein v. Treasury Inspector Gen. for Tax Admin.*, 172 F. Supp. 3d 221, 234 (D.D.C. 2016). Moreover, HUD's June 2018 production demonstrates that the agency can segregate its response-specific scores from other material included in the same documents because, in that production, HUD provided documents that include both response-specific scores and other information, and HUD withheld only the scores. *See* Tars Decl. ¶¶ 16-17 & Exs. B, C.

CONCLUSION

For the foregoing reasons, the Court should deny HUD's summary judgment motion and grant summary judgment to NLCHP.

Dated: January 11, 2019

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL LAW CENTER ON)	
HOMELESSNESS & POVERTY,)	
)	
Plaintiff,)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
HOUSING AND URBAN)	
DEVELOPMENT,)	
)	
Defendant.)	
)

C.A. No. 18-cv-00998 (APM)

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE AND
PLAINTIFF’S STATEMENT OF ADDITIONAL MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE**

I. Plaintiff’s Response to Defendant’s Statement of Material Facts as to Which There Is No Genuine Issue

Plaintiff NLCHP does not believe that there exist genuine issues of material fact that preclude summary judgment in this case. NLCHP responds to the statement of material facts filed by defendant as follows:

1. On June 22, 2017, Defendant U.S. Department of Housing and Urban Development (“HUD”) received a Freedom of Information Act (“FOIA”) request from Plaintiff dated May 8, 2017. Declaration of Norman A. Suchar (“Suchar Decl.”) ¶ 3.

Plaintiff’s response: Admitted.

2. Plaintiff submitted a similar FOIA request by e-mail dated September 13, 2017. *Id.*
4.

Plaintiff’s response: Disputed. On or about September 13, 2017, NLCHP sent HUD a letter that followed up on NLCHP’s May 8, 2017 request and sought a

response to that request. NLCHP did not submit a new FOIA request to HUD on that date. *See* Decl. of Eric S. Tars ¶ 9 (Tars Decl.).

3. The September 13, 2017, FOIA request sought records maintained by HUD, specifically seeking:

(1) all responses by funding applicants to Community Planning and Development's Notice of Funding Availability for the FY 2015 Continuum of Care Program Competition (FR-5900-N-25) in response to Section VII.A.1.j. Outreach;

(2) all responses by funding applicants to Community Planning and Development's Notice of Funding Availability for the FY 2016 Continuum of Care Program Competition (FR-6000-N-25) in response to Section VII.A.1.i. Criminalization; and

(3) the points awarded by HUD to each applicant's corresponding responses to each of the above questions. *Id.* ¶ 5.

Plaintiff's response: NLCHP admits that this paragraph is an accurate summary of the FOIA request at issue in this case. NLCHP disputes that the date of that request was September 13, 2017. NLCHP made the relevant request on or about May 8, 2017. *See* Tars Decl. ¶¶ 6, 9. NLCHP also disputes that defendant's statement includes the full text of NLCHP's FOIA request; the full text of that request is attached as Exhibit A to the Declaration of Eric S. Tars.

4. Plaintiff requested a fee waiver. However, because no fees have been assessed for Plaintiff's request, the fee-waiver request is moot. *Id.* ¶ 6.

Plaintiff's response: Admitted.

5. By letter dated September 26, 2017, HUD acknowledged receipt of Plaintiff's FOIA request and assigning it HUD tracking number 17-FI-HQ-02175. *Id.* ¶ 7; Ex. A.

Plaintiff's response: Admitted.

6. Plaintiff filed its Complaint in this action on April 27, 2018 (ECF No. 1).

Plaintiff's response: Admitted.

7. The Parties have agreed that Plaintiff will not challenge HUD's search with respect to its September 13, 2017, and May 8, 2017, FOIA requests. Suchar Decl. ¶ 10.

Plaintiff's response: NLCHP disputes that this case involves two FOIA requests; at issue is a single, May 8, 2017, request. *See* Tars Decl. ¶¶ 6, 9. NLCHP admits that the parties agreed that NLCHP is not challenging HUD's search with regard to the material it produced to NLCHP that responds to the first two parts of NLCHP's FOIA request. NLCHP disputes, however, that NLCHP does not contest the adequacy of HUD's search for material responsive to the third part of NLCHP's request. HUD's *Vaughn* index implies that this aspect of the agency's search was inadequate. *See* Pl.'s Memo. ISO Pl.'s Mot. for Summ. J. and in Opp. to Def.'s Mot. for Summ. J. 25-26 (Pl.'s S.J. Memo.).

8. On June 28, 2018, HUD sent its final response to Plaintiff. *Id.* ¶ 11; Ex. B. HUD determined that the responses to Section VII.A.1.j., titled "Outreach" in the Community Planning and Development's Notice of Funding Availability ("NOFA") for the FY 2015 Continuum of Care ("CoC") Program Competition (FR-5900-N-25), and the responses to Section VII.A.1.i., titled "Criminalization" for the Community Planning and Development's NOFA for the FY 2016 CoC Program Competition (FR-6000-N-25) could be released. HUD provided Plaintiff with 114 pages of responsive records. Suchar Decl. ¶ 12.

Plaintiff's response: NLCHP admits that HUD sent it a response dated June 28, 2018 and that HUD characterized its response as final. NLCHP admits the second sentence. NLCHP admits the third sentence, with the clarification (as recognized in defendant's paragraph 12) that all 114 pages included redactions. *See* Tars Decl. ¶¶ 16-17 & Exs. B, C. NLCHP denies that HUD sent the described response on

June 28; NLCHP received it on June 27. *See* Tars Decl. ¶ 16. NLCHP denies the characterization of HUD’s production as final to the extent it represents a legal conclusion about the propriety of HUD’s redactions, which NLCHP disputes as a matter of law. *See* Pl.’s S.J. Memo. 15-25. NLCHP also disputes any implication that HUD’s original search was adequate as a matter of law; in response to continued discussions between the parties, HUD searched for and produced additional responsive documents. *See* Tars Decl. ¶¶ 18-19; Suchar Decl. ¶ 15 & Ex. C, ECF Nos. 17-2 & 17-3.

9. HUD determined that the scores awarded by HUD staff to each applicant’s corresponding responses to each application question associated with the above sections should be withheld pursuant to FOIA Exemption 5. *Id.* ¶ 13.

Plaintiff’s response: NLCHP admits this statement to the extent it represents HUD’s characterization of its own action and on the understanding that by the phrase “scores awarded by HUD staff to each applicant’s corresponding responses,” HUD refers to the final scores that HUD assigned to each Continuum of Care (CoC) response that is included in the documents that HUD produced to NLCHP in June 2018. *See* Suchar Decl. ¶¶ 12, 13 (regarding June 2018 response to NLCHP’s request), 26-28 (describing scoring process) & Ex. D (describing the withheld scores as “[p]oints award by HUD...”). NLCHP denies this statement to the extent it represents a legal conclusion about the propriety of HUD’s withholdings, which plaintiff disputes as a matter of law. *See* Pl.’s S.J. Memo 15-25.

10. On September 26, 2018, HUD provided Plaintiff with an additional 17 pages of

responsive records identifying additional responses that applicants had to specific application questions under the *Outreach* section in the 2015 CoC NOFA. *Id.* ¶ 15-16; Ex. C.

Plaintiff’s response: Admitted.

11. HUD determined that the scores awarded by HUD staff to each applicant’s corresponding responses to each of the application questions associated with requested sections were being withheld pursuant to FOIA Exemption 5. *Suchar Decl.* ¶ 17.

Plaintiff’s response: NLCHP admits this statement to the extent it represents HUD’s characterization of its own action and on the understanding that by the phrase “scores awarded by HUD staff to each applicant’s corresponding responses,” HUD refers to the final scores that HUD assigned to each CoC response that is included in the documents that HUD produced to NLCHP in September 2018. *See Suchar Decl.* ¶¶ 15, 17 (regarding September 2018 response to NLCHP request), 26-28 (describing scoring process) & Exs. C, D (describing withheld documents). NLCHP denies this statement to the extent it represents a legal conclusion about the propriety of HUD’s withholdings, which plaintiff disputes as a matter of law. *See Pl.’s S.J. Memo* 15-25.

12. Of the 131 total pages HUD released to Plaintiff, 114 pages were released in part, with redactions made pursuant to Exemption 5. *Id.* ¶ 19.

Plaintiff’s response: Admitted.

13. The CoC Program is designed to promote communitywide commitment to the goal of ending homelessness, provide funding for efforts by nonprofit providers, and state and local governments to quickly rehouse homeless individuals and families while minimizing the trauma and dislocation caused to homeless individuals, families, and communities by homelessness,

promote access to and effect utilization of mainstream programs by homeless individuals and families, and optimize self-sufficiency among individuals and families experiencing homelessness. Suchar Decl. ¶ 20.

Plaintiff's response: Admitted.

14. The FY 2015 CoC Program Competition opened on September 17, 2015, and closed November 20, 2015, at 7:59:59 p.m. Eastern Standard Time ("EST"), and the FY 2016 CoC Program Competition opened June 28, 2016, and closed on September 14, 2016, at 7:59:59 p.m. Eastern Daylight Time ("EDT"). In both of these years, it took the Special Needs Assistance Programs ("SNAPS") over six months to develop, write, edit, clear, and publish these NOFA competitions. *Id.* ¶ 21.

Plaintiff's response: Admitted.

15. The training conducted for reviewing and scoring a NOFA competition is an extensive, multi-step process in order to ensure consistency, fairness, accuracy, and objectivity. Throughout the year experienced staff in the SNAPS offices spend multiple weeks preparing for a NOFA competition. This includes a two-part application assessment training that employees receive on reviewing, scoring, and paneling applications. *Id.* ¶ 22.

Plaintiff's response: Admitted.

16. In addition to the training discussed above, to ensure quality and consistency in any NOFA competition the staff has hands-on training on scoring before beginning the formal CoC NOFA competition review. For the hands-on training, the staff use a randomly selected final application that was submitted for that CoC competition, and each desk officer performs a mock dry-run review and scoring of the application followed by a detailed debrief on how each desk officer applied the scoring guidance. This additional training measure ensures that before any of

the applications are officially reviewed, all staff have been properly trained for the specific CoC NOFA competition. *Id.* ¶ 23.

Plaintiff's response: Admitted.

17. Once the CoC NOFA competition closes, the review and scoring of the CoC NOFA competition is a multi-step process, which ensures that no application is subject to any biases. Every application is reviewed at multiple levels by multiple staff members. *Id.* ¶ 24.

Plaintiff's response: Admitted.

18. A CoC NOFA application typically requires applicants to respond to questions organized into four sections of the application. The sections are divided and reviewed among the staff in the SNAPS office; this means that no staff member scores any one application from beginning to end. *Id.* ¶ 25.

Plaintiff's response: Admitted.

19. Once the desk officers review and score the applications, the applications proceed to the panel session for scoring. There, the desk officers review their scores and if there is a discrepancy, discuss why each desk officer scored differently and determine the final score for the question. If the desk officers cannot agree on the final score for a question, one of the SNAPS managers reviews and discusses with the desk officer to determine the final score by using the NOFA language as the basis for the final determination. *Id.* ¶ 27.

Plaintiff's response: Admitted.

20. In addition to the desk officer review and review panel, some questions of particular sections in the application are auto-scored by a computer. These auto-scores are incorporated into the overall scoring. Auto-scoring is used for questions where the applicant was to select an option from a dropdown box or checkboxes. Auto-scoring is also used in relation to some reports that are

required as a supplemental to the application. For example, CoCs are required to conduct a Housing Inventory Count (“HIC”) within the last 10 days of January each year and submit data for the HIC by a certain date and time in the spring. The CoC Program NOFA states the date this information must be collected (within the last 10 days of January) and submitted by the CoC. The auto-score is based on whether the data was timely collected and submitted. *Id.* ¶ 28.

Plaintiff’s response: Admitted.

21. Ultimately, an overall score is assigned to each CoC NOFA application. While the individual scores to each section and subsection play a role in the overall scoring and funding decisions, a specific score in an individual section does not mandate funding, nor is it the ultimate factor in determining whether or not the applicant will receive project funding. *Id.* ¶ 29.

Plaintiff’s response: NLCHP admits the first sentence. With regard to the second sentence, NLCHP admits that individual scores for each section and subsection play a role in overall scoring and funding decisions and that a specific score in an individual section does not necessarily mandate funding or serve as the ultimate factor in determining whether or not an applicant will receive project funding. To the extent that HUD intends to state that a specific score that a CoC receives in an individual section can never determine whether or not a project receives funding, NLCHP denies such statement. In the 2015 and 2016 CoC program competitions, a specific such score could determine whether or not a project categorized as Tier 2 received funding. *See HUD, Notice of Funding Availability for the 2015 Continuum of Care Program Competition, FR-5900-N-25 §§ II.B.15.b, VIII.A.2.d* (Sept. 17, 2015) <https://www.hudexchange.info/resources/documents/Revised-FY-2015-CoC-Program-NOFA.pdf> (2015 NOFA) (showing that a Tier 2 project’s Tier

2 score could determine whether or not it received funding); HUD, *Notice of Funding Availability (NOFA) for the Fiscal Year (FY) 2016 Continuum of Care Program Competition, TECHNICAL CORRECTION* §§ II.B.16.b, VIII.A.2.e, <https://www.hudexchange.info/resources/documents/FY-2016-CoC-Program-NOFA.pdf> (last visited Dec. 3, 2018) (2016 NOFA) (similar); *see also* 2015 NOFA §§ II.B.15-16, VII, VIII.A.2.d (showing that CoC scores, calculated as the sum of the scores assigned to categories listed in the Notice of Funding Availability, were used to calculate Tier 2 scores and were used to break ties between Tier 2 scores); 2016 NOFA §§ II.B.16-17, VII, VIII.A.2.e (similar); Suchar Decl. ¶ 26 (showing that points assigned to an individual subsection of a CoC application are tied to a scoring category listed in the Notice of Funding Availability); *2016-05-25 16.02 FY 2015 Continuum of Care Competition Debrief 3*, 4-5, <https://www.hudexchange.info/trainings/courses/fy-2015-coc-competition-debrief1/> (at link titled “transcript”) (last visited Dec. 13, 2018) (2015 Debrief Transcript) (discussing importance of CoC scores in determining whether a Tier 2 project received funding); *2017-02-09 10.32 FY2016 CoC NOFA Debriefings 2*, 5, 6, <https://www.hudexchange.info/trainings/courses/fy2016-coc-nofa-debriefings/1833/> (at link titled “transcript”) (last visited Dec. 13, 2018) (2016 Debrief Transcript) (similar).

II. Plaintiff’s Statement of Additional Material Facts as to Which There Is No Genuine Issue

Plaintiff submits the following additional material facts as to which there is no genuine issue:

22. The CoC program is a HUD-administered grant program that distributes federal funds through a national competition to local communities to aid homeless individuals or families.

See 42 U.S.C. §§ 11382 (regarding applicants and grants), 11383(a) (listing eligible activities), 11386a (establishing competition between different “geographic areas”).

23. In addition to directly funding housing efforts and services, the CoC program provides for certain administrative costs and community-based planning, collaboration, and fund-distribution activities. *See* 42 U.S.C. § 11383(a)(8)-(12).

24. In the CoC program, the term “Continuum of Care” both describes the program and refers to a type of entity—a “community-based homeless assistance program planning network[],” 77 Fed. Reg. at 45,422—through which the program operates. *See* 24 C.F.R. §§ 578.3 (defining Continuum of Care), 578.7 (describing responsibilities of CoCs).

25. Each year, HUD conducts a national competition to select projects for CoC program funding. *See* 42 U.S.C. § 11386a; 24 C.F.R. §§ 578.17, 578.19.

26. The annual CoC program competition is based on a Notice of Funding Availability that HUD publishes for that year’s competition and that sets out the applicable policy priorities, guidelines, and procedures. *See* 42 U.S.C. § 11382(b); 24 C.F.R. §§ 578.17(a)(ii), 578.19, 578.21.

27. In general, through an entity called a “collaborative applicant,” each CoC submits to HUD a combined application for that year’s CoC program competition that reflects, for the CoC’s geographic area, all the applicants and all of those applicants’ projects that a CoC has selected to apply for HUD funding. *See* 24 C.F.R. §§ 578.9 (explaining CoC role in consolidating applications), 578.15 (regarding eligible applicants). *But see* 42 U.S.C. § 11382(i) (permitting solo applicants in certain exceptional circumstances).

28. HUD awards CoC program grants to specific projects “based on selection criteria” that the agency establishes in accordance with statutory and regulatory requirements. 24 C.F.R.

§ 578.21; *see also* 42 U.S.C. §§ 11386a(a) (similar), 11386a(b) (listing required criteria, which HUD can supplement).

29. When HUD first announces CoC program grants based on its selection criteria, the awards are termed “conditional” because HUD executes the actual grant agreements with awardees after they satisfy applicable conditions, such as establishing control over relevant sites. *See* 42 U.S.C. § 11382(c)(2), (d)(1)-(2); 24 C.F.R. § 578.21.

30. HUD announces the projects it selects for funding. *See* HUD, *HUD Awards and Allocations*, <https://www.hudexchange.info/grantees/allocations-awards/> (last visited Jan. 7, 2019); *see generally* 24 C.F.R. § 578.21(b).

31. In the 2015 and 2016 CoC program competitions, each CoC submitted a consolidated application that included an application for the CoC itself and applications for each project under that CoC (including any new project, renewal project, “CoC Planning” project, or—if the CoC were eligible—a particular type of planning project, called a UFA Costs project, *see* 24 C.F.R. § 578.41). *See* 2015 NOFA §§ I.C.2-3, VI.C.1-3; 2016 NOFA §§ I.C.2-3, VI.C.1-3.

32. In the 2015 and 2016 CoC program competitions, HUD required each CoC to categorize and rank by priority all of its projects, other than CoC Planning or UFA Costs projects. *See* 2015 NOFA §§ I.C.2-3, II.B.14-15; 2016 NOFA §§ I.C.2-3, II.B.15-16.

33. In the 2015 and 2016 CoC program competitions, CoCs designated their higher priority projects as “Tier 1” projects, which meant they were eligible for a pool of money that included the bulk of available grant funds. *See* 2015 NOFA §§ I.C.2, II.B.15; 2016 NOFA §§ I.C.2, II.B.16.

34. In the 2015 and 2016 CoC program competitions, a CoC's "Tier 2" projects were eligible for a separate, smaller pool of funds. *See* 2015 NOFA §§ I.C.2, II.B.15; 2016 NOFA §§ I.C.2, II.B.16.

35. In the 2015 and 2016 CoC program competitions, HUD assessed whether each project and applicant met certain threshold criteria. *See* 2015 NOFA § VIII.A; 2016 NOFA § VIII.A.

36. In the 2015 and 2016 CoC program competitions, HUD rejected any projects that did not satisfy threshold criteria for the project and applicant. *See* 2015 NOFA § VIII.A.1; 2016 NOFA § VIII.A.1.

37. In the 2015 and 2016 CoC program competitions, HUD conditionally funded all of the CoC Planning projects, UFA Costs projects, and certain 2016 renewal grants that satisfied the threshold criteria for the project and the applicant. *See* 2015 NOFA § VIII.A.2.a-b; 2016 NOFA § VIII.A.2.a-c.

38. In the 2015 and 2016 CoC program competitions, HUD also assessed the consolidated CoC applications against certain criteria described in the Notice of Funding Availability to derive CoC scores, which it then used to determine which other projects it would fund. *See* 2015 NOFA §§ VII, VIII.A; 2016 NOFA §§ VII, VIII.A.

39. Regarding the Tier 1 projects that satisfied threshold criteria in the 2015 and 2016 CoC program competitions, HUD's Notices of Funding Availability established that the agency would select projects for funding "based on CoC score beginning with the highest scoring CoC to the lowest scoring CoC." 2015 NOFA § VIII.A.2.c; *see also* 2016 NOFA § VIII.A.2.d (same).

40. Regarding Tier 2 projects that satisfied threshold criteria in the 2015 and 2016 CoC program competitions, HUD used CoC scores and other factors to conduct an additional scoring

exercise and selected projects in order of their point values until available funds were gone. *See* 2015 NOFA § VIII.A.2.d; 2016 NOFA § VIII.A.2.e.

41. In the 2015 and 2016 CoC program competitions, the scoring rubrics meant that HUD-assigned scores were essential to the agency's determination of which Tier 2 projects to fund. *See* 2015 NOFA § VIII.A.2.d; 2016 NOFA § VIII.A.2.e; 2015 Debrief Transcript 2, 5; 2016 Debrief Transcript 1-2, 6.

42. In the 2015 and 2016 CoC program competitions, the available funds could not cover all of the eligible Tier 2 projects, and thus the agency could only fund Tier 2 projects whose scores exceeded a certain value. *See* 2015 Debrief Transcript 2, 5; *see also* 2016 Debrief Transcript 1-2, 6; 2015 NOFA § VIII.A.2.d; 2016 NOFA § VIII.A.2.e.

43. In the 2015 and 2016 CoC program competitions, the CoC score itself was especially integral to HUD's Tier 2 funding decisions. *See generally* 2015 Debrief Transcript 3 (describing the CoC score as the "most important factor in determining whether tier two projects were funded or not"); 2016 Debrief Transcript 2 (similar); *see also* 2015 NOFA § II.B.16.a and 2016 NOFA § II.B.17.a (showing similar use, in both years, of the CoC score in scoring Tier 2 projects).

44. In the 2015 and 2016 CoC program competitions, HUD evaluated each Tier 2 project against a 100-point scale, divided into four categories of available points. *See* 2015 NOFA § II.B.16; 2016 NOFA § II.B.17.

45. In the Tier 2 scoring exercise in the 2015 and 2016 CoC program competitions, the largest category of available points—up to 60 points in 2015 and up to 50 points in 2016—was calculated in "direct proportion to" the CoC score. 2015 NOFA § II.B.16.a; 2016 NOFA § II.B.17.a.

46. In the 2015 and 2016 CoC program competitions, HUD used CoC scores to break any tie between two Tier 2 projects with the same project score; the project whose CoC had received the higher CoC score was funded first. *See* 2015 NOFA § VIII.A.2.d; 2016 NOFA § VIII.A.2.e.

47. Each year, HUD uses its CoC Notice of Funding Availability to explain, in general terms, how it will score COCs' consolidated applications to derive the CoC scores that it uses to select projects for funding. *See generally* 24 C.F.R. § 578.21; Suchar Decl. ¶ 37.

48. The CoC Notices of Funding Availability for the 2015 and 2016 competitions listed the maximum points available to a CoC, the categories (or subcategories) in which HUD would assess points that would sum to the total CoC score, the maximum points available in each category (or subcategory), and a brief description of the relevant considerations. *See* 2015 NOFA § VII; 2016 NOFA § VII; *see also* Suchar Decl. ¶ 37 (explaining that “[w]ithin the NOFA, the detailed scoring information is ... always included, this includes the maximum points available for each section and subsection”).

49. In the 2015 and 2016 CoC program competitions, to the extent relevant to the portions of the Notices of Funding Availability at issue in this case, HUD linked each of the categories and subcategories of points listed in the Notices to certain questions on the CoC application. *See* Suchar Decl. ¶¶ 26, 28.

50. In the 2015 and 2016 CoC program competitions, to the extent relevant to the portions of the Notices of Funding Availability at issue in this case, HUD scored CoCs' applications at a level more granular than that described in the Notice, by assigning response-specific scores to each CoC's responses to particular application questions, and for each CoC, adding those scores to determine a score for the Notice of Funding Availability category or

subcategory linked to those questions. *See id.* ¶¶ 26 (giving example of how two response-specific scores can sum to the score for one NOFA scoring subcategory), 28 (regarding auto-scoring for certain questions).

51. In the 2015 and 2016 CoC program competitions, HUD summed the scores it assigned to each scoring category or subcategory listed in the Notice of Funding Availability to reach the total CoC score. *See* 2015 NOFA § VII (showing that NOFA scoring categories sum to the total available CoC score); 2016 NOFA § VII (similar).

52. In the 2015 and 2015 CoC program competitions, when HUD used staff to derive certain response-specific scores, desk officers applied “scoring guidance,” Suchar Decl. ¶ 23, to review and evaluate the relevant CoC response and provide their own qualitative assessments, before the agency reconciled those individuals’ assessments into one, final HUD-assigned, numeric score, *see id.* ¶¶ 26-27.

53. HUD “recognizes the value for applicants in understanding the [CoC] application questions and providing general insight into how questions are scored.” *Id.* ¶ 37.

54. HUD provides guidance “so applicants can be clear and informed about the intent of the [CoC] application questions and how each question is weighted in the determination of the overall [CoC] score.” *Id.*

55. In its most recent CoC Notice of Funding Availability, issued for the 2018 CoC program competition, HUD listed, for each scoring category, the “rating factor[s],” the maximum points available for each factor, and what a CoC must do “to receive maximum points” for that factor. HUD, *Notice of Funding Availability (NOFA) for the Fiscal Year (FY) 2018 Continuum of Care Program Competition, FR-6200-N-25* § VII.B, <https://www.hudexchange.info/resources/>

documents/FY-2018-CoC-Program-Competition-NOFA.pdf (last visited Dec. 3, 2018) (2018 NOFA).

56. In webinars following the 2015 and 2016 CoC program competitions, HUD summarized and discussed the project selection process, the competition results, and some of the factors that led certain CoCs to receive higher scores and/or more projects funded and others to receive lower scores and/or fewer projects funded. *See* 2015 Debrief Transcript; 2016 Debrief Transcript.

57. After the 2015 and 2016 CoC program competitions, HUD gave each CoC a debrief document that included the CoC's total score, its response-specific scores for key questions on the CoC application, and other information. *See* 2015 Debrief Transcript 1, 7 (discussing debrief document); 2016 Debrief Transcript 3 (similar); *Continuum of Care Program Competition Debriefing, FY 2015*, <http://helpingtohousevt.org/wp-content/uploads/2016/06/HUD-VT-BoS-CoC-Debriefing-Scores-FY2015-NOFA.pdf> (last visited Jan. 3, 2019) (attached as Exhibit A to Decl. of Rebecca Smullin) (example of debrief for 2015 competition); *CoC Name: Vermont Balance of State CoC*, <http://helpingtohousevt.org/wp-content/uploads/2016/07/FY16-VT-BoS-CoC-Debrief.pdf> (last visited Dec. 14, 2018) (attached as Exhibit B to Decl. of Rebecca Smullin) (example of debrief for 2016 competition).

58. After the 2015 CoC program competition, any CoC could request a debrief that would include the “final score for each rating factor.” HUD, *General Section to the Fiscal Year 2015 NOFAs for Discretionary Programs, FR-5900-N-01* § VI.A.9 (Oct. 10, 2014), <https://www.hudexchange.info/resources/documents/FY2015-NOFA-Policy-Requirements-and-General-Section.pdf> (2015 NOFA General Section); *see generally* 2015 NOFA § Overview G (recognizing that General Section applies to CoC program competition).

59. In 2018, HUD published an explanation of why, in the 2017 CoC program competition, a CoC might not have received the maximum score for its response to a particular question on the CoC application. *See* HUD, *We Increased the Number of Successful Permanent Housing Placements From Emergency Shelter (ES), Safe Havens (SH), Transitional Housing (TH), and Rapid Rehousing (RRH). Why Didn't We Receive the Maximum Score for Question 3A-3?* (June 2018), <https://www.hudexchange.info/faqs/3385/we-increased-the-number-of-successful-permanent-housing-placements-from/>.

60. HUD's guidance to CoCs and their partners regarding the CoC application questions and HUD's scoring procedures includes not only its Notices of Funding Availability and detailed application instructions, but also its publication of Frequently Asked Questions "for new concepts introduced in the CoC application," its answering of "questions from applicants" submitted online through HUD Exchange (a HUD website), its inclusion of links to the HUD Exchange in the CoC Notice of Funding Availability, and its communication of updates through the HUD Exchange website and listserv. Suchar Decl. ¶ 37.

61. Through HUD's guidance to CoCs on how it scores applications, CoCs and their partners might learn how to prepare effective applications. *See* 24 C.F.R. § 578.101 (authorizing HUD to fund technical assistance to help entities "improve their capacity to prepare applications").

62. HUD's CoC program regulation specifically contemplates the provision of technical assistance to help entities "improve their capacity to prepare applications" for the CoC program competition. 24 C.F.R. § 578.101 (allowing HUD to fund such assistance).

63. During the most recent CoC program competition, HUD alerted the CoC community that detailed instructions for the application "contain[ed] information that is necessary to fully complete the CoC Application questions and maximize scoring potential." HUD,

Continuum of Care (CoC) Application, e-snaps Instructional Guide, Version 1, at 1, <https://www.hudexchange.info/resources/documents/FY-2018-CoC-Application-Navigational-Guide.pdf> (last visited Dec. 17, 2018).

64. HUD has employed its CoC scoring rubric to encourage CoCs to change their actual activities, strategies, or results, not simply the way they complete the required forms, by using its flexibility over the scoring methodology to develop criteria that reflect the agency's goals and the CoC actions, strategies, or results that it wants to incentivize. *See* 2015 Debrief Transcript 1, 4 (explaining how the agency structured the CoC competition to reward commitment to certain agency goals); *see also* 2016 Debrief Transcript 3 (similar, regarding the 2016 CoC program competition); *see generally* 42 U.S.C. § 11386a (giving HUD discretion over scoring criteria).

65. HUD's criteria for scoring CoCs and their projects can change from year to year. *See* 42 U.S.C. § 11386a (giving HUD discretion over scoring criteria); *compare* 2015 NOFA § VII with 2016 NOFA § VII (showing changes in scoring criteria).

66. In 2015, HUD assigned up to two points for a CoC's commitment to goals in *Opening Doors*, an administration strategic plan that matched HUD's own goals. *See* 2015 NOFA §§ II.A (discussing *Opening Doors*), VII.A.1.b (scoring criteria addressing commitment to *Opening Doors*).

67. In the 2015 CoC program competition, HUD made the *Opening Doors* goals "key" to HUD's decisions about "how the competition was structured" and "how [it] ma[de] resource allocation decisions" as part of HUD's "attempt to try and meet" the goals. 2015 Debrief Transcript 1.

68. Because "reducing homelessness" was "something [HUD was] really focused on," it made "reducing homelessness ... a really important factor throughout the [2015 CoC]

application”; as a result, “CoCs that did well” in that year’s CoC program competition were those that “had managed to reduce homelessness.” *Id.* at 4.

69. In the 2016 CoC program competition, HUD “had several scoring factors related to reduction in homelessness” and “CoCs that did well tended to do well in all of these areas” related to that topic. 2016 Debrief Transcript 3.

70. In the 2016 CoC program competition, HUD assigned “a lot of points” to a CoC’s use of “performance criteria to rate and rank projects,” as that was “a big priority” for HUD. *Id.*

71. Because HUD uses its scoring system to encourage CoCs to adopt desired strategies or achieve desired results, a higher CoC score generally means that a CoC has shown that it is doing more of what HUD wants. *See* 2015 Debrief Transcript 1, 4; 2016 Debrief Transcript 3.

72. On or about May 8, 2017, NLCHP submitted a FOIA request to HUD for the following material:

1. All responses by funding applicants to Community Planning and Development’s Notice of Funding Availability for the 2015 Continuum of Care program Competition (FR-5900-N-25) in response to *Section VII.A.1.j. Outreach*, found on page 45 of the NOFA, which reads as follows:

Outreach. Up to 2 points to CoCs that demonstrate recipients have implemented specific strategies that prevent criminalization of homelessness, affirmatively further fair housing as detailed in 24 CFR 578.93(c), and ensure that outreach is conducted to homeless individuals and families who are least likely to request housing or services in the absence of special outreach. Maximum points will be awarded to CoCs that provide information that demonstrates that 100 percent of the geographic area is covered by the strategies and that describes the specific outreach procedures in place that are used by the homeless service organizations to identify and engage homeless individuals and families, including their efforts to provide meaningful outreach to persons with disabilities and persons with limited English proficiency. Applicants must describe how they are reducing criminalization of homelessness and the procedures they will use to market their housing and supportive services to eligible persons regardless of race, color, national origin, religion, sex, age, familial status, or disability who are least likely to apply in the absence of special outreach.

2. All responses by funding applicants to Community Planning and Development’s Notice of Funding Availability for the 2016 Continuum of Care program Competition

(FR-6000-N-25) in response to *Section VII.A.1.i. Criminalization*, found on page 35 of the NOFA, which reads as follows:

Criminalization. Up to 2 points to CoCs that implemented specific strategies to prevent criminalization of homelessness within the CoC's geographic area. Maximum points will be awarded to CoCs that indicate specific strategies to ensure homelessness in not criminalized such as engaging or educating local policy makers, engaging or educating law enforcement, implementing community plans, or engaging or educating businesses.

3. The points awarded by HUD to each applicant's corresponding responses to each of the above questions (*Section VII.A.1.j. Outreach* of the 2015 NOFA and *Section VII.A.1.i. Criminalization* of the 2016 NOFA).

Tars Decl. Ex. A.

73. When this lawsuit was filed, HUD had not provided a substantive response to NLCHP's FOIA request. *See* Tars Decl. ¶ 15.

74. The documents that HUD produced to NLCHP in June 2018 were two charts containing CoCs' responses to one question in the 2015 CoC application and one question in the 2016 CoC application, as well as the corresponding scores, which were redacted. *See* Tars Decl. ¶¶ 16-17 & Exs. B, C; Suchar Decl. ¶ 13 & Exs. B, D.

75. Through their formatting, the charts that HUD produced in June 2018 linked each redacted score to a particular CoC and that CoC's response or responses to which HUD assigned the score. *See* Tars Decl. ¶¶ 16-17 & Exs. B, C.

76. In its September 2018 production of records to NLCHP, HUD provided charts with CoCs' responses to two questions in the 2015 CoC application—those numbered 1C-6 and 4B-3, *see* Tars Decl. ¶ 19 & Exs. D, E; Suchar Decl. ¶ 16 & Ex. C.

77. The scores that HUD redacted and the scores on the documents that HUD withheld in full are ones that HUD assigned either automatically, by computer, or after reconciling individual desk officers' recommendations into a single, final HUD-assigned score. *See* Suchar Decl. ¶¶ 27, 28 & Ex. D.

78. The scores that HUD withheld are not (and do not include) the assessments by individual HUD desk officers that the agency uses to develop its final, response-specific scores. *See id.* ¶¶ 26-28 (describing scoring process), Ex. D (stating that the withheld material reflects the “[p]oints awarded by HUD” to applicants’ responses).

79. The material that HUD has withheld does not reveal who was involved in scoring a response or the opinions or views of anyone involved. *See id.* ¶¶ 26-28 (explaining scoring process), Ex. D (stating that the withheld material only includes scores).

80. HUD already provides CoCs incentives to tailor their responses to receive the most points possible, and to do so honestly. *See, e.g.,* 2015 NOFA § VIII.A (showing role of CoC scores in HUD’s selection of projects for funding); 2016 NOFA § VIII.A (similar); 2018 NOFA § VII.B (providing guidance on maximizing scores); HUD, *CoC Registration and CoC Review, HUD Detailed Instructions and Navigational Steps FY 2018, Version 1*, at 46, <https://www.hudexchange.info/resources/documents/CoC-Program-Registration-and-CoC-Review-Instructions.pdf> (last visited Dec. 17, 2018) (explaining certification of true and accurate responses that HUD requires during registration process connected to CoC application); 2015 NOFA General Section ¶ IV.G.3 (regarding requirement for certification of material representations); *see generally* 18 U.S.C. § 1001 (regarding false statements to the government).

81. The response-specific scores that HUD awarded to particular CoCs based on their individualized circumstances in 2015 and 2016 do not provide a certain formula for CoCs seeking to tailor their responses to the questions in future years’ applications, because HUD’s scoring rubric changes from year to year and can include reducing complex, multi-part answers to a single score. *Compare* 2015 NOFA § VII, *with* 2016 NOFA § VII, *and* 2018 NOFA § VII (showing

changes in scoring criteria); *see also* Tars Decl. Ex. C (showing that one response-specific score was based on a multi-part answer that included check-box responses and free-text fields).

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Respectfully submitted,

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