UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR RESPONSIBLE LENDING, Plaintiff, v. OFFICE OF MANAGEMENT AND BUDGET, Defendant.	)	Civil Action No. 19-cv-00209 (ABJ)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff Center for Responsible Lending hereby moves for summary judgment in this Freedom of Information Act case against defendant Office of Management and Budget on the ground that, based on material facts as to which there is no genuine dispute, 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; Declarations of Rebecca K. Borné and Rebecca Smullin; and a proposed order.

Dated: November 24, 2020

Respectfully submitted,

/s/ Rebecca Smullin
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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Rebecca Smullin (D.C. Bar No. 1017451)
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

LEGISLATIVE MATERIALS

REGULATIONS, FEDERAL REGISTER NOTICES, AND RULES

MISCELLANEOUS

INTRODUCTION

This action challenges the unlawful withholding of records and parts of records by defendant Office of Management and Budget (OMB) in response to a Freedom of Information Act (FOIA) request made by plaintiff Center for Responsible Lending (CRL) in 2018. The request sought certain records concerning payday loans, vehicle title loans, and longer-term consumer installment loans, including communications regarding a Consumer Financial Protection Bureau (CFPB) rule on such loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017). After CRL filed this action, OMB began monthly productions of records, but disputes remain over two sets of records that OMB has withheld in full or in part pursuant to FOIA Exemption 5.

In the first set, the records are mostly communications between OMB and the CFPB regarding proposals made under the Paperwork Reduction Act (PRA), which requires agencies to seek OMB approval of proposed information collections. Although the PRA requires public disclosure of communications between OMB's Office of Information and Regulatory Affairs (OIRA) and agencies concerning proposed information collections, 44 U.S.C. § 3507(e)(2), OMB has asserted the deliberative process privilege to withhold portions of emails and their attachments that constitute such communications. Regarding the few other portions of the records that reflect only internal OMB communications, OMB has made only general assertions about the application of the deliberative process privilege and thus has not satisfied its burden to establish that the privilege applies. Further, OMB cannot sustain the withholdings because it has not established that disclosure of any of the withheld material would cause foreseeable harm or that it adequately identified and disclosed segregable, disclosable material.

In the second set of records, OMB has asserted the presidential communications privilege and the deliberative process privilege and withheld records in full. As to the presidential communications privilege, OMB has not carried its burden of showing that the records are linked to presidential decision-making, to advice to the president, or to White House officials with broad and significant responsibility for formulating advice to the President on the relevant topic. Moreover, neither the President nor the White House counsel acting at his direction has invoked the privilege. And to the extent that the withheld records include email threads that reproduce the text of earlier emails that are responsive to CRL's request and that do not themselves constitute presidential communications, OMB has provided no basis for withholding those earlier and distinct email records. Finally, OMB's conclusory assertions do not establish that the deliberative process privilege applies, that disclosure would cause foreseeable harm, or that the agency adequately identified segregable, disclosable material.

Because OMB's withholdings are improper, this Court should grant CRL's motion for summary judgment and order OMB to disclose the withheld records. The Court should also order OMB to match attachments to emails, including earlier emails contained lower in the identified threads, to the extent OMB has not already done so.

BACKGROUND

I. The CFPB's Payday Rule

In the fall of 2017, the CFPB finalized a rule that restricted unfair and abusive practices regarding payday loans, vehicle-title loans, and certain longer-term installment loans. *See* 82 Fed. Reg. 54,472 (Payday Rule). One of those practices was making certain loans to borrowers without determining that they have the ability to repay the loans. *See* 12 C.F.R. § 1041.4 (2019). To restrict

that practice, the rule required lenders making such loans to institute a new system of underwriting, which would be supported by consumer reporting agencies, called "registered information systems," that would distribute information about borrowers to lenders. *See id.* §§ 1041.5 (2019), 1041.11 (2019); *see also* 82 Fed. Reg. at 54,789-91. The Payday Rule's effective date was January 16, 2018. 82 Fed. Reg. at 54,472. And although the Payday Rule generally did not require compliance by lenders until August 2019, the Rule stated that its provisions regarding registration of information systems would be operational on the January 16 effective date. *See* 12 C.F.R. § 1041.11(c) (2019); 82 Fed. Reg. at 54,814.

The CFPB's adoption of the Payday Rule followed more than five years of research and outreach. *See* 82 Fed. Reg. at 54,503-14. By 2018, however, the CFPB, under the leadership of OMB director Mick Mulvaney as acting director of the CFPB, had begun reversing its approach to payday lending and other types of loans.[1] On the Payday Rule's effective date, the CFPB announced its intention to "reconsider" the rule. CFPB, *CFPB Statement on Payday Rule* (Jan. 16, 2018), https://tinyurl.com/ybdwlpls. That same month, the CFPB dismissed a lawsuit against four payday-lending-related companies and reportedly dropped an investigation into another lender.[2]

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[1] *See* Renae Merle, *Richard Cordray Is Stepping Down as Head of Consumer Financial Protection Bureau*, Wash. Post (Nov. 15, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/15/richard-cordray-is-stepping-down-as-head-of-consumer-financial-protection-bureau/; The White House, *Statement on President Donald J. Trump's Designation of OMB Director Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau* (Nov. 24, 2017), https://tinyurl.com/yzuqotj3.

[2] *See* Steve Vockrodt, *CFPB Drops Kansas Payday Lending Case, Stoking Fears Trump Is Backing Off the Industry*, Kan. City Star (Jan. 19, 2012), https://www.kansascity.com/news/politics-government/article195623824.html; Kate Berry, *CFPB Drops Probe into Lender that Gave to Mulvaney's Campaigns*, Am. Banker (Jan. 23, 2018), https://tinyurl.com/yxpvb5dj.

On February 14, 2019, the CFPB proposed to delay the compliance date for and repeal the parts of the Payday Rule regarding borrowers' ability to repay loans. *See* 84 Fed. Reg. 4252 (Feb. 14, 2019); 84 Fed. Reg. 4298 (Feb. 14, 2019). Later in 2019, the CFPB finalized the rule delaying the compliance date, *see* 84 Fed. Reg. 27,907 (June 17, 2019), and in July 2020, the CFPB finalized the repeal. *See* 85 Fed. Reg. 44,382 (July 22, 2020).

II. OMB's consideration of CFPB's Paperwork Reduction Act proposal

The PRA requires agencies to receive OMB approval and satisfy other requirements before conducting or sponsoring a "collection of information," 44 U.S.C. § 3507(a), a term that includes certain government requirements or requests that entities obtain, disclose, or report information, *see* 5 C.F.R. § 1320.3(c). Accordingly, on July 22, 2016, when CFPB published its payday rulemaking proposal, and on November 17, 2017, when the final Payday Rule was published in the Federal Register, the CFPB submitted requests for OMB approval of proposed information collections associated with the rule. *See* 81 Fed. Reg. 47,864, 48,166 (July 22, 2016); 82 Fed. Reg. at 54,871.[3] The CFPB's information-collection proposal touched on several parts of the Payday Rule, including those concerning applications to be registered information systems, which were set to be operational on the effective date. *See* 82 Fed. Reg. at 54,871.

Because OMB did not approve the proposed information collections before publication of the final rule, *id.*, the PRA required OMB to "approve, instruct the agency to make a substantive or material change to, or disapprove, the collection[s] of information contained in the final rule"

[3] *See also* OMB, *OMB Control Number History*, *OMB Control Number: 3170-0065*, https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3170-0065 (last visited Nov. 13, 2020); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201711-3170-002.

within 60 days after the rule's publication in the Federal Register. 5 C.F.R. § 1320.11(h). In this case, expiration of the 60-day period coincided with the rule's effective date, January 16, 2018. Opponents of the Payday Rule had advocated that Mulvaney use his OMB authority to disapprove the proposed information collections and thus hinder the rule's implementation. *See* David B. Rivkin Jr. & Andrew M. Grossman, *Mulvaney Can Undo Cordray's Legacy*, Wall St. J. (Nov. 30, 2017), https://www.wsj.com/articles/mulvaney-can-unravel-cordrays-legacy-1512086936. OMB, however, neither approved, disapproved, nor requested a change by January 16, 2018; the request remained pending. *See* OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201711-3170-002 (showing request pending until 2020 withdrawal).

In February 2019, when the CFPB proposed to repeal parts of the Payday Rule, the agency recognized that such repeal would eliminate parts of the proposed Payday Rule information-collection requirements. It therefore revised its PRA proposal. *See* 84 Fed. Reg. at 4296. In July 2020, OMB withdrew the request that the CFPB had submitted in November 2017 when it finalized the Payday Rule. *See* OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201711-3170-002. Then, in September 2020, several months after the CFPB finalized its July 2020 rule repealing parts of the Payday Rule, OMB approved the remaining Payday Rule information collections. OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202007-3170-001 (concluded Sept. 24, 2020);

OMB, *OMB Control Number History*, *OMB Control Number: 3170-0071*, https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3170-0071 (visited Nov. 13, 2020).[4]

III. CRL's FOIA request and this litigation

On January 31, 2018, CRL sent a FOIA request to OMB seeking certain records "concerning payday loans, vehicle title loans, or longer-term consumer installment loans" and asking for a public-interest fee waiver. Borné Decl., Ex. A at 1. The request sought "[a]ny and all communications … to or from any staff of the Office of Management and Budget" on the topics, and enumerated specific examples, including communications concerning the Payday Rule. *See id*. The request also sought records regarding meetings on the same subjects. *See id.* For months, OMB failed to provide any response to CRL other than a tracking number. *See* Borné Decl. ¶¶ 3-4. In September 2018, OMB stated that it had initiated a search, but the following month, OMB informed CRL that its best estimate was that OMB would take nearly another year, until August 2019, to respond to the request. *See id.* ¶ 4 & Ex. C at 1.

CRL filed this suit in January 2019, *see* Compl., ECF No. 1, when OMB still had not produced records or provided any further update. *See* Borné Decl. ¶ 5. After OMB initiated keyword searches and agreed to process documents monthly, *see* Joint Status Report of Mar. 29, 2019, at 1, ECF No. 9, this Court ordered production to begin by April 30, 2019, *see* Minute Order of April 2, 2019. The Court later ordered OMB to make monthly productions, based on processing

[4] *See also* CFPB, *Paperwork Reduction Act Submission, Information Collection Request, Supporting Statement Part A, Payday, Vehicle Title, and Certain High-Cost Installment Loans (12 CFR Part 1041), (OMB Control Number: 3170-0071)* (Sept. 24, 2020), *at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202007-3170-001 (at "supporting statement").

400 documents per month, considering an email with its attachments to count as one document. *See* Minute Order of June 4, 2019.

Between June and December 2019, OMB made multiple productions from a subset of the potentially responsive records that it had identified. *See* Joint Status Report of July 2, 2019, ECF No. 13; Joint Status Report of Aug. 16, 2019, ECF No. 14; Joint Status Report of Aug. 21, 2019, ECF No. 15; Joint Status Report of Sept. 25, 2019, ECF No. 16; Joint Status Report of Dec. 3, 2019, ECF No. 18; Joint Status Report of Jan. 21, 2020, ECF No. 19. Then, in 2020, OMB conducted additional searches and provided *Vaughn* index drafts. *See* Joint Status Report of Feb. 21, 2020, ECF No. 20; Joint Status Report of Apr. 21, 2020, ECF No. 24; Joint Status Report of May 20, 2020, ECF No. 26; Joint Status Report of July 6, 2020, ECF No. 27; Joint Status Report of July 27, 2020, ECF No. 28; Pl's Supp. Status Report, ECF No. 29; Joint Status Report of Aug. 4, 2020, ECF No. 30; Joint Status Report of Aug. 18, 2020, ECF No. 31; Smullin Decl. ¶ 3.

In its productions, OMB omitted not only records or parts of records that OMB deemed to fall within a FOIA exemption, but also records or parts of records that OMB concluded were replicated in other distinct records. For instance, OMB sometimes identified an email responsive to CRL's request but concluded that the email's text was replicated in a later email thread. On that basis, OMB did not separately produce the earlier email or identify it in its draft *Vaughn* index. *See* Smullin Decl. ¶¶ 3, 4, 10, 13-14 & Ex. B. Similarly, when OMB concluded that multiple, non-duplicate emails included the same document as an attachment, it sometimes did not produce or identify in its *Vaughn* index more than one copy of such document or identify all the emails to which the document was attached. *See id.* ¶¶ 5, 6 & Ex. B; Joint Status Report of Aug. 21, 2019, at 2, ECF No. 15; Joint Status Report of Sept. 25, 2019, at 2, ECF No. 16. OMB did not provide a

full accounting of when it omitted records or parts of records from its productions and *Vaughn* index drafts in this way, or which documents were attachments to which emails. *See* Smullin Decl. ¶¶ 4, 6, 10, 12, 13.

IV. OMB withholdings

On August 25, 2020, CRL sent OMB a list of the withholdings that CRL challenges. That list is Exhibit C to defendant's motion, ECF No. 34-3 (Def's Ex. C). *See* Smullin Decl. ¶ 7.

A. Paperwork Reduction Act withholdings

One set of challenged withholdings consists of records or parts of records regarding CFPB information-collection proposals. These withholdings are described in Part B of the August 25 list. *See* Def's Ex. C at 1-2; Smullin Decl. ¶¶ 9-11. First, CRL challenges redactions, based on Exemption 5 and the deliberative process privilege, in the text of nine emails that OMB identified as responsive to CRL's request and produced in part. The emails are items 17 and 20-27 in OMB's *Vaughn* index, ECF No. 34-1. The produced portions of the emails are Exhibits C-K to the Smullin Declaration. *See* Smullin Decl. ¶ 9; Def.'s Ex. C at 1-2 (listing emails produced in March and August 2020).[5] The emails all regard CFPB's proposed collections of information related to the Payday Rule. *See* Decl. of Heather V. Walsh ¶¶ 13-14, ECF No. 34-2 (Walsh Decl.). Some of the emails also address other then-pending CFPB information-collection proposals. For instance, *Vaughn* index item 20 (Smullin Decl. Ex. D) concerns "all pending information collection requests

[5] CRL's August 25 list identifies two other emails that OMB produced in part. OMB made only Exemption 6 redactions in the text of those emails. CRL does not challenge Exemption 6 redactions. *See* Smullin Decl. ¶ 10 & Exs. L, M (with initial Bates numbers ending in 1495 and 1529); Def.'s Ex. C at 1.

to OMB OIRA submitted by CFPB." *Vaughn* index at item 20. [6] *Vaughn* index item 26 (Smullin Decl. Ex. J) addresses proposed collections tied to a CFPB rule on prepaid accounts.[7]

All of the emails constitute or reproduce communications regarding such PRA proposals between Darrin King, CFPB's PRA officer, and OIRA employees: Shagufta Ahmed, Lindsay Abate, and/or Christine Kymn. *See* Smullin Decl. ¶ 2 & Ex. A (regarding Ahmed, Abate, Kymn); *id.* Exs. C-K (showing participants in emails and King's signature block and/or email name). *Vaughn* index items 17, 22, and 24-27 consist entirely of such OIRA-CFPB communications. *See id*. Exs. C, F, H-K. *Vaughn* index items 20, 21, and 23 are emails between OMB employees that forward such OIRA-CFPB communications, which are reproduced in redacted form further down in the documents. *See id.* Ex. D at 1, 2; *id.* Ex. E at 1; *id.* Ex. G at 1; *see also* Walsh Decl. ¶ 14; *Vaughn* index 20; Smullin Decl. Exs. F, K (related threads).

Second, CRL challenges OMB's withholding of three additional documents based on the deliberative process privilege. These documents are items 16, 18, and 19 in OMB's *Vaughn* index. *See* Smullin Decl. ¶ 11; Def.'s Ex. C at 2 (listing those documents by the OMB document numbers). Items 16 and 18 were contained in communications between CFPB (through King) and OIRA (through Ahmed and/or Abate) as attachments to emails regarding the CFPB's Payday Rule

[6] *See also* Smullin Decl. Ex. D at 2 (referencing student loan-related request); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-3170-001 (visited Nov. 22, 2020) (showing identified request pending until withdrawn on Nov. 19, 2020).

[7] *See* OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3170-002 (visited Nov. 4, 2020) (showing request with control number 3170-0050, pending between Nov. 22, 2016 and Mar. 22, 2019, and with the "ICR Reference No." in email); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3170-001 (visited Nov. 4, 2020) (similar, regarding control number 3170-0014).

information-collection proposal; item 19 is the same as item 18. *See* Smullin Decl. ¶¶ 12-14 & Exs. N, O; Walsh Decl. ¶ 14.[8]

Third, in light of CRL's challenges to OMB's withholding of attachments to the listed emails (and the earlier emails they include), CRL seeks identification of which attachments were made to which emails, to understand the records as a whole. *See* Def.'s Ex. C. at 1-2 (also noting challenge to any other withholdings of OIRA-CFPB communications).

B. Presidential communications withholdings

CRL additionally challenges withholdings as to which OMB has asserted FOIA Exemption 5 based on the presidential communications privilege. *See* Def's Ex. C at 1. OMB's *Vaughn* index lists records withheld on that basis as items 1-15. *See* Walsh Decl. ¶ 8. OMB also asserts that these records are withheld under the deliberative process privilege. *See* Def.'s Mem. Supp. Summ. J. 11, ECF No. 34 (Def.'s Mem.); Walsh Decl. ¶ 13.

Most of the presidential-privilege withholdings regard a Department of Treasury report on certain types of financial companies called "nonbank" companies and "fintech." *See Vaughn* index items 1-13; Walsh Decl. ¶ 9 & n.1. The final report, published online, discusses payday lending, among other topics, and reflects that, in developing the report, the Treasury Department sought input from a variety of federal agencies, as well as many private sector entities and others. *See* Steven T. Mnuchin & Craig S. Phillips, *A Financial System that Creates Economic Opportunities:*

[8] After OMB filed its summary judgment motion, OMB counsel confirmed by email that item 18 was sent as an attachment to item 17; and that item 16 was attached to a February 11, 2019 OIRA-CFPB email regarding the CFPB Payday Rule information-collection proposal, *see* Smullin Decl. ¶¶ 12-13 & Ex. N, which OMB did not produce separately because it concluded its text was repeated in item 17, *see id*. ¶¶ 13-14 & Exs. N, O.

Nonbank Financials, Fintech, and Innovation 4, 127-28, 189-194 (July 2018), https://tinyurl.com/y823jpjf. Of the 13 Treasury report items in OMB's *Vaughn* index, six were sent by OMB staff to other OMB staff. *See Vaughn* index items 1, 5, 7, 9, 11, 12. One Treasury report item, *Vaughn* index item 3, was sent by OMB staff to the White House Staff Secretary. OMB did not identify senders or recipients for the other six Treasury report items, which the *Vaughn* index or the document titles label as report drafts. *See id.* at items 2, 4, 6, 8, 10, 13.

The remaining presidential-privilege withholdings at issue are *Vaughn* index items 14 and 15. Item 14 is a communication entitled "Re: Various" sent to OMB Director Mulvaney from an "Assistant to the President" whom OMB does not name. *Vaughn* index item 14; Walsh Decl. ¶ 10. Item 15 is an email entitled "Meeting this afternoon," *Vaughn* index item 15, from Mulvaney's assistant to an unnamed "staff member" of the "Assistant to the President," Walsh Decl. ¶ 11.

CRL's August 25 list noted that CRL's challenge extends to any attachment to any listed email or any earlier email not listed separately because its text is repeated in another email. *See* Def.'s Ex. C at 1 (also noting challenge to other presidential-communications-based withholdings).

LEGAL STANDARDS

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 justifiable inferences" in the non-movant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Under FOIA, the Court reviews the agency's withholdings de novo. 5 U.S.C. § 552(a)(4)(B). Further, 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)

("the burden is on the agency to sustain its action."). Thus, "[e]ven when the [FOIA] requester files a motion for summary judgment, the Government ultimately has the onus of proving that the [withheld material is] exempt from disclosure," *Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 185 F.3d 898, 904 (D.C. Cir. 1999) (cleaned up). The "agency must provide a detailed description of the information withheld through the submission of a so-called 'Vaughn Index,' sufficiently detailed affidavits or declarations, or both," "to enable the court and the opposing party to understand the withheld information in order to address the merits of the claimed exemption." *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 88 (D.D.C. 2009). Agency affidavits must "contain reasonable specificity of detail rather than merely conclusory statements." *Prison Legal News v. Samuels*, 787 F.3d 1142, 1147 (D.C. Cir. 2015) (citation omitted). If the government cannot "carry its burden of convincing the court that … [a] statutory exemption[ ] appl[ies]," the agency must release the requested records. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

ARGUMENT

FOIA Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption "incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant … and excludes these privileged documents from FOIA's reach." *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008) (internal quotation marks and citation omitted). Two privileges are at issue here. First, Exemption 5 incorporates the deliberative process privilege, which applies to protect "confidential intra-agency advisory opinions and materials reflecting deliberative or policy-

making processes," *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (citation and internal quotation marks omitted). Second, Exemption 5 incorporates the presidential communications privilege, which "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Loving*, 550 F.3d at 37.

I. OMB's withholdings of Paperwork Reduction Act material are improper.

OMB claims that items 16-27, which concern CFPB's proposed information collections, fall under the deliberative process privilege, in whole or part. The PRA, 44 U.S.C. § 3507(e)(2), however, *requires* disclosure of nearly all of the records or portions of records at issue. In addition, disclosure is required because OMB has not established that all the withheld material is predecisional and deliberative, that foreseeable harm will result from disclosure, or that OMB has segregated and released information where possible. Notably, OMB's statement of material facts, in ECF No. 34, does not claim that any undisputed material facts establish the propriety of the asserted privilege.[9]

A. Section 3507(e)(2) of the Paperwork Reduction Act requires disclosure.

The PRA mandates that "[a]ny written communication between the Administrator of the Office of Information and Regulatory Affairs, or any employee of the Office of Information and

[9] OMB's failure to assert the existence of such undisputed material facts in its statement of facts is reason enough to deny OMB's motion, as it suggests that OMB itself believes that it has not established the facts necessary to support the identified privileges. *See* Local Civ. R. 7(h)(1); *Butt v. U.S. Dep't of Justice*, No. CV 19-504 (JEB), 2020 WL 4436434, at *3 (D.D.C. Aug. 3, 2020) ("The procedure contemplated by Local Rule 7(h) is not an empty formality. It serves a critical function by helping to crystallize for the district court the material facts and relevant portions of the record" (cleaned up)); *Apollo v. Bank of Am., N.A.*, No. 17-cv-2492 (APM), 2019 WL 5727766, at *1 (D.D.C. Nov. 5, 2019) ("The court is not required to hunt for 'facts' in a filing that does not clearly identify them").

Regulatory Affairs, and an agency or person not employed by the Federal Government concerning a proposed collection of information shall be made available to the public." 44 U.S.C. § 3507(e)(2). This provision requires disclosure of nearly all of the challenged withholdings in *Vaughn* index items 16-27, regardless of whether they are deliberative. *Vaughn* index items 16-19, 22, and 24-27, in their entirety, are "written communication[s]" (*i.e.*, the bodies of emails or attachments to emails) sent between OIRA employees and the CFPB, "concerning a proposed collection of information." 44 U.S.C. § 3507(e)(2). *See* Pl.'s Statement of Additional Material Facts ¶¶ 29, 33-35. Section 3507(e)(2) also applies to most of the withholdings in *Vaughn* index items 20, 21, and 23, which are internal OMB emails that include the text of earlier OIRA-CFPB communications regarding proposed information collections. *See id.* ¶¶ 30-32. In these documents, the PRA provision applies to the entire text of the OIRA-CFPB exchange, although not to the portions of the internal OMB exchanges that occurred *after* the forwarded OIRA-CFPB exchange (and that appear in the email *above* the forwarded OIRA-CFPB text). Thus, in *Vaughn* index item 23, the PRA provision applies to all of the challenged redactions. *See* Smullin Decl. Ex. G (in exchanges between OMB employees occurring after OIRA-CFPB exchange, showing only Exemption 6 redactions, which CRL does not challenge, *see* Def.'s Ex. C. at 1). In *Vaughn* items 20 and 21, the PRA provision applies to all challenged redactions other than the first Exemption 5 redaction in each. *See id.* Ex. D (at 1) (showing one Exemption 5 redaction in Ahmed-Abate exchange, before repeating an Ahmed-King email, which included earlier emails); *id.* Ex. E (at 1) (showing one Exemption 5 redaction in Ahmed-Abate exchange, before repeating an Ahmed-King email).

Where section 3507(e)(2) applies, OMB cannot withhold material in reliance on the deliberative process privilege. Exemption 5 applies only to material "that would not be available

by law" to a party "in litigation with the agency." 5 U.S.C. § 552(b)(5). Thus, the "parameters of Exemption 5 are determined by reference to the protections available to litigants in civil discovery." *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 516 (D.C. Cir. 1996). The deliberative process privilege is a common law privilege, *see In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997), that is not available in litigation when, as here, Congress has spoken to the issue and required disclosure. *See* Fed. R. Evid. 501 (providing that common law does not apply to a claim of privilege when a federal statute "provides otherwise"); *cf. City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981) (recognizing that "federal common law is subject to the paramount authority of Congress" and applies only when "Congress has not spoken to a particular issue") (cleaned up).

A statute overrides common law that might otherwise apply when "the words of the statute are unambiguous." *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (citation omitted). Here, Congress has unambiguously spoken to the issue by enacting section 3507(e)(2), which requires disclosure. Subject to only two inapplicable exceptions, *see infra* p. 17-18, section 3507(e)(2) requires disclosure of "any" written communication between OIRA and an agency on the subject of proposed information collections. "[T]he word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *accord Ali v. Fed. Bur. of Prisons*, 552 U.S. 214, 219 (2008). The statute's plain words are incompatible with a limitation that only *some* written communications on the subject—those not falling within the deliberative process privilege—are subject to disclosure.

Moreover, applying the deliberative process privilege to these materials would render section 3507(e)(2)'s requirement of disclosure of inter-agency communications largely meaningless by excepting most "written communication between the Administrator of the Office of Information and Regulatory Affairs, or any employee of the Office of Information and Regulatory Affairs, and an agency … concerning a proposed collection of information." *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) (recognizing "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute") (cleaned up); *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013) (rejecting reading of statute that would render another provision "a worthless addendum"). Congress first adopted a public disclosure requirement for OIRA-agency communications in 1986, amending the Paperwork Reduction Act in effect at that time to add 44 U.S.C. § 3507(h). *See* Pub. L. No. 99-591, § 817(c), 100 Stat. 3341, 3341-338 (1986). In 1995, in a comprehensive revision of the PRA, Congress adopted section 3507(e) in its current form to "consolidate[] … public disclosure" provisions, S. Rep. No. 104-8 (1995) at 51, and make "[p]ublic accountability … strengthened," *id.* at 3. *See* Paperwork Reduction Act of 1995, Pub. L. No. 104-13, § 2, 109 Stat. 163, 178 (1995). Limiting 3507(e)(2) by allowing OMB to withhold material as deliberative would result in little "public accountability" for inter-agency communications, by hiding from view the precise materials identified in the statute for "public" disclosure. Section 3507(e)(2) is focused on materials that are predecisional and deliberative, as it encompasses inter-agency communications regarding "proposed" collections of information that are subject to a statutorily defined OMB decisional process. To read an unstated "deliberative process" exception into section 3507(e)(2) and allow such materials to be withheld would amend

"Congress' answer" to the question of PRA-communication disclosure "so thoroughly that the [statute] becomes meaningless," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), for the bulk of the records encompassed by the statute's plain language.[10]

Alternatively, and for similar reasons, Exemption 5 does not apply because the PRA disclosure provision displaces that exemption. As just described, applying Exemption 5 and the deliberative process privilege would be inconsistent with the plain text of section 3507(e)(2) and Congress's intent to strengthen public accountability through transparency, and would render section 3507(e)(2) largely superfluous. Those considerations indicate that Congress has excluded application of FOIA Exemption 5 to the covered communications. *See Asiana Airlines v. Fed. Aviation Admin.*, 134 F.3d 393, 398 (D.C. Cir. 1998) (holding that a statute created an exception to the Administrative Procedure Act when a contrary reading of the relevant provision would "deprive" it "of any effect" and "thwart the apparent intent of Congress").

The PRA's two exceptions to section 3507(e)(2)'s disclosure requirement reinforce that OMB cannot properly rely on Exemption 5 here. The exceptions, neither of which OMB has

[10] In a footnote, OMB suggests that "[a] congressional repeal of an Executive privilege raises substantial constitutional concerns." Def.'s Mem. 15 n.4. OMB appears to be referencing the doctrine of constitutional avoidance, but that doctrine "has no application absent ambiguity," *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (cleaned up), which does not exist in section 3507(e)(2). Moreover, the deliberative process privilege is not a constitutional privilege, but "primarily a common law privilege," *In re Sealed Case*, 121 F.3d at 745, and the PRA-related communications at issue involve no constitutional issue. *Cf. Common Cause v. Nuclear Regul. Comm'n*, 674 F.2d 921, 935 (D.C. Cir. 1982) (rejecting constitutional challenge to application of open meetings law to agency meetings on budget and finding no deliberative process exception). The Office of Legal Counsel opinion that OMB cites is not relevant, as it involves concerns about national security, diplomatic relations, and the presidential communications privilege that do not exist here. *See Publ'n of Report to President on the Effect of Auto. & Auto.-Part Imports on the Nat'l Sec.*, Op. O.L.C., 2020 WL 502937 (Jan. 17, 2020).

suggested should apply here, are set forth in section 3705(e)(3), which states that the disclosure requirement does not apply to "(A) any information which is protected at all times by procedures established for information which has been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept secret in the interest of national defense or foreign policy; or (B) any communication relating to a collection of information which is not approved under this subchapter, the disclosure of which could lead to retaliation or discrimination against the communicator." That Congress specified two exceptions to the public disclosure requirement counsels strongly against OMB's plea to read a third exception, for Exemption 5 deliberative materials, into the statute. *See Hillman v. Maretta*, 569 U.S. 483, 497 (2013) (if "Congress explicitly enumerates certain exceptions … additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent") (citation omitted); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (recognizing principle that "mention of one thing implies the exclusion of another") (citation omitted). Further, if Congress had intended FOIA's exemption scheme to apply, Congress would not have needed to provide *any* PRA-specific exceptions. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). And notably, the first exception mimics FOIA Exemption 1, 5 U.S.C. § 552(b)(1), which exempts from disclosure under FOIA information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is properly classified. If FOIA's exemptions applied notwithstanding section 3507(e)(2), section 3507(e)(3)(A) would be unnecessary. For this reason as well, the exceptions bely OMB's assertion that Exemption 5, with the deliberative process privilege, trumps the public disclosure requirement of section 3507(e)(2).

Giving effect to section 3507(e)(2)'s displacement of Exemption 5 is fully consistent with the D.C. Circuit's recent decision in *Env't Integrity Project v. Env't Prot. Agency*, 864 F.3d 648 (D.C. Cir. 2017), holding that a Clean Water Act (CWA) disclosure provision did not supersede FOIA Exemption 4. To begin with, *Environmental Integrity*'s analysis has no bearing on the relationship between a disclosure provision, such as the PRA's, and the common law deliberative process privilege, *see supra* at p. 14-17. And on the separate question that the opinion addresses, regarding the relationship between a disclosure provision and the FOIA statute, the PRA provision is very different from the CWA provision at issue in *Environmental Integrity*.

Environmental Integrity begins by noting that the CWA provision did not expressly mention FOIA Exemption 4. *See* 864 F.3d at 649. But that point does not resolve whether a statute supersedes a FOIA exemption, because Congress can supersede or modify the Administrative Procedure Act by making its intent clear in other ways. *See Asiana Airlines*, 134 F.3d at 397-98 ("[T]he import of the § 559 instruction is that Congress's *intent to make a substantive change* be clear." (citation omitted)); *cf. Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 322 (D.C. Circ. 2006) (in FOIA case, recognizing that government "has not taken issue" with premise that it must disclose material covered by a statutory "public record requirement," even if it is predecisional and deliberative).

Here, Congress made its intent to supersede FOIA Exemption 5 clear, in ways not reflected in the CWA provision. It did so most evidently by enacting a disclosure provision for inter-agency communications that would effectively be meaningless if Exemption 5 allowed withholding on the basis of the deliberative process privilege. By contrast, as *Environmental Integrity* explained, the CWA disclosure provision would not be rendered "meaningless" by applying FOIA Exemption 4,

"at least in historical context." 864 F.3d at 650. When the CWA provision was enacted, it was not clear that the records at issue (which originated from power companies and states) would be "agency records" and thus "subject to disclosure" at all, absent the statute. *Id.* (citing *Forsham v. Harris*, 445 U.S. 169, 182-84 (1980), which was decided after the CWA provision was adopted). That historical point does not apply here.

Eschewing any attempt to relay on *Environmental Integrity*, OMB instead refers (at 15) to a statement in the PRA that one of its purposes is to "ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws, including laws relating to …. *access* to information, including [FOIA]." 44 U.S.C. § 3501(8) (emphasis added). The statement is of no help to OMB here, however. It simply suggests that agencies should comply with applicable laws, including FOIA, when those laws apply. It mentions FOIA as just one example of an access statute and does not discuss the circumstances in which *any* such statutes apply. And to the extent that the statement emphasizes any policy goal, the cited provision, like other parts of the PRA, emphasizes disclosure (*i.e.*, "access"), not withholding. *See also* 44 U.S.C. § 3501(7) (noting PRA's purpose of "provid[ing] for the dissemination of public information").

Appropriately, OMB has not invoked its public access regulation, 5 C.F.R. § 1320.14, to justify withholding of materials subject to section 3507(e)(2). OMB's regulation states that OMB may waive public access requirements, but only "to the extent permitted by law," *id.* § 1320.14(a)—a limitation that acknowledges that OMB lacks authority to override statutory disclosure requirements such as those in section 3507(e)(2). OMB originally promulgated a version of its public access regulation in 1983, when the PRA did not require public availability

of OIRA's external communications about information-collection proposals and access to OMB's paperwork docket was a matter of OMB discretion. *See* 5 C.F.R. § 1320.18 (1984); 48 Fed. Reg. 13,666, 13,696 (Mar. 31, 1983). OMB reissued its regulations following the 1986 amendments to the PRA, which, among other things, added the disclosure requirement for communications regarding proposed information collections, as section 3507(h), *see* Pub. L. No. 99-591, § 817(c). At that time, OMB acknowledged that it lacked authority to withhold public access to communications covered by section 3507(h)'s "legal requirements" of disclosure. *See* 53 Fed. Reg. 16,618, 16,621 (May 10, 1988). Following Congress's reenactment of the PRA in 1995, OMB revised and reissued its regulations. *See* 60 Fed. Reg. 44,978 (Aug. 29, 1995). Reflecting its earlier recognition that it lacks authority to override the statutory disclosure requirement, OMB added the "to the extent permitted by law" limitation to its waiver authority in the public access regulation (which it renumbered as section 1320.14). *See* 60 Fed. Reg. at 44,493-94 (to be codified at 5 C.F.R. 1320.14); *see also* 60 Fed. Reg. 30,438, 30,443 (June 8, 1995) (proposal, describing the new section 1320.14 as "equivalent to existing section 1320.19").[11]

B. OMB's alternative reading is unsupported by the statute's plain language and is contrary to Congress's intent.

OMB does not dispute that section 3507(e)(2) requires OMB to make the covered communications public *eventually*. It argues (at 15), however, that the requirement of public

[11] The 1988 rule had moved the public access provision to section 1320.19. *See* 53 Fed. Reg. at 16,630. The 1995 amendment to OMB's regulation also eliminated an earlier sentence stating that regulatory "[p]rovisions …. guaranteeing public availability of comments on agency collections of information will not be waived or modified." *Compare id.* (1988 rule, section 1320.19(a)) *with* 5 C.F.R. § 1320.14(a). Because PRA section 3507(e)(2) requires disclosure of communications between OIRA and outside entities regarding proposed information collections, that regulatory provision was no longer necessary.

disclosure can be postponed for 25 years—the cutoff date under FOIA Exemption 5 for assertion of the deliberative process privilege. OMB's position is incompatible with the PRA's express language. The requirement that covered communications "shall be made available to the public," 44 U.S.C. § 3507(e)(2), directs that OMB should disclose materials affirmatively and contemporaneously. *Cf. Food Chem. News v. Dep't of Health & Hum. Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992) (holding that statute stating that documents "shall be available for public inspections and copying" requires agency to affirmatively provide access).

OMB's alternative construction is unsupported by the text of section 3507(e)(2) and runs counter to Congress's intent to increase accountability through disclosure. *See* S. Rep. No. 104-8 at 3. The PRA's information-collection provisions set several 30-day and 60-day deadlines for public engagement or OMB response.[12] Contrary to OMB's suggestion (at 14 n.3), the existence of those deadlines *strengthens* the implication that Congress intended contemporaneous disclosure of information under section 3507(e)(2). It would be nonsensical for Congress to provide a limited timeframe for public comments and require quick turnaround from OMB on proposed information collection requests, but then allow OMB to keep hidden for years documents that could inform the public's input regarding such decision-making. In addition, OMB's approvals of information collections expire after three years or less. *See* 44 U.S.C. § 3507(g). Delayed disclosure thus hampers the public's ability to assess OMB decision-making when information collections are up

[12] Agencies are generally required to provide 60-day notices for public comment on proposed information collections not in rules. 44 U.S.C. § 3506(c)(2)(A). When an agency submits a request to OMB, OMB is not required to provide any more than 30 days for public comments on proposed information requests, *id.* § 3507(b), and has only 60 days to provide a decision or comment to a requesting agency in certain cases, *id.* § 3507(c)(2), (d)(1)(B).

for renewal. Congress's inclusion of an exception to protect individuals from retaliation, 44 U.S.C. § 3507(e)(3)(B), is also significant. That exception reflects that Congress envisioned contemporaneous disclosure of communications, since few people would worry about possible retaliation for communications that were not disclosed until decades after the relevant events.

Moreover, the suggestion that Congress may have intended to do nothing more than incorporate FOIA's 25-year limit on assertions of deliberative process privilege, *see* Def.'s Mem. 15 (citing 5 U.S.C. § 552(b)(5)), makes no sense because the PRA disclosure provision was adopted more than two decades before the 25-year limit on deliberative process privilege withholdings under Exemption 5. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 540 (amending 5 U.S.C. § 552(b)(5)); Paperwork Reduction Act of 1995, Pub. L. No. 104-13, § 2, 109 Stat. 163, 178 (1995). Thus, under OMB's theory, at the time of the PRA's enactment, the specific public disclosure requirement for PRA communications was trumped by FOIA's general exemption for deliberative materials, for as long as OMB could assert the exemption. Again, OMB's reading would render the section 44 U.S.C. § 3507(e)(2) requirement for disclosure of inter-agency communications virtually meaningless.

The D.C. Circuit has made clear, in an analogous context, that the government cannot withhold records in this way, long past their relevance. In *Food Chemical News*, 980 F.2d 1468, the court considered how to construe the Federal Advisory Committee Act (FACA), which requires that certain documents "made available to or prepared for or by each advisory committee shall be available for public inspection and copying," 5 U.S.C. app. 2 § 10(b). Like the PRA's section 3507(e)(2), FACA section 10(b) does not expressly specify a time by which the materials must be disclosed. But the Court of Appeals held that "FACA require[d] no less" than the release

of materials "before or on the date of the advisory committee meeting for which the materials were prepared." 980 F.2d at 1472. Recognizing that Congress's intent in adopting section 10(b) was to encourage transparency and public participation, the court concluded that disclosure was required at a time when the records could be useful to the public. Specifically, it explained:

> In order for interested parties to present their views, and for the public to be informed with respect to the subject matter, it is essential that, whenever practicable, parties have access to the relevant materials before or at the meeting at which the materials are used and discussed. Opening the meetings to the public would be meaningless if the public could not follow the substance of the discussions.

Id. (internal quotation marks omitted). The same principles apply here and require disclosure. Indeed, in *Food Chemical News*, the D.C. Circuit concluded, based on FACA's similar language, that the agency was required to disclose information without a FOIA request—except if the "agency reasonably claims [them] to be exempt from disclosure pursuant to FOIA," *id.* at 1469, a circumstance that, as established above, would not apply here because the terms of section 3507(e)(2), unlike those of FACA, are incompatible with assertions of the deliberative process privilege under Exemption 5.[13]

C. OMB has not carried its burden of establishing that all withheld material is predecisional and deliberative.

OMB also has not established that the deliberative process privilege applies to the limited withholdings in the PRA records that fall outside the scope of section 3507(e)(2)—namely, the redactions in items 20 and 21 of brief exchanges between OMB employees prefatory to forwarded OIRA-CFPB emails that fall within section 3507(e)(2)'s disclosure requirement. OMB's general

[13] In contrast to the PRA disclosure provision, the FACA disclosure provision itself states that it is "[s]ubject to" FOIA. 5 U.S.C. app. 2 § 10(b).

assertions about the PRA-related materials are insufficient to support withholding of these short OMB-only communications.

The deliberative process privilege covers only materials that are both "predecisional" and "deliberative." *See Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2010). A document is "predecisional if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process." *Id.* (citation omitted). To be covered by the privilege, 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.* Aimed at "prevent[ing] injury to the quality of agency decisions," the privilege must "be construed as narrowly as consistent with efficient Government operation." *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citations and internal quotation marks omitted).

Showing that a document is predecisional and deliberative requires more than conclusory statements. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). To support an assertion of the privilege, an agency generally must address "(1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient." *New Orleans Workers' Ctr. for Racial J. v. U.S. Immig. & Customs Enf't*, 373 F. Supp. 3d 16, 50 (D.D.C. 2017) (citation omitted).

Here, however, OMB relies only on general assertions and brief *Vaughn* index descriptions to assert that the deliberative process privilege applies to the withholdings in items 20 and 21. *See* Walsh Decl. ¶ 15 (making general assertions, without discussing individual documents, redactions,

or employees); *see also Vaughn* index items 20-21. Although OIRA-CFPB communications regarding pending information-collection proposals will ordinarily be predecisional and deliberative, OMB's general and conclusory assertions are inadequate to establish that the redacted internal OMB communications by themselves involved substantive, deliberative discussions sufficient to trigger the privilege. For instance, the *Vaughn* index states that item 20 regards "deliberations related to the analysis of the status" of other requests, but does not provide enough information to establish that the OMB employees, forwarding an OIRA-CFPB communication, were engaged in any deliberative "give and take." *Cf. Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 3d 155, 175 (D.D.C. 2017) (holding that "[m]erely including the word 'analysis' in a document's description is insufficient" to establish that the deliberative process privilege applies).

D. OMB must disclose the withheld communications because it has not established foreseeable harm.

Even where a FOIA exemption would apply, an agency may withhold a record only if it "reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A)(i)(I). Added to FOIA in 2016 to address Congress's concerns that agencies were overusing exemptions, this "foreseeable-harm requirement imposes an independent and meaningful burden on agencies," *Ctr. for Investig. Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 106 (D.D.C. 2019) (cleaned up), that agencies cannot satisfy with only "generalized assertions" of harm, *Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020) (internal quotation marks omitted). To justify a discretionary withholding, an agency must both "identify specific harms to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the withheld materials" and "connect the harms in a meaningful

way to the information withheld." *Ctr. for Investig. Reporting*, 464 F. Supp. 3d at 106. (internal citations and brackets omitted).

OMB has not satisfied this burden with regard to any of the material in *Vaughn* index items 16-27. OMB provides only a general assertion about interests protected by the deliberative process privilege, stating that OMB redacted information "to protect frank discussions from being chilled by the effects of public scrutiny of the deliberative process." Walsh Decl. ¶ 17; *see also id.* ¶ 15 (same). This Court has repeatedly concluded that such a general statement is insufficient to establish foreseeable harm. *See Ctr. for Investig. Reporting*, 436 F. Supp. 3d at 106 (holding that "boilerplate statements" and "generic nebulous articulations of harm" cannot satisfy foreseeable harm standard); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) ("general explanations of the possibility of a 'chilling effect' fall short of articulating a link between the specified harm and specific information contained in the material withheld) (internal quotation marks omitted); *see also Judicial Watch, Inc. v. U.S. Dep't of Justice*, No. 19-CV-800 (TSC), 2020 WL 5798442, at *4 (D.D.C. Sept. 29, 2020) (similar); *Danik v. U.S. Dep't of Justice*, 463 F. Supp. 3d 1, 10 (D.D.C. 2020) (similar).

Although OMB suggests elsewhere in its filings that public confusion "could" ensue from releasing items 16, 18, and 19 because they are "drafts," Walsh Decl. ¶ 16; *see also* Def.'s Mem. 12, this speculative assertion also does not establish foreseeable harm. *See Ctr. for Investig. Reporting v. U.S. Dep't of the Interior*, ___ F. Supp. 3d. ___, No. 18-cv-1599 (DLF), 2020 WL 1695175 at *4 (D.D.C. Apr. 7, 2020) (holding that to meet the foreseeable harm requirement, "the [agency] must show that disclosure *would* cause reasonably foreseeable harms, not that it *could* cause such harms"). Further, OMB's declaration undermines its own speculation by stating that

draft documents "contain edits, marginal suggestions and comments, and/or embedded questions regarding content." Walsh Decl. ¶ 16. Because the documents thus "have at least some markings that indicate they are drafts, it is unlikely that they would be mistaken for final agency [documents]." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 2020 WL 5798442, at *3.

OMB's conclusory assertions are not analogous to the agency's showing in *Machado Amadis*, 971 F.3d 364. *See* Def.'s Mem. 13. In that case, the agency did not rest on a generalized invocation of the interests protected by the deliberative process privilege, but "specifically focused on the information at issue" in the records under review. 971 F.3d at 371 (internal quotation marks omitted). It identified the particular records at issue ("Blitz forms") and the specific individuals and types of discussions that *would* be discouraged ("line attorneys" and discussions of "ideas, strategies, and recommendations"). *Id.* Further, it explained the importance of the records and the relevant individuals' roles, *see id.* at 370, and the reason ("efficient and proper adjudication of administrative appeals") for which "forthright internal discussion [was] necessary," *id.* at 371 (cleaned up). OMB has not provided such details.

OMB's general assertion of harm is also inconsistent with the agency's own actions. It already publishes agencies' submissions reflecting their proposed collections of information on its website. *See, e.g.*, *supra* at pp. 4 n.3, 5, 9 nn.6-7 (citing several "View ICR-OIRA Conclusion" pages, each of which makes agency material available at link titled "View Supporting Statement and Other Documents"). OMB has also released part of an email in which the CFPB informs OMB of its position that OMB "can continue its review" of PRA requests connected to a rule *other than* the CFPB's Payday Rule. *See* Smullin Decl. Ex. J. And here, the PRA public disclosure provision, 44 U.S.C. § 3507(e)(2), underscores that disclosure would not cause foreseeable harm (even if this

Court concludes that the deliberative process privilege can apply), because it reflects Congress's judgment that "public scrutiny," Walsh Decl. ¶ 17, of communications regarding pending information-collection proposals is not harmful.

E. OMB has not satisfied its burden to identify and release segregable information.

OMB's withholdings in *Vaughn* index items 16-27 are also improper because OMB fails to satisfy FOIA's requirement that it identify and disclose segregable non-exempt information, 5 U.S.C. § 552(a)(8)(A)(ii), (b). To satisfy this burden, an "agency must provide a detailed justification and not just conclusory statements to demonstrate that all reasonably segregable information has been released." *Am. Immigr. Council v. U.S. Dep't of Homeland Sec.*, 21 F. Supp. 3d 60, 83 (D.D.C. 2014) (internal quotation marks and citation omitted); *see also Berard v. Fed. Bureau of Prisons*, 209 F. Supp. 3d 167, 171 (D.D.C. 2016) (holding that agency "has the burden of detailing 'what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document'") (quoting *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). OMB's blanket assertion that it "considered whether any information could be segregated and released without causing foreseeable harm to the agency and its operations," Walsh Decl. ¶ 17, is insufficient, particularly because OMB's *Vaughn* index and declaration discuss the redactions and withheld documents only in general terms, *see id.* ¶ 15. OMB relies (at 13) on a presumption in favor of agency statements about segregability, but "this presumption of compliance does not obviate [an agency's] obligation to carry its evidentiary burden and fully explain its decisions on segregability." *Am. Immigr. Council*, 21 F. Supp. 3d at 82-83 (holding that general assertion that agency reviewed each record line-by-line is insufficient when agency did not provide "descriptions of excerpts deemed to be non-segregable"). As just one

example, OMB's assertions about the deliberative nature of the redactions in emails focus on the CFPB's Payday Rule request, *see* Walsh Decl. ¶ 15, but provide no indication of why OMB could not segregate factual material or material regarding topics other than the CFPB Payday Rule, *see, e.g.*, *Vaughn* index item 20 & Smullin Decl. Exs. D, I, J (mentioning other PRA requests).

II. OMB's withholding of items 1-15 is improper.

For items 1-15, OMB also asserts Exemption 5 but this time relies on both the deliberative process privilege and the presidential communications privilege. OMB has failed to demonstrate that either privilege attaches to the withheld records.

The presidential communications privilege is construed "as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected." *Judicial Watch*, 365 F.3d at 1116 (citation omitted). To trigger the privilege, a communication must be one that "reflect[s] presidential decision-making and deliberations … that the President believes should remain confidential." *Id.* at 1113. The *type* of communication is important, as "the privilege has always been limited to … communications in performance of a President's responsibilities of his office and made in the process of shaping policies and making decisions." *Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 28 (D.D.C. 2013) (cleaned up). The privilege also requires the involvement of certain people: It applies only to "communications directly involving and documents actually viewed by the President, as well as documents solicited and received by the President," *Loving*, 550 F.3d at 37 (cleaned up), or "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the

communications relate," *In re Sealed Case*, 121 F.3d at 752. Additionally, White House advisers' communications are protected only if made in the "course of preparing advice for the President." *Id*. In determining whether the privilege applies, this Court "must ask whether application of the privilege is necessary to protect the confidentiality of communications as between the President and his advisers." *Ctr. for Effective Gov't*, 7 F. Supp. 3d at 25.

OMB's statement of material facts, in ECF No. 34, does not claim that there are any undisputed material facts that would establish the propriety of the presidential communications privilege or the deliberative process privilege, as applied to items 1-15. OMB's *Vaughn* index and declaration also do not establish that either of the asserted privileges applies. Moreover, OMB's deliberative process privilege withholdings as to these items are improper because OMB has not demonstrated any foreseeable harm from disclosure or sufficiently addressed the requirement that OMB segregate non-exempt information.

A. The presidential communications privilege does not apply to items 1-13.

Items 1-13, regarding a Treasury report, do not fall within the presidential communications privilege. OMB has failed to link the documents to any need to protect the "confidentiality of the President's decision-making process." *Judicial Watch*, 365 F.3d at 1116 (citation omitted).

First, the documents do not involve personnel who could trigger the privilege. OMB does not contest that the documents do not "directly involve the President." *Loving*, 550 F.3d at 39 (cleaned up). The documents also do not involve an immediate White House adviser, or staff to such an adviser, with "broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 752. OMB attempts to link the documents to Staff Secretary Derek

Lyons, noting also that he is on the staff of the Chief of Staff, *see* Walsh Decl. ¶ 9, and suggesting (at 8) that *either* Lyons *or* the office of the Chief of Staff generally satisfies the "broad and significant responsibility" standard. But OMB misconstrues the standard and does not offer evidence to support its assertions.

What matters is whether the specific White House staff person purportedly involved—Lyons—had "broad and significant responsibility" to formulate advice for the President on the topic of the particular communications, not whether the Chief of Staff (or his office) had such responsibility, because OMB does not establish that the Chief of Staff solicited or received the materials in question. *See Judicial Watch*, 365 F.3d at 1114 (focusing on the responsibility of the advisers who "solicited and received" documents); *In re Sealed Case*, 121 F.3d at 758 (holding that extern's memo qualified for privilege only because it was "created at the request of" and "received by" White House staff who satisfied the "broad and significant responsibility" standard).

OMB has not established that Lyons had "broad and significant responsibility for investigating and formulating" advice for the President on the subject of this Treasury report, *In re Sealed Case*, 121 F.3d at 752, or any matter at all. Instead, relying on a White House website for prospective interns, OMB represents that the Staff Secretary is the "'gate-keeper of paper flowing into and out of the Oval Office,'" who also "coordinates and monitors decision-making processes." Walsh Decl. ¶ 9 (citing The White House, *White House Internship Program: Presidential Departments*, https://www.whitehouse.gov/get-involved/internships/presidential-departments/ (visited Oct. 30, 2020)). OMB's statement that the position of Staff Secretary and Lyons' additional title, of Assistant to the President, "reflect the role as being an immediate advisor to the President with the responsibility to solicit input and feedback on draft reports … in the

course of … formulating advice," *id.*, is immaterial. Lyons' titles alone establish neither that Lyons is an immediate White House adviser nor that he had "broad and significant" responsibility for developing advice to the President on the topic at hand—a responsibility very different from that of soliciting input and feedback on reports.[14]

Second, the presidential communications privilege does not shield the Treasury report records because the privilege applies only to "communications made by presidential advisers in the course of preparing advice for the President," *In re Sealed Case*, 121 F.3d at 752. OMB identifies no preparation of advice. It does not even establish that most of the records are *communications* that *Lyons* "solicited and received." *Loving*, 550 F.3d at 37. Many are draft reports, not communications. OMB's assertion that the documents "state[]" that they "reflect[] information that was solicited and received by the *Office of* the Staff Secretary," Walsh Decl. ¶ 9 (emphasis added), does not bring the documents within the privilege. OMB ties only item 3 to *Lyons* himself. *See Vaughn* index items 1-13. And OMB's declaration does not even assert that the documents *actually* reflect "information that was solicited and received" by the named office,

[14] OMB's *Vaughn* index likewise does not establish that Lyons has the necessary responsibility. The index states (at item 1) that the Staff Secretary and Chief of Staff have "responsibility to advise the President on the development and clearance of Administration policy documents such as those discussed in these records," but, again, does not demonstrate that *Lyons* had "broad and significant" responsibility for "investigating and formulating" advice on the Treasury report. The word "advise" in the *Vaughn* index cannot make up for the absence of actual evidence that Lyons had the requisite responsibility regarding this report. *See Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d at 89 ("bare legal conclusions" in *Vaughn* index are insufficient to support withholding). And responsibility for "development and clearance" of documents, in the form of paper-flow management and monitoring described in the Walsh Declaration, is distinct from the type of policy advice that the privilege covers. *See Judicial Watch*, 365 F.3d at 1113 (recognizing that privilege focuses on communications "made in the process of shaping policies and making decisions") (cleaned up).

only that the documents say that they do.[15] Absent a showing that the records were solicited and received by a person in the office who had broad and significant responsibility for formulating advice to the President on the relevant topic, and that the communications were made in the course of preparing such advice, such general statements are not sufficient to establish that the records are privileged. *See Prop. of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 387-88 (D.D.C. 2018) (rejecting "broad and vague" descriptions in *Vaughn* index as insufficient to demonstrate that the presidential communications privilege applied).

Moreover, mere repetition of information that was, elsewhere, provided to an appropriate White House official (in a different setting, with a different framing) does not bring a document within the scope of the presidential communications privilege. Such repetition may not reveal anything about presidential decision-making. Repeating information is not the same as "memorializing" a communication. *See Judicial Watch, Inc. v. U.S. Dep't of Def.*, 913 F.3d 1106, 1113 (D.C. Cir. 2019) (upholding withholding of memoranda that "memorialized" legal advice "that the President and his top national security advisers solicited and received") (internal quotation marks and citation omitted). Indeed, although the privilege may extend to factual material, *see In re Sealed Case*, 121 F.3d at 750, OMB's general statement that the documents say that some information in them was somehow provided to the Office of the Staff Secretary does not establish that the documents reveal either what particular piece of information, among many, was communicated to the Staff Secretary's "office," or the source of that information. *Cf. Judicial*

[15] In light of OMB's declaration, the *Vaughn* index's repeated statement that documents reflect information "solicited and received by the White House Staff Secretary" appears to conflate the "*Office* of the Staff Secretary" with Lyons himself, and *stating* that information was received with its *actual* receipt.

Watch, 365 F.3d at 1123 (in excluding internal Justice Department papers described as "'transmitting information'" regarding pardons from the scope of the privilege, noting that they will be less "revelatory of advice given to the President").

Third, the presidential communications privilege does not apply to the Treasury report records because OMB has failed to show that they "reflect presidential decision-making and deliberations … that the President believes should remain confidential." *Id.* at 1113 (citation omitted). Although OMB claims to have distilled a four-part test for the privilege, it omits this requirement altogether, *see* Def.'s Mem. 7, and does not identify any *presidential* decision or deliberation at issue. *Cf. Campaign Legal Ctr. v. U.S. Dep't of Justice*, No. 18-cv-1771 (TSC), 2020 WL 2849909, at *6 (D.D.C. June 1, 2020) (appeal filed) (holding that even describing records as a "subject of potential decisionmaking" does not establish that "the President actually did make the decision or that the communications were made by presidential advisers in the course of preparing advice for the President") (cleaned up). The report discussed in the documents was issued by the Treasury Department, not the White House. OMB mentions (at 9) that the report responded to an executive order, but that also does not make items 1-13 privileged. Accepting that the mere fact that an agency is responding to direction from the President in executing a delegable duty is itself enough to trigger the privilege would "sweep within the reach of the presidential privilege much of the functions of the executive branch," *Judicial Watch*, 365 F.3d at 1122 (limiting the extent to which the privilege reaches agency officials to avoid such a broad result). *See also Prop. of the People*, 330 F. Supp. 3d at 390 ("the mere fact of communications between the OMB Director and White House staff or agency staff on matters of policy is insufficient to show that [the communications] concern matters of presidential decisionmaking").

Relatedly, OMB's materials do not establish that withholding "is necessary to protect the *confidentiality* of communications as between the President and his advisers," *Ctr. for Effective Gov't*, 7 F. Supp. 3d at 25 (emphasis added), and the record suggests otherwise. Most of the records at issue were communicated to other staff in OMB, not necessarily to Lyons (and certainly not solely to him). *See Vaughn* index items 1-2, 4-13. OMB's memorandum states (without evidentiary support) that Lyons was "soliciting information from various agencies," Def.'s Mem. 8—an assertion that suggests the records at issue could have been widely circulated. That the final report was authored by Treasury, published publicly, and involved input from a wide range of stakeholders, *see* Mnuchin & Phillips, *A Financial System*, *supra*, at 4, 189-194, are all further evidence that the candor of advisors in the course of presidential decision-making is not at issue. *Cf. Ctr. for Effective Gov't*, 7 F. Supp. 3d at 27 (holding that presidential privilege does not attach to document "widely transmitted to multiple agencies and their staffers who serve in *non-advisory* roles"). Indeed, while OMB's declaration makes a *hypothetical* reference to some of the interests protected by the privilege—stating that disclosure "*could* reveal information … meant only for the Office of the President, to assist in making important decisions on national interests …..," Walsh Decl. ¶ 17 (emphasis added)—it makes no link between its hypothetical and the actual records at issue. OMB identifies *no* information that was *actually* "meant only for the Office of the President" and *no* "important decisions on national interests" at stake.

B. Items 14 and 15 fall outside the presidential communications privilege.

The presidential communications privilege also does not apply to *Vaughn* index items 14 and 15. Again, OMB has not established the necessary links between the particular communications and White House personnel involved in presidential decision-making.

OMB provides conflicting statements about the topic of item 14: The *Vaughn* index states that it solicits information on "financial regulations," while the declaration does not describe its topic, and the memorandum asserts without any support (at 9) that item 14 relates to the Treasury report. In any event, OMB does not establish that the communication was made to someone who could trigger the privilege. OMB's conclusory assertion is insufficient to establish that the unnamed "Assistant to the President" who received the document was an immediate adviser or member of such an adviser's staff. *See Prop. of the People*, 330 F. Supp. 3d at 387-88 (holding "broad and vague" descriptions insufficient to demonstrate that withheld documents memorialize communications with individuals who could trigger the presidential communications privilege). And OMB's assertion that the person's "responsibilities include[] financial regulation," Walsh Decl. ¶ 10, does not establish any "broad and significant responsibility for investigating and formulating the advice to be given the President" in this area (or any other), *In re Sealed Case*, 121 F.3d at 752. Moreover, OMB does not tie the document to any subject of *presidential* decision-making intended to be confidential and does not establish that the communication was made in the course of the Assistant's preparation of advice to the President on financial regulation. The Walsh Declaration (at ¶ 10) mentions preparing advice only in conclusory fashion, without mentioning a topic. The *Vaughn* index states that the document "provided information that played a role in formulation of advice … to the President on financial regulation and oversight"—but this passive-voice assertion does not answer the question whether the requester or someone else was preparing advice on that topic (and whether such advice was prepared using item 14). Indeed, the record might just include a fact, such as that the CFPB was revising its Payday Rule, that someone *else* used in formulating advice.

Regarding item 15, OMB provides even less information, stating only that a "staff member" to the unnamed "Assistant to the President" was involved. *See* Walsh Decl. ¶ 11. This barebones statement does not show that the communication was "authored or solicited and received" by someone satisfying the "broad and significant responsibility" standard, *In re Sealed Case*, 121 F.3d at 752. And again, OMB did not establish that item 15 is a record "that reflect[s] presidential decisionmaking and deliberations and that the President believes should remain confidential." *Id.* at 744. Indeed, the email's title ("Meeting this afternoon") and OMB's description of it, Walsh Decl. ¶ 11, suggest the email may simply concern scheduling.[16]

C. The presidential communications privilege also does not apply because it was not invoked by any official qualified to assert it.

The presidential communications privilege does not apply here for the additional reason that it has not been invoked by the President or any other official qualified to assert it. "Only the President, not the agency, may assert the presidential privilege," *Common Cause*, 674 F.2d at 935, and he has not done so here. Although "the issue of whether a President must *personally* invoke the privilege remains an open question," *Judicial Watch*, 365 F.3d at 1114 (emphasis added); *see also In re Sealed Case*, 121 F.3d at 744 n.16 (recognizing that earlier cases "do not establish whether the privilege must be invoked by the President as opposed to a member of his staff"), the D.C. Circuit has never suggested that a different rule from that stated in *Common Cause* might apply to FOIA cases, such that an agency can invoke the privilege. And Supreme Court and other D.C. Circuit case law suggest that only the current President, a former President, the White House

[16] The *Vaughn* index text for item 15 appears to be a mistake, as it repeats the description of item 14 and conflicts with the index's column for recipients and the Walsh Declaration.

Counsel acting at the President's direction (or perhaps the Vice President) may invoke the privilege. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 744 & n.16; *see also United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (stating, in the context of the military and state secrets privilege, that "[t]here must be [a] formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer" (footnotes omitted)).

Requiring formal invocation of the privilege by a President, former President, or White House Counsel acting at the President's direction is consistent with the privilege's unique attachment to the office of the President. "[R]ooted in the *President's* need for confidentiality in the communications of his office," *Judicial Watch*, 365 F.3d at 1115 (emphasis added, internal quotation marks and citation omitted), and "the President's unique constitutional role," *In re Sealed Case*, 121 F.3d at 745, the privilege only applies when the "President believes" material "should remain confidential," *id.* at 744. Such invocation also assures that the President has personally made a judgment that invoking the privilege is in the public interest and that the President is personally accountable for that decision. The Supreme Court has observed that the privilege is properly invoked "[i]f a *President* concludes" that disclosure "would be injurious to the public interest." *United States v. Nixon*, 418 U.S. 683, 713 (1974) (emphasis added). Similarly, the D.C. Circuit has observed that where a former President asserts the privilege, "an incumbent President, aided perhaps by his close subordinates, must exercise some discrimination and judgment" to determine "if he wishes to support it." *Public Citizen v. Burke*, 843 F.2d 1473, 1479 (D.C. Cir. 1988); *accord Reynolds*, 345 U.S. at 8 n.20 (stating that it is essential that the decision to assert executive privilege "be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have

formed the view that on grounds of public interest they ought not to be produced") (citation and internal quotation marks omitted). A President "has the primary, if not the exclusive, responsibility of deciding when presidential privilege must be claimed, when *in his opinion* the need of maintaining confidentiality in communications … outweighs whatever public interest or need may reside in disclosure." *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977) (emphasis added).

In *Lardner v. U.S. Dep't of Justice*, No. 03-cv-0180 (JDB), 2005 WL 758267 (D.D.C. Mar. 21, 2005), a district court in this Circuit held that an agency's assertion of the privilege was sufficient, at least in FOIA litigation, *see id*. at *6, and other cases have relied on that decision or similar reasoning, *e.g.*, *Am. Ctr. for Law & Justice v. U.S. Dep't of State*, 330 F. Supp. 3d 293, 308 (D.D.C. 2018). *Lardner*, however, is inconsistent with the D.C. Circuit's decision in *Common Cause* and the principles discussed above. Importantly, *Common Cause* regarded the transparency of government meetings under the Sunshine Act, 5 U.S.C. § 552b, a context closely analogous to FOIA. *See* 674 F.2d at 928-29 (discussing Sunshine Act's open-government purpose and use of exemptions that mostly parallel FOIA's). Moreover, subsequent to *Lardner*, the D.C. Circuit has continued to suggest that the White House or Office of the Vice President would need to determine whether to invoke the privilege in a FOIA case. *See Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 532 F.3d 860, 866 (D.C. Cir. 2008).

In this case, the government has produced no evidence that the President or a person authorized by him invoked the privilege. Although OMB's declarant states that her staff consulted with the White House Counsel's office, absent from her declaration is any suggestion that the President determined that the privilege should be invoked; indeed, she does not even state that *anyone* purported to formally invoke it. *See* Walsh Decl. ¶ 12.

D. OMB has not established that the presidential communications privilege applies to earlier emails replicated in *Vaughn* index items.

Even if OMB establishes that the presidential communications privilege applies to the records in the *Vaughn* index, OMB's presidential communications-based withholdings may be improper. As described above, when OMB concluded that the text of an email responsive to CRL's request was replicated in another, non-duplicate email thread, OMB did not always identify the earlier email as a separate responsive record. *See* Smullin Decl. ¶¶ 3-4, 10, 14. In this way, OMB may have effectively extended its assertion of the presidential communications privilege over items 1-15 to *earlier* emails that were reproduced in the withheld items but did not themselves involve presidential-privileged communications.[17] But extending the privilege in this way is improper when OMB has not evaluated the earlier emails standing alone. *Cf. Defs. of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 10 (D.D.C. 2004) ("records may not be withheld simply because a similar, draft, or annotated version was produced"). For instance, an email thread that is privileged may reflect the text of earlier emails that were not themselves written "in the course of preparing advice for the President" or "authored or solicited and received" by appropriate personnel. *In re Sealed Case*, 121 F.3d at 752. In such a case, the earlier emails would be stand-alone, non-privileged records that OMB must produce.

OMB's filings do not explain how OMB has handled any such earlier emails. They also make no representations about why the presidential communications privilege should apply to any emails that are reproduced in an email thread (but not listed separately in the *Vaughn* index). *See*

[17] The *Vaughn* index suggests that items 1, 3, 5, 7, 9, 11, 12, 14, and 15 may be emails.

Walsh Decl. ¶ 5 (stating only that she reviewed *Vaughn* index items). OMB thus has no basis to withhold any such emails that are responsive to CRL's request and not listed separately.

E. The deliberative process privilege does not shield items 1-15.

OMB has also failed to establish that *Vaughn* index items 1-15 can be withheld in whole or part on the basis of the deliberative process privilege. As discussed above, establishing that the privilege applies requires discussion of the specific documents, people, and deliberative process involved. *See supra* at p. 25. But for items 1 through 15, OMB submits only a conclusory statement in the Walsh Declaration (¶ 13) and brief boilerplate *Vaughn* index descriptors ("*e.g.*, internal deliberations" or "Deliberative draft document"), which it does not even provide for items 14 and 15. OMB does not, for example, identify the specific "function and significance" of each listed item or describe "the nature of the decisionmaking authority vested in" the authors or recipients, *New Orleans Workers' Ctr*, 373 F. Supp. 3d at 50 (citation omitted). OMB's categorization of some documents as drafts does not alone establish that they are predecisional and deliberative. *See id.* at 52-53; *see also Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982). And for items 14 and 15, OMB does not even identify any "specific deliberative process" the items concerned, *New Orleans Workers' Ctr*, 373 F. Supp. 3d at 50, let alone establish that the documents "reflect[ ] the give-and-take of the consultative process," *Coastal States Gas Corp.*, 617 F.2d at 866, rather than facts, logistics, or other non-protected material.[18]

[18] The assertion in OMB's memorandum (at 11) that items 1-15 contain "deliberative, pre-decisional information and communications about CFPB matters" is not only conclusory, but also lacks evidentiary support and cannot account for withholding all the documents in full, given that items 1-13 are described as discussing a Treasury Department report, that addresses a wide range of matters. *See* Walsh Decl. ¶ 9; Mnuchin & Phillips, *A Financial System*, supra.

F. If the deliberative process privilege applies, OMB has failed to establish foreseeable harm or proper segregation.

Even if the deliberative process privilege applies, OMB must disclose any withheld material that is not subject to the presidential communications privilege because it has failed to carry its burden of showing that it "reasonably foresees that disclosure" of these records, to the extent they may be subject to the deliberative process privilege, "would harm an interest protected by [the] exemption." 5 U.S.C. § 552(a)(8)(A)(i)(I). With regard to *Vaughn* index items 1-15, as with regard to its PRA-related records, OMB makes only a generalized assertion about the interests protected by the deliberative process privilege. *See* Walsh Decl. ¶ 17. This assertion is inadequate to satisfy its burden to establish foreseeable harm from disclosure. *See supra* at pp. 26-28.

Further, as described above, *supra* at pp. 29-30, OMB's blanket assertion that it "considered whether any information could be segregated and released without causing foreseeable harm to the agency and its operations," Walsh Decl. ¶ 17, is insufficient to satisfy OMB's burden to "provide a detailed justification and not just conclusory statements to demonstrate that all reasonably segregable information has been released," *Am. Immigr. Council*, 21 F. Supp. 3d at 83 (internal quotation marks and citation omitted). Indeed, the "absen[ce] of a sufficient *Vaughn* index" underscores the deficiency of OMB's conclusory statements, because without details in such an index, "an agency must provide other facts, beyond its good-faith assurances, establishing that it released all reasonably segregable, non-exempt information." *New Orleans Workers' Ctr.*, 373 F. Supp. 3d at 54 n.14 (cleaned up). Here, for example, it appears evident that some material (*e.g.*, email headers or portions of emails) should be segregable from any pre-decisional, deliberative material, but OMB has not made clear even whether it believes

any information is segregable (let alone why or why not), if the Court concludes that the deliberative process privilege, but not the presidential communications privilege, applies.

III. OMB must match the text of emails with those emails' attachments.

OMB's *Vaughn* index provides incomplete information about the attachments included in the emails at issue. Though OMB disclosed in response to a specific request that items 16 and 18 are attachments to item 17 and an earlier email included in item 17, *see* Smullin Decl. ¶¶ 12-13, OMB has not identified whether these (or other documents) were also sent as attachments to other emails whose text is reproduced in the identified email threads, *see id.* ¶¶ 6, 10, 13.[19]

"[A]ttachments can only be fully understood and evaluated when read in the context of the emails to which they are attached." *Families for Freedom v. U.S. Customs & Border Prot.*, No. 10-cv-2705, 2011 WL 4599592, at *5 (S.D.N.Y. Sep. 30, 2011) (cited in *Judge Rotenberg Educ. Ctr., Inc. v. U.S. Food & Drug Admin.*, 376 F. Supp. 3d 47, 62 (D.D.C. 2019)); *cf.* Minute Order of June 4, 2019 (requiring OMB to count an email and its attachments as a single document). Accordingly, to address the scope of the records at issue and to the extent OMB has not already done so, this Court should require OMB not only to produce all withheld emails, including all attachments, but also to match each specific email in a thread to any attachments that it included.

FOIA requires an agency to indicate "[t]he amount of information deleted … on the released portion of [a] record." 5 U.S.C. § 552(b). In litigation, a *Vaughn* index is meant to "describe *each* document or portion thereof withheld," *King v. U.S. Dep't of Justice*, 830 F.2d 210,

[19] OMB's *Vaughn* index also does not confirm whether it identifies all the attachments to the identified email threads or the earlier emails that they contain, which CRL's August 25 list mentioned. *See* Def's Ex. C. at 1-2; *see also* Def's Statement of Material Facts ¶¶ 8-9 (identifying specifically listed withholdings at issue, but not mentioning question of attachments).

223 (D.C. Cir. 1987) (as amended), not to obscure what records (or parts of records) exist. Yet CRL may not be able to discern which emails contained attachments (and what those attachments were), even if OMB lifts all of the withholdings identified in the *Vaughn* index. OMB's practice of not producing earlier emails in a thread obscures information about where in an email thread an attachment was sent, because when someone replies to an email with an attachment, that reply may not show that the original email included that attachment. *Compare* Smullin Decl. Ex. C at 2 (including text of February 11, 2019 4:40 pm email, but not identifying attachments) *with* Ex. O (copy of February 11, 2019 4:40 pm email, showing attachment); *see also, e.g.*, *id.* ¶ 10 & Ex. L. Further, as described above, OMB has not individually identified all attachments to emails when such attachments are the same as attachments to other emails. *See id.* ¶¶ 5-6. FOIA does not permit agencies to obscure information about the composition of email records in this way.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in plaintiff's favor and deny defendant's summary judgment motion. It should order OMB to produce all of the withheld material at issue and order OMB to identify which emails, or earlier emails they reproduce, contain attachments and which documents constitute such attachments.

Dated: November 24, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR RESPONSIBLE LENDING, Plaintiff, v. OFFICE OF MANAGEMENT AND BUDGET, Defendant.	)	Civil Action No. 19-cv-00209 (ABJ)

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

1. On or about January 31, 2018, Plaintiff Center for Responsible Lending ("CRL") submitted a FOIA request to Defendant seeking records related to payday loans, vehicle title loans, or longer-term consumer installment loans. Compl., ECF No. 1 ¶ 15.

Plaintiff's Response: Plaintiff admits that this is an accurate summary of the FOIA request at issue. Plaintiff denies that this text represents the entirety of the FOIA request, which is attached as Exhibit A to the Declaration of Rebecca Borné. Plaintiff admits that the subject request was submitted on or about January 31, 2018, and clarifies that it was submitted on January 31, 2018. Borné Decl. ¶ 2 & Ex. B.

2. The request specified that it sought records created or received by Defendant between November 24, 2017, and the date of processing of the request. *Id.*

Plaintiff's Response: Admitted.

3. On February 2, 2018, Defendant acknowledged the request and assigned it tracking number 2018-143. *Id.* ¶ 10.

Plaintiff's Response: Admitted.

4. On September 24, 2018, Defendant informed Plaintiff that searches were being conducted for potentially responsive records. *Id.*

Plaintiff's Response: Plaintiff admits that on September 24, 2018, OMB stated to CRL that it "ha[d] initiated a search," and disputes the statement to the extent it suggests that OMB communicated something else. Borné Decl. Ex. C at 1.

5. On January 28, 2019, Plaintiffs filed this action. Compl., ECF No. 1.

Plaintiff's Response: Admitted.

6. In responding to the FOIA request, Defendant withheld records in full or in part pursuant to FOIA Exemption (b)(5), 5 U.S.C. § 552(b)(5), specifically the deliberative process privilege and the presidential communications privilege. Decl. of Heather Walsh ("Walsh Decl.") ¶¶ 5-16.

Plaintiff's Response: Plaintiff admits that defendant is asserting the presidential communications privilege and/or the deliberative process privilege regarding the withholdings at issue in the parties' cross motions. To the extent the statement might be understood as making a legal assertion about the correctness of OMB's invocation of the privileges, plaintiff denies any such assertion, which it disputes

as a matter of law, as explained in the memorandum filed herewith. *See* Pl.'s Mem. Supp. Summ. J. 12-26, 30-42. Plaintiff also disputes this statement to the extent it suggests that the privilege claims constituted the entirety of withholdings that OMB made over the course of responding to CRL's FOIA request, in that OMB withheld records or parts of records on other bases as well, *See, e.g.*, Smullin Decl. ¶¶ 7, 9.

7. In an August 25, 2020 document, Plaintiff listed its challenges to Defendant's particular withholdings pursuant to FOIA Exemption (b)(5) and divided the challenged documents into Part A and Part B. *See* Ex. C.

Plaintiff's Response: Plaintiff admits that Exhibit C to defendant's summary judgment motion, ECF No. 34-3 (Def's Ex. C), is a copy of a document that CRL sent to OMB on August 25, 2020 regarding withholdings that CRL challenges. *See* Smullin Decl. ¶ 7. Plaintiff admits that such document lists withholdings under two headings, Parts A and B. Plaintiff admits that in summary judgment, defendant has asserted only Exemption 5 with regard to the disputed withholdings, but plaintiff disputes that it specified that its challenges were limited to Exemption 5 withholdings. *See* Def.'s Ex. C at 1-2.

8. In Part A, fifteen documents are challenged for containing withholdings applied pursuant to FOIA Exemption 5, specifically the presidential communications and deliberative process privileges. *Id.*

Plaintiff's Response: Plaintiff admits that Part A of its August 25, 2020 document lists 15 items whose withholdings defendant asserts are made under the presidential communications and deliberative process privilege, *see* Def.'s Mem. 11, and that

CRL is challenging. Plaintiff disputes that Part A was limited to withholdings in the 15 listed documents. The document specified that CRL's challenges included all records withheld in full or part on the basis of the presidential communications privilege, whether or not listed. It also specified that CRL was challenging the withholding of any attachment to any listed email thread and all attachments to individual emails that OMB did not separately identify because their content was included in another indicated email thread. *See* Def.'s Ex. C at 1.

9. In Part B, fourteen documents are challenged for containing withholdings applied pursuant to FOIA Exemption 5, specifically the deliberative process privilege, on the basis that the Paperwork Reduction Act ("PRA") compels the disclosure of these records. *Id.*

Plaintiff's Response: Plaintiff admits that Part B of its August 25 document lists 14 items for which CRL is challenging withholdings other than Exemption 6 withholdings. *See* Def.'s Ex. C at 1-2. Plaintiff further admits that, Exemption 6 aside, OMB asserts only Exemption 5 for the withholdings in the identified records. *See* Def.'s Mem. 11-12. CRL clarifies that two of the listed items are emails whose text was produced with only Exemption 6 withholdings, though at least one earlier email included in those listed email threads had attachments in which OMB made redactions based on Exemption 5. *See* Smullin Decl. ¶¶ 9-11 & Exs. J-M; *Vaughn* index items 26, 27. Plaintiff disputes that Part B stated that it was limited to deliberative process privilege withholdings or that Part B stated that CRL only challenged withholdings in the listed items, if OMB made other withholdings of the type described in Part B. The document specified that CRL was challenging any

withholding of an OIRA-CFPB communication concerning a proposed collection of information (even if not listed), any attachment to any listed email thread and all attachments to individual emails that OMB did not separately identify because their content was included in another indicated email thread. *See* Def's Ex. C at 1-2. Plaintiff admits that it argues that the Paperwork Reduction Act requires disclosure of nearly all of the withholdings specifically identified in Part B of its August 25 document, *see* Pl.'s Mem. Supp. Summ. J. 12-24. Plaintiff also challenges these and the other withholdings in *Vaughn* index items 16-27 on other grounds. *See id.* at 24-30. Plaintiff disputes any suggestion that its August 25 document limited the basis on which plaintiff can dispute OMB's withholdings. *See* Def.'s Ex. C at 1-2.

10. While applying withholdings to the records, Defendant evaluated all withheld documents and segregated non-exempt information from exempt information. Walsh Decl. ¶ 17.

Plaintiff's Response: Plaintiff admits that this is defendant's characterization of its actions. Plaintiff denies that defendant has established that it segregated non-exempt information and also denies any legal conclusion about the propriety of all of defendant's withholdings, as plaintiff explains in its memorandum filed herewith. *See* Pl.'s Mem. Supp. Summ. J. 12-44. Plaintiff adds that the records related to the Paperwork Reduction Act include discussions of topics other than the CFPB Payday Rule. *See Vaughn* index item 20 & Smullin Decl. Exs. D, I, J.

11. Defendant conducted a foreseeable harm analysis on the withheld information while reviewing redactions. *Id.* ¶ 17.

Plaintiff's Response: Plaintiff admits that this is defendant's characterization of its action. Plaintiff denies that defendant has established foreseeable harm and also denies any legal conclusion about the propriety of all of defendant's withholdings, as plaintiff explains in its memorandum filed herewith. *See* Pl.'s Mem. Supp. Summ. J. 12-44. Plaintiff adds that OMB's declaration indicates that certain drafts have "edits, marginal suggestions and comments, and/or embedded questions." Walsh Decl. ¶ 16. Further, OMB makes available some agency-OIRA communications regarding proposed collections of information. *See* Pl.'s Statement of Additional Material Facts ¶ 36 (and sources cited therein), *infra* p. 13.

12. Defendant considered whether any information could be segregated and released without causing a foreseeable harm to the agency and its operations, and determined that no further segregation of meaningful information in the withheld documents described herein would be possible without disclosing information that warrants protection under the law. *Id.*

Plaintiff's Response: Plaintiff admits that this is defendant's characterization of its actions. Plaintiff denies that defendant has established that it properly segregated and released information and also denies any legal conclusion about the propriety of all of defendant's withholdings, as plaintiff explains in its memorandum filed herewith. *See* Pl.'s Mem. Supp. Summ. J. 12-44. Plaintiff adds that the records related to the Paperwork Reduction Act include discussions of topics other than the CFPB Payday Rule. *See Vaughn* index item 20 & Smullin Decl. Exs. D, I, J. Plaintiff also adds that OMB's declaration indicates that certain drafts have "edits, marginal suggestions and comments, and/or embedded questions." Walsh Decl.

¶ 16. Further, OMB makes available some agency-OIRA communications regarding proposed collections of information. *See* Pl.'s Statement of Additional Material Facts ¶ 36 (and sources cited therein), *infra* p. 13.

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

Plaintiff submits the following additional undisputed material facts:

13. Exhibit A to the Declaration of Rebecca K. Borné is the FOIA request at issue in this matter.

14. During the course of this litigation, OMB conducted searches for responsive records and produced some responsive records to CRL in whole or in part, while withholding others in full. *See* Joint Status Report of July 2, 2019, ECF No. 13; Joint Status Report of Aug. 16, 2019, ECF No. 14; Joint Status Report of Aug. 21, 2019, ECF No. 15; Joint Status Report of Sept. 25, 2019, ECF No. 16; Joint Status Report of Dec. 3, 2019, ECF No. 18; Joint Status Report of Jan. 21, 2020, ECF No. 19; Joint Status Report of Feb. 21, 2020, ECF No. 20; Joint Status Report of Apr. 21, 2020, ECF No. 24; Joint Status Report of May 20, 2020, ECF No. 26; Joint Status Report of July 6, 2020, ECF No. 27; Joint Status Report of July 27, 2020, ECF No. 28; Pl's Supp. Status Report, ECF No. 29; Joint Status Report of Aug. 4, 2020, ECF No. 30; Joint Status Report of Aug. 18, 2020, ECF No. 31; Smullin Decl. ¶ 7.

15. Before the start of summary judgment proceedings, OMB provided drafts of a *Vaughn* index to CRL. *See* Smullin Decl. ¶ 3; Joint Status Report of July 6, 2020, ECF No. 27; Joint Status Report of Aug. 4, 2020, ECF No. 30; Joint Status Report of Aug. 18, 2020, ECF No. 31.

16. During the course of identifying and producing responsive records, OMB sometimes concluded that the text of a responsive email was replicated in one or more subsequent email chains that OMB did produce or otherwise identify to CRL, and, on this basis, did not produce the earlier responsive email or identify it in the drafts of its *Vaughn* index. *See* Smullin Decl. ¶¶ 3, 4, 10, 13-14 & Ex. B.

17. When OMB did not produce a responsive email or identify such email in its draft *Vaughn* index because the email's text was replicated in a subsequent email chain, OMB considered the earlier email to be "produced" if the later email chain was produced. *See id.* ¶¶ 3, 14.

18. During the course of identifying and producing responsive records, OMB sometimes concluded that multiple, non-identical emails that were responsive to CRL's request included the same document as an attachment. In these instances, OMB sometimes only identified one copy of such attachment as part of the responsive records, on the basis that the attachments to the multiple emails were the same. Additionally, in these cases, OMB's drafts of its *Vaughn* index sometimes did not reflect the multiple attachments or identify all the emails to which a document was attached. *See* Smullin Decl. ¶¶ 5, 6 & Ex. B; Joint Status Report of Aug. 21, 2019, at 2, ECF No. 15; Joint Status Report of Sept. 25, 2019, at 2, ECF No. 16.

19. OMB has not provided CRL a full accounting of which emails (or earlier emails included in an identified email thread) have attachments and what those attachments are. In particular, though OMB has provided additional information about attachments since filing its summary judgment motion, OMB has not stated whether each of the relevant emails (including

emails whose text is replicated in identified email threads) had any attachments and if so, what those attachments were. *See* Smullin Decl. ¶¶ 6, 10, 12, 13; *see generally Vaughn* index.

20. OMB has not provided CRL a full accounting of all of the emails that OMB concluded were responsive to CRL's request but did not produce or identify on drafts of its *Vaughn* index because OMB concluded that their content was replicated in the bodies of other emails. In particular, OMB has not informed CRL whether it identified separately any earlier emails included in the documents that OMB withheld in full based on the presidential communications privilege. *See* Smullin Decl. ¶ 4.

21. In CRL's August 25, 2020 document (Def.'s Ex. C), Parts A and B list specific records or parts of records that are responsive to CRL's request but that OMB withheld in full or part. *See id.* ¶¶ 8-11.

22. Part A of CRL's August 25 document includes a challenge to any record withheld in full or in part on the basis of the presidential communications privilege, including both the specifically listed withholdings and any others, not specifically listed, as well as any attachment to any email identified in Part A or any email whose text was replicated in the listed email records, but which OMB did not separately identify on such basis. *See* Def.'s Ex. C at 1. The specifically listed withholdings are items 1-15 in OMB's *Vaughn* index. *See* Walsh Decl. ¶ 8.

23. Part B of CRL's August 25 document includes a challenge to the listed withholdings and any other withholding of communication between CFPB and OMB's Office of Information and Regulatory Affairs (OIRA) concerning a proposed collection of information even if not specifically listed (other than Exemption 6 withholdings), and any attachment to any email

identified in Part B or any email whose text was replicated in the listed email records, but which OMB did not separately identify on such basis. *See* Def.'s Ex. C at 1, 2.

24. Part B of CRL's August 25 document identifies nine email documents that OMB produced to CRL in part, in response to CRL's FOIA request, with redactions in their text based on OMB's assertion of the deliberative process privilege under Exemption 5. Part B of the document also identifies three documents that OMB withheld in full. *See* Smullin Decl. ¶¶ 9, 11. The other two emails specifically identified in CRL's August 25 list are ones in which OMB made only Exemption 6 redactions in the text, which CRL does not challenge. *See id.* ¶ 10.

25. *Vaughn* index items 16, 18, and 19 are the withheld-in-full documents listed in Part B of CRL's August 25 document. *See id.* ¶ 11. Exhibits C-K to the Declaration of Rebecca Smullin are the nine identified emails with Exemption 5 redactions, as OMB produced them to CRL in part. *See* Smullin Decl. ¶ 9 & Ex. C-K. For those emails, the list below specifies which Smullin Declaration exhibit corresponds to which entry in OMB's *Vaughn* index. *See id.* ¶ 9.

Vaughn index count number	Exhibit
17	C
20	D
21	E
22	F
23	G
24	H
25	I
26	J
27	K

26. At the time of all the emails at issue in this case, Darrin King was an employee of the CFPB. *See id.* Exs. C-K (showing King's signature block and/or email name).

27. At the time that they wrote or received any of the emails at issue this case, Shagufta Ahmed, Lindsay Abate, and Christine Kymn were employees of OIRA. *Id.* ¶ 2 & Ex. A.

28. *Vaughn* index items 16-27 all concern proposed collections of information. All of these items regard proposed collections of information related to a CFPB rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (final rule to be codified at 12 C.F.R part 1041) (Payday Rule). *See* Walsh Decl. ¶¶ 13-14. Some of these items also regard other proposed CFPB information collections. *See, e.g.*, *Vaughn* index item 20 (referencing "all pending information collection requests"); Smullin Decl. Ex. D at 1, 2 (also specifically referencing pending proposal related to student loan servicing); *id.* Ex. J at 1 (referencing request for "Prepaids Final Rule"); *see also* OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3170-002 (visited Nov. 4, 2020) (regarding prepaid accounts rule, showing request pending between Nov. 22, 2016 and Mar. 22, 2019); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3170-001 (visited Nov. 4, 2020) (regarding prepaid accounts rule, showing request pending between Nov. 22, 2016 and Mar. 22, 2019); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-3170-001 (visited Nov. 22, 2020) (regarding student loan servicing market monitoring, showing request pending between Sept. 6, 2017 and Nov. 19, 2020).

29. *Vaughn* index items 17, 22, and 24-27, in their entirety, are the texts of emails between CFPB and OIRA concerning proposed information collections. *See* Walsh Decl. ¶ 14; Smullin Decl. Exs. C, F, H-K (showing that emails are between King and one or more of following: Abate, Ahmed, and/or Kymn); *see also* Pl.'s Statement of Additional Material Facts ¶¶ 26, 27

(regarding King, Abate, Ahmed, and Kymn); *id.* ¶ 28 (discussing proposed information collections).

30. *Vaughn* index item 20 (Smullin Decl. Ex. D) reproduces the text of an August 27, 2018 email (at or about 11:00 am) from CFPB (King) to OIRA (Ahmed) regarding proposed CFPB information collections. This email begins at the third block of text in the printed thread and includes all of the remaining text in the document. Thus, the portion of Exhibit D, beginning at the start of such August 27, 2018 email (with King's name noted) and continuing to the end of Exhibit D, repeats an OIRA-CFPB communication about a proposed collection of information. *See* Walsh Decl. ¶ 14; Smullin Decl. Ex. D at 1, 2; *Vaughn* index item 20.

31. *Vaughn* index item 21 (Smullin Decl. Ex. E) reproduces the text of a January 29, 2019 email (at or about 3:37 pm) from CFPB (King) to OIRA (Ahmed) concerning the CFPB's proposed information collections related to the Payday Rule. This email begins at the fourth block of text in the printed thread and includes all of the remaining text in the document. Thus, the portion of Exhibit E, beginning at the start of such January 29, 2019 email (with King's name noted) and continuing to the end of Exhibit E, repeats an OIRA-CFPB communication about a proposed collection of information. *See* Walsh Decl. ¶ 14; Smullin Decl. Ex. E; *see also id.* Ex. K (related thread).

32. *Vaughn* index item 23 (Smullin Decl. Ex. G) reproduces the text of a November 13, 2018 email (at 4:23:53 pm) from CFPB (King) to OIRA (Ahmed) that concerns the CFPB's proposed information collections related to the Payday Rule. This email begins at the third block of text and includes all of the remaining text in the document. Thus, the portion of Exhibit G, beginning at the start of such November 13, 2018 email (with King's name noted) and continuing

to the end of Exhibit G, repeats an OIRA-CFPB communication about a proposed collection of information. *See* Walsh Decl. ¶ 14; Smullin Decl. Ex. G; *see also id.* Ex. F (related thread).

33. *Vaughn* index item 16 was sent from CFPB (King) to OIRA (Ahmed and Abate) as an attachment included in a February 11, 2019 email, whose text OMB concluded was replicated in *Vaughn* index item 17 (Smullin Decl. Ex. C). The communication concerned CFPB's Payday Rule information-collection proposal. *See* Smullin Decl. ¶¶ 13-14 & Exs. C, N, O; Walsh Decl. ¶ 14.

34. *Vaughn* index item 18 was sent from OIRA (Abate) to CFPB (King) as an attachment included in item 17 (Smullin Decl. Ex. C). The communication concerned the CFPB's Payday Rule information-collection proposal. *See* Smullin Decl. ¶ 12 & Exs. C, N; Walsh Decl. ¶ 14.

35. *Vaughn* index item 19 is the same as item 18. *See* Smullin Decl. ¶ 12 & Ex. N.

36. OMB makes available some agency-OIRA communications regarding proposed collections of information. OMB's website includes agencies' submissions reflecting their proposed collections of information. *See* OMB, *Information Collection Review*, https://www.reginfo.gov/public/do/PRAMain (allowing search, by agency, of information collections under review); *see, e.g.*, OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201711-3170-002 (at link for "View Supporting Statement and Other Documents"); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3170-001 (similar); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3170-002 (similar); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-3170-

001 (similar); OMB *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202007-3170-001 (similar). OMB has released part of an email that shows the CFPB informing OMB "that it can continue its review" of PRA requests connected to a rule. *See* Smullin Decl. Ex. J; *see also* OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3170-002 (visited Nov. 4, 2020) (referenced request); OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3170-001 (visited Nov. 4, 2020) (other referenced request).

37. The following report was issued by the Department of Treasury: Steven T. Mnuchin & Craig S. Phillips, *A Financial System that Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation* (July 2018), https://tinyurl.com/y823jpjf (July 2018 Treasury report).

38. The July 2018 Treasury report addresses a range of topics, not simply the CFPB. *See id.*

39. Development of the July 2018 Treasury report involved input from a wide range of stakeholders, including multiple federal government agencies and multiple other non-government entities and individuals listed in Appendix A of the report. *See id.* at 4, 189-194.

40. The July 2018 Treasury report was published publicly. *See id.*, https://tinyurl.com/y823jpjf.

Dated: November 24, 2020

Respectfully submitted,

/s/ Rebecca Smullin

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