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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Freedom of Information Act (FOIA) case involves 27 items that defendant Office of Management and Budget (OMB) has withheld, in whole or part, under Exemption 5. First, OMB asserts the deliberative process privilege to withhold portions of emails, including their attachments, regarding proposals made by the Consumer Financial Protection Bureau (CFPB) under the Paperwork Reduction Act (PRA). Second, OMB asserts both the presidential communications privilege and the deliberative process privilege to withhold 15 other items in full.

OMB has not shown that any of the information at issue is exempt from disclosure under FOIA. Nearly all of the withholdings from the 12 items relating to PRA proposals are improper because the PRA requires public disclosure of written communications between agencies and OMB's Office of Information and Regulatory Affairs (OIRA) regarding information collection proposals under the PRA. Further, OMB has failed to show that *any* of the other withheld material falls within the scope of the deliberative process privilege or, where asserted, the presidential communications privilege. And OMB has failed to show that it foresees harm from disclosure of any of the withheld material, as FOIA requires to sustain deliberative-process privilege withholdings; or that OMB has segregated releasable material. Additionally, the presidential privilege cannot support withholding here because neither the President nor any other White House official has invoked it.

OMB's briefing underscores the deficiencies in its showing. In a FOIA case, the agency ordinarily has exclusive "knowledge of the precise content of documents withheld," *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987), and it bears the burden of justifying any withholding, even when the requester seeks summary judgment, *see Pub. Citizen Health Rsch.*

Grp. v. Food & Drug Admin., 185 F.3d 898, 904 (D.C. Cir. 1999). It is thus incumbent on the *agency* to provide specific descriptions of its withholdings, "to permit adequate adversary testing … and enable the District Court to make a rational decision." *King*, 830 F.2d at 218-19 (cleaned up, footnotes omitted). Here, OMB has offered no such specificity. Moreover, with regard to its assertions of privilege, OMB has ignored Local Civil Rule 7(h) and not set forth any undisputed facts to establish that the asserted privileges apply. Although plaintiff flagged this deficiency in its cross motion (at 13, 31), OMB has made no attempt to remedy it. *See Apollo v. Bank of Am., N.A.*, No. 17-cv-2492 (APM), 2019 WL 5727766, at *1-2 (D.D.C. Nov. 5, 2019) (denying *pro se* litigant's summary judgment motion without statement of facts and noting "[t]he court is not required to hunt for 'facts' in a filing that does not clearly identify them"). Instead, OMB muddied the waters further by making inconsistent statements about the nature and subject-matter of the communications as to which it claims presidential privilege, as well as some of its PRA-related documents. OMB also failed to respond to—and thus should be considered to have admitted—plaintiff's statement of additional material facts. *See* Fed. R. Civ. P. 56(e)(2); Local Civ. R. 7(h)(1).

The Court should grant plaintiff's cross-motion for summary judgment.

ARGUMENT

I. OMB has no basis to withhold items 16 through 27.

A. The deliberative process privilege does not apply to items 16 through 27.

1. The Paperwork Reduction Act forecloses all but two of the Exemption 5 withholdings in items 16 through 27.

OMB does not contest that the great majority of the material that OMB has withheld in items 16 through 27 under Exemption 5 falls under the PRA's public disclosure provision, 44 U.S.C. § 3507(e)(2), because that material consists of "written communication[s] between … [an]

employee of the Office of Information and Regulatory Affairs [(OIRA)], and an agency [the CFPB] … concerning a proposed collection of information." The PRA mandates that "[a]ny" such communication "shall be made available to the public." *Id.* This mandate applies to items 16 through 19, 22, and 24 through 27 in their entirety, and it applies to all the material in items 20, 21, and 23 in which OMB had made Exemption 5 redactions, other than the first Exemption 5 redactions in items 20 and 21 (which cover brief portions of the emails consisting exclusively of intra-OMB communications). *See* Pl.'s Mem. Supp. Summ. J. 14, ECF No. 37; Pl.'s Statement of Additional Material Facts ¶¶ 26-35, ECF No. 37.

In its reply and opposition memorandum, OMB insists that "the PRA is meant to interact with FOIA and allows for the application of the deliberative process privilege." Def.'s Reply Supp. Mot. Summ. J. 12, ECF No. 39 (Def.'s Opp.). But OMB does not support this assertion or attempt to address plaintiff's earlier arguments. As plaintiff's opening memorandum explained, the plain language of the PRA provision overrides the common-law deliberative process privilege.[1] The PRA unambiguously requires disclosure by providing that "[a]ny" covered communication must be made public, subject to two inapplicable exceptions. Moreover, Congress's intent to override the privilege is clear because applying the privilege as OMB advocates would render section 3507(e)(2) virtually meaningless for interagency communications and defeat Congress's aim to

[1] Contrary to OMB's assertion, plaintiff does not argue that the PRA "overrides any … Executive privileges," Def.'s Opp. 12. Plaintiff argues that the PRA disclosure provision overrides a common law privilege—the deliberative process privilege—and, in the alternative, that FOIA Exemption 5 does not apply. Plaintiff does not contend that the PRA's disclosure requirement would override the presidential communications privilege to the extent that it is constitutionally based. *See In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). OMB did not assert the presidential communications privilege, or any other constitutional privilege, with regard to items 16-27.

promote "public accountability." S. Rep. No. 104-8, at 3 (1995). *See* Pl.'s Mem. Supp. Summ. J. 15-17, 22-24; *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110-12 (1991) (holding that because courts "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof," the language of a statute "make[s] clear" that common law does not apply when applying common law would leave a statutory provision "essentially without effect"). Indeed, when Congress first amended the PRA to require disclosure of OIRA-agency communications, *see* Pub. L. No. 99-591, § 817(c), 100 Stat. 3341, 3341-338 (1986), one of the PRA's original sponsors described the amendment as a "'sunshine' provision[] which require[s] more openness on the part of both the agencies and the OIRA *in the way decisions under the act are made*." 132 Cong. Rec. 32,541 (1986) (statement of Sen. Lawton Chiles) (emphasis added). If the PRA provision did not require disclosure of deliberative information, it would not enable the public to learn "the way decisions … are made," because the deliberative process privilege obscures precisely such information. *See Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2010) (explaining that a document is "deliberative if it reflects the give-and-take of the consultative process").

Because Congress has "spoken directly to the issue at hand," *Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (citing *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981)), by enacting a "balanced scheme of disclosure and exemption," common law on the topic—here, the common-law privilege—does not apply, *id.* (holding that under FOIA's "balanced scheme of disclosure and exemption," common law regarding *disclosure* does not apply).

Alternatively, and for similar reasons, applying Exemption 5 to the communications at issue would "thwart the apparent intent of Congress," *Asiana Airlines v. FAA*, 134 F.3d 393, 398

(D.C. Cir. 1998). Congress reinforced that Exemption 5 should not apply to PRA communications by enumerating two exceptions to the PRA disclosure provision—without any reference to FOIA's exemptions. *See* 44 U.S.C. § 3507(e)(3). Indeed, if Congress had intended FOIA's exemptions (including Exemption 5) to apply to the PRA disclosure mandate, Congress would not have included PRA section 3507(e)(3)(A), which provides a disclosure exception that mimics FOIA Exemption 1 and would be superfluous on OMB's reading of the statute. *Compare* 5 U.S.C. § 552(b)(1) *with* 44 U.S.C. § 3507(e)(3)(A). *See* Pl.'s Mem. Supp. Summ. J. 17-21.

2. OMB has not shown that the two internal OMB communications in items 20 and 21 are deliberative and predecisional.

Two Exemption 5 withholdings in the PRA records fall outside the scope of the PRA disclosure provision: the exchanges between OMB employees that are prefatory to the forwarded OIRA-CFPB emails repeated in items 20 and 21 (consisting, respectively, of a phrase covering less than one line in item 20 and what appears to be a two-line paragraph in item 21). As plaintiff's opening memorandum explained (at 25-26), OMB's general and conclusory assertions are insufficient to carry the agency's burden of showing that these OMB-only exchanges are predecisional and deliberative, as required to invoke the deliberative process privilege. *See Pub. Citizen*, 598 F.3d at 876.

OMB responds by focusing on the OIRA-CFPB communications that make up the bulk of the withheld material. *See* Def.'s Opp. 12-13. Plaintiff does not contest that the OIRA-CFPB communications that fall under the PRA public disclosure provision include predecisional and deliberative material. With regard to the two OMB-*only* exchanges in items 20 and 21, however, OMB has not demonstrated the privilege applies.

For instance, OMB's memorandum asserts that the withheld material in items 16 through 27 generally is "about [a] proposed rule" and "intended to gather edits and/or feedback for the agency decisionmakers within OMB." Def.'s Opp. 13. But OMB's statement conflicts with OMB's *Vaughn* index, which describes item 20 as regarding "the status of all pending information collection requests to OMB OIRA submitted by CFPB" and makes no reference to deliberations over a proposed rule. OMB's general statement also conflicts with the title of item 21 (Smullin Decl. Ex. E), which refers to the CFPB's *final* Payday Rule (published in 2017, 82 Fed. Reg. 54,472 (Nov. 17, 2017)), not a proposed rule.[2] And nothing in the record evidences that the two intra-OMB exchanges regard feedback or edits (or that any such discussion is deliberative).

Equally insufficient is paragraph 14 in the Walsh Declaration, which OMB's opposition highlights (at 13). To show that the OMB-only material in items 20 and 21 is deliberative and predecisional, OMB must "correlat[e]" its privilege claims "with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). Instead, the Walsh Declarations throws together an amalgam of terms, without specifying which apply where, and never focuses on the redacted portions that consist exclusively of intra-OMB communications. Even if the Walsh Declaration had labeled that specific material as deliberative, that label would be insufficient, as proving that the privilege applies requires OMB to identify not only "what deliberative process is involved," but also "the role played by the documents … in the course of that process." *Coastal States Gas Corp. v. Dep't of Energy*,

[2] The number in the title of item 21, 3170-0065, corresponds with the Paperwork Reduction Act request submitted with the November 2017 final rule. *See* OMB, *OMB Control Number History, OMB Control Number: 3170-0065*, https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3170-0065.

617 F.2d 854, 868 (D.C. Cir. 1980); *see also Hall v. U.S. Dep't of Justice*, 552 F. Supp. 2d 23, 28–29 (D.D.C. 2008) ("Conclusory assertions of the privilege that merely parrot legal language or contain no factual support are insufficient."); Pl.'s Mem. Supp. Summ. J. 25-26.

OMB's suggestion that it cannot provide more detail because of a concern about "chilling effect," Def.'s Opp. 13, finds no support in the record or the law. "Because FOIA challenges necessarily involve situations in which one party (the government) has sole access to the relevant information, and that same party bears the burden of justifying its disclosure decisions, the courts must require the government to provide as detailed a description as possible—without, of course, disclosing the privileged material itself—of the material it refuses to disclose." *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996). The information generally required to justify a deliberative process privilege withholding is far more detailed than what OMB has provided, but would not reveal "the exact nature of the conversation," Def.'s Opp. 13. What OMB should have provided, but did not, is information specific to each withholding, such as "(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. Immigr. & Customs Enf't*, 373 F. Supp. 3d 16, 50 (D.D.C. 2017) (citation omitted).

B. OMB's PRA-related deliberative process privilege withholdings fail to satisfy FOIA's foreseeable harm standard or segregability requirements.

Even if the withheld material in items 16 through 27 were subject to the deliberative process privilege, OMB must disclose it. As demonstrated in plaintiff's opening memorandum, OMB has not made the heightened showing necessary to establish that releasing such material would harm an interest protected by Exemption 5, as FOIA requires to justify a deliberative process

privilege withholding. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). OMB provides only abstract and conclusory assertions, which are insufficient to satisfy FOIA's foreseeable harm requirement. *See* Pl.'s Mem. Supp. Summ. J. 26-29 (citing cases). OMB's conclusory assertions are also insufficient to meet its burden "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) (citation omitted); *see* Pl.'s Mem. Supp. Summ. J. 29-30. OMB's opposition does not acknowledge or respond to plaintiff's foreseeable harm and segregability arguments concerning items 16-27.

II. OMB has no basis for withholding items 1 through 15.

A. OMB has not shown that the presidential privilege applies to items 1 through 13.

The presidential communications privilege applies narrowly, to protect communications that "reflect presidential decision-making and deliberations and that the President believes should remain confidential." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004). OMB has not shown that items 1 through 13 satisfy this standard. For instance, OMB has not shown that these documents involve White House staff to whom the privilege can apply: the President or "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 (emphasis added). Nor has OMB demonstrated that the communications were made in the "course of" such person's "preparing advice for the President," *id.*; that any "presidential decision-making" was at issue, *Judicial Watch*, 365 F.3d at 1113; or that "application of the privilege is necessary to protect the confidentiality of communications as between the President and his advisors," *Ctr. for*

Effective Gov't v. U.S. Dep't of State, 7 F. Supp. 3d 16, 25 (D.D.C. 2013). *See* Pl.'s Mem. Supp. Summ. J. 30-36.

OMB's opposition fails to remedy these deficiencies. After attempting in its opening memorandum to link these items to White House Staff Secretary Derek Lyons, *see* Def.'s Mem. Supp. Summ. J. 7, ECF No. 34, OMB devotes pages in its opposition memorandum to repeating quotes from *past* staff secretaries about their jobs. *See* Def.'s Opp. 3-4. These quotes are both irrelevant and inadmissible. As an initial matter, OMB's *Vaughn* index and declaration only establish—at most—that one document (item 3) was received by Lyons. *See* Pl.'s Mem. Supp. Summ. J. 33. The *Vaughn* index identifies only OMB senders and recipients (or none at all) for items 1, 2, and 4 through 13.[3] And although the *Vaughn* index and Walsh Declaration make various suggestions that items 1 through 13 contain information that Lyons or someone on his staff received, the privilege is not triggered whenever a communication happens to contain information that is separately contained in a privileged communication; if it did, the privilege would sweep extraordinarily broadly, given the wide range of facts that must be communicated to the President or his advisers on a daily basis. *See* Pl.'s Mem. Supp. Summ. J. 34-35. Further, OMB does not even establish that such information was received by Lyons himself, as opposed to by his office.[4] For this reason, OMB's discussion of staff secretaries is irrelevant to items 1, 2, and 4 through 13.

[3] OMB counsel has since represented to plaintiff's counsel that the items listed in the *Vaughn* index without senders and recipients were attached to emails. Plaintiff agrees that those items were part of *some* communication if they were attachments, but OMB has not identified *which* emails included those items as attachments.

[4] The most specific statement in the Walsh Declaration (¶ 9) is that the documents "*state*" that they "*reflect*[] information that was solicited and received by the *Office of* the Staff Secretary") (emphases added), not that *any* of items 1 through 13 were *actually* received by *Lyons*. Plaintiff's

Moreover, the cited press release, articles, and opinion piece do not establish Lyons's responsibilities generally or, critically, with regard to the topics of items 1 through 13. The Court should not consider these materials' content for the truth of any matter asserted, as they are hearsay, *see* Fed. R. Evid. 801(c), and thus not "presented in a form that would be admissible evidence," Fed. R. Civ. P. 56(c)(2). *See* Fed. R. Evid. 802; *see also Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007) ("sheer hearsay … counts for nothing on summary judgment") (cleaned up); *Humane Soc'y of U.S. v. Animal & Plant Health Inspection Serv.*, 386 F. Supp. 3d 34, 44 (D.D.C. 2019) (refusing to consider, as hearsay, "out-of-court statements from private third-parties to justify an agency's withholding"). And even if the Court considered the materials admissible evidence, they would not satisfy OMB's burden to show that the privilege applies to an item received by Lyons. The materials discuss past staff secretaries' jobs, not Lyons's; recognize debate over the significance of the role; and acknowledge that the role depends on the President and the person holding the position. In short, the cited materials cannot establish that Lyons (or anyone on his staff) had "broad and significant responsibility for investigating and formulating the advice to be given the President" on any particular matter, let alone "the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 752.

OMB suggests that it could satisfy its burden, for an item received by Lyons, by establishing that "the Staff Secretary's sole job is to prepare information and advice for the President regarding decision making." Def.'s Opp. 5. But such a general description of Lyons's

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opening memorandum (at 33-34 & n.15) overlooked that the Walsh Declaration (¶ 9) also asserts that the documents reflect information that was *received* by the Staff Secretary's *office*. But while the *Vaughn* index uses a different formulation, the declaration never suggests Lyons *himself* received the pertinent information.

responsibility would not establish the necessary links between Lyons's responsibilities with regard to the *topic of the documents*; some *actual* preparation of advice by *Lyons* on *this* topic; and *actual* and *confidential* Presidential decision-making. Lyons's job might have focused on providing the president summaries of other staff's decision memos and helping arrange meetings, as some other staff secretaries suggested was a focus of their jobs. *See* Def.'s Opp. 4. But those activities do not constitute giving policy-related advice, which is the focus of the presidential communications privilege. *See* Pl.'s Mem. Supp. Summ. J. 33 n.14 (discussing *Judicial Watch*, 365 F.3d at 1113); *see also In re Sealed Case*, 121 F.3d at 752 (noting that the "privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President"). And OMB does not establish that the sole identified topic of items 1 through 13—a Treasury Department report—was the subject of any presidential decisionmaking, let alone that Lyons was charged with communicating confidential advice to the President on *that* subject. Indeed, OMB's *Vaughn* index (items 1-13) and Walsh Declaration (¶ 9) refer only to potential responsibility with regard to reports "such as" the one at issue here; they do not purport to describe Lyons's *actual* responsibility regarding *this* report.

OMB introduces confusion, and does not advance its argument, by suggesting that items 1 through 13 regard feedback on a proposed rule. *See* Def.'s Opp. 5. Nothing in the record supports that assertion. The Walsh Declaration (¶ 9) and *Vaughn* index refer only to the drafting of a Department of Treasury report. Moreover, it is not self-evident that *either* topic is one of *presidential* decision-making or that requires *presidential* confidentiality, as OMB suggests, Def.'s Mem. 5-6. Like the drafting of the Treasury report, rulemaking is generally an *agency* responsibility. *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); *Prop. of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 390 (D.D.C. 2018) ("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"). And even involvement by the President himself (which OMB has not shown) would not alone establish that *confidentiality* was at issue. *See Ctr. for Effective Gov't*, 7 F. Supp. 3d at 27 (holding privilege does not apply to document issued by President, because document was "distributed widely within the Executive Branch for non-advisory purposes"). Here, items 1 through 13 appear, collectively, to have reached multiple people within OMB, including an intern. And OMB has provided no other indication of how many other people the items might have reached (including through any earlier emails whose content is replicated in the indicated documents). *See* Pl.'s Mem. Supp. Summ. J. 35-36.

Finally, OMB mischaracterizes plaintiff's argument as suggesting that a particular withheld email must use "magic words," Def.'s Opp. 5, or that plaintiff is demanding a showing that would require revealing confidential communications, *id.* at 6. Whatever the topic of items 1 through 13, OMB could have established the relevant White House staff's role and the existence and confidentiality of any presidential decisionmaking process at issue without revealing the precise advice or using any particular words in the documents themselves. Though OMB has provided multiple and conflicting or incomplete descriptions of the topics of items 1 through 13,

OMB has not suggested the *topic* or the *fact* of confidentiality is itself confidential—it has simply failed to provide evidence supporting its assertion of privilege.

B. OMB has not shown that the presidential privilege applies to items 14 and 15.

OMB also has not shown that items 14 and 15 fall within the presidential communications privilege. *See* Pl.'s Mem. Supp. Summ. J. 36-38. Again, OMB relies on an article about White House staff to argue that the unnamed "Assistant to the President" who sent item 14 was an immediate presidential adviser. But like the material cited regarding staff secretaries, the cited article is hearsay that neither constitutes admissible evidence nor, if taken as true, would establish that the privilege applies.

Moreover, even if accepted as true, the cited article supports plaintiff, not OMB. It sheds no light on the role of the Assistant's staff member, who received item 15. *See* Walsh Decl. ¶ 11. And regarding item 14, the article underscores the ways in which OMB has failed to carry its burden to show that the "Assistant to the President" who sent that item, *see id.* ¶ 10, has "broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communication[] relate[s]," *In re Sealed Case*, 121 F.3d at 752. The article describes each "Assistant to the President" as having a longer title (referencing a particular topic) or an additional title, while recognizing that other White House personnel have a qualified title (*i.e.*, "Deputy" or "Special" "Assistant to the President"). *See* Martha Joynt Kumar, *Assistants to the President at 18 Months: White House Turnover Among the Highest Ranking Staff and Positions* 4 & app. A, http://www.whitehousetransitionproject.org/wp-content/uploads/2018/10/Kumar_Assistants_to_the_President_Turnover_10-02-2018.pdf (visited Jan. 12, 2021).

Further, the article suggests that individuals with an "Assistant to the President" title have a broad range of responsibilities. *See id.* at app. A. OMB could have, but did not, provide the full title or titles and responsibilities of the unnamed "Assistant to the President." Thus, the sole fact that OMB did provide—that the individual had "responsibilities including financial industry regulations," Walsh Decl. ¶ 10—says little to distinguish the unnamed individual from the range of individuals with related titles, many of whom might touch on financial regulation at some point, without having "broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which" item 14 relates. Indeed, the article does not even state that *every* Assistant to the President "provide[s] policy recommendations" to the President or that *every* Assistant is one of "the most influential" advisers to the President. Kumar, *Assistants to the President*, *supra*, at 1. The article describes the group as providing advice "as well as coordinating and implementing" the President's decisions, *id.* at 4, and states that the title has been given to individuals serving the First Lady and the Vice President (and whose responsibilities to advise the *President* are thus presumably limited), *see id.* at 16, 20. A White House document also shows a similar range of titles and responsibilities. *See* Executive Office of the President, *Annual Report to Congress on White House Office Personnel* (June 28, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/06/July-1-2019-Report-FINAL.pdf.

OMB also cites its *Vaughn* index descriptions of items 14 and 15. *See* Def.'s Opp. 7. But OMB fails to account for the fact that item 15's description appears to be a typographical error; it repeats that of item 14, conflicts with the Walsh Declaration (¶ 11), and conflicts with the other columns in the *Vaughn* index for item 15 (which identify a different sender and recipient). *See* Pl.'s Mem. Supp. Summ. J. 38 n.16. In addition, the statement does not establish that the privilege

applies. The statement not only fails to satisfy the "broad and significant responsibility" standard, but also does not show that either communication was made "in the course of" the Assistant's performance of the "function of advising the President" on the topic of the communication, *In re Sealed Case*, 121 F.3d at 752; or that the communications "reflect presidential decision-making and deliberations … that the President believes should remain confidential," *Judicial Watch*, 365 F.3d at 1113. At most, the *Vaughn* index asserts that some (unidentified) fact was used by some person (not necessarily a sender or recipient of item 14 or 15) at some (unidentified) point to formulate advice to the President. *See* Pl.'s Mem. Supp. Summ. J. 37-38. It does not show the privilege applies.

C. OMB's declaration is insufficient to invoke the presidential privilege.

The D.C. Circuit has instructed that an agency cannot by itself invoke the presidential privilege. *See Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 935 (D.C. Cir. 1982) ("Only the President, not the agency, may assert the presidential privilege."). This holding alone resolves that OMB cannot withhold items 1 through 15 under the presidential privilege, as OMB submitted only an agency declaration to support its privilege claims. *Common Cause*'s holding is unqualified and consistent with the Supreme Court's and D.C. Circuit's repeated suggestion that only a President, former President, or limited other White House officials can invoke the privilege. *See In re Sealed Case*, 121 F.3d at 744 & n.16; Pl.'s Mem. Supp. Summ. J. 38-39. Although OMB characterizes *Common Cause*'s statement about invocation of the privilege as dicta, *see* Def.'s Opp. 9, the opinion does not support that assertion: *Common Cause* expressly stated that the reason it did not address any claim of presidential privilege was that only the President could invoke that privilege, and he had not done so. *See* 674 F.2d at 935.

OMB notes its consultation with the White House Counsel's office, *see* Def.'s Opp. 10 n.5, but offers no evidence that such office invoked the privilege. OMB's suggestion in briefing that the White House Counsel's office "agreed with the invocation" of the presidential communications privilege, *id.*, likewise has no evidentiary support. The Walsh Declaration (¶ 12) mentions "reviewing the facts necessary to determine that the documents contained Presidential communications," but does not state that *anyone* formally invoked the privilege; that the White House Counsel agreed with such invocation; or that the Counsel did so at the President's direction, as should be required to invoke the privilege, *see* Pl.'s Mem. Supp. Summ. J. 38-39.[5]

The D.C. Circuit's more recent opinion in *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Homeland Sec.* ("*CREW*"), 532 F.3d 860 (D.C. Cir. 2008), is wholly consistent with *Common Cause.* In *CREW*, a FOIA case involving Secret Service visitor logs, the court held that it lacked jurisdiction to consider an interlocutory appeal from an order denying the government's summary judgment motion, which had argued that the visitor logs were not agency records. *See id.* at 862. Although the government had "reserve[d] the right to assert any applicable exemption claim(s) prior to disclosure," *id*., "most notably Exemption 5," *id*., if it lost on the agency records issue, it contended that requiring invocation of Exemption 5 would cause injury by "requiring the President or Vice President to consider the assertion of privileges," *id.* at 864. In dismissing as "unpersuasive" the government's arguments that it should not be required to invoke the exemption,

[5] Thus, this Court need not address the open question of whether the President's staff can invoke the privilege or he (or a former President or perhaps the Vice President) must do personally. *See Judicial Watch*, 365 F.3d at 1114 ("whether a President must personally invoke the privilege remains an open question"). Even with its second filing, OMB has not introduced any invocation by "a member of [the President's] staff," *In re Sealed* Case, 121 F.3d at 744 n.16.

id. at 865, the court repeatedly assumed—consistent with the government's own description of its concern, *id.* at 864—that the President, Vice President, or their advisers would be responsible for deciding to invoke the presidential privilege, *see id.* at 866 (discussing White House Counsel review for "any assertion of privilege"); *id.* at 867 (referring to review by "the President, Vice President, or their staffs," "the burden on the White House or Office of the Vice President to decide whether to claim Exemption 5," and a "blanket claim of privilege" by the "White House").

OMB attempts to minimize *CREW*'s analysis by pointing out that some of the cases it cites did not involve invocation by White House staff (or did not state whether they did). *See* Def.'s Opp. 10. But in light of the opinion's repeated acknowledgment of the work that would be required by the President, Vice President, or their staff to invoke the privilege, the opinion's citations to such cases can hardly be taken as a suggestion (let alone a holding) that agency invocation suffices to establish that the presidential privilege applies. Indeed, if the court of appeals thought agency invocation would suffice, it would have rejected out of hand the government's concern about "requiring the President or Vice President to consider the assertion of privilege." 532 F.3d at 864.

OMB also contends that FOIA allows an agency alone to invoke the privilege to withhold documents under Exemption 5—even if that would not establish that the privilege applies in civil litigation. *See* Def.'s Opp. 7. And OMB makes this argument in absurdly sweeping terms, suggesting that it can withhold a document under Exemption 5 without "actually prov[ing]" that a document is privileged. *Id.* More narrowly, OMB suggests that an agency declaration alone can establish that the presidential privilege applies in FOIA, even if Presidential or other White House invocation is required in civil discovery, because agencies "need not adhere to the procedural formalities" required in civil discovery. *See id.* at 8. OMB's arguments, however, are inconsistent

not only with *Common Cause*, but also with FOIA precedent and the suggestions in other Supreme Court and D.C. Circuit case law that only a current President, former President, the White House Counsel acting at the President's direction (or perhaps the Vice President) may invoke the privilege. *See* Pl.'s Mem. Supp. Summ. J. 38-40.

OMB relies heavily on *Lardner v. U.S. Dep't of Justice*, No. 03-cv-0180 (JDB), 2005 WL 758267 (D.D.C. Mar. 21, 2005), where the court considered whether "any requirement that the President personally invoke the presidential communications privilege in civil discovery … automatically carr[ies] over into the Exemption 5 analysis." 2005 WL 758267, at *7. *Lardner* held that even if the President must invoke the presidential communications privilege in civil litigation, an agency official's declaration demonstrating that a document "fall[s] within the scope of the presidential communications privilege" is sufficient to justify a FOIA withholding under Exemption 5. *Id*. at *6.

The district court's ruling in *Lardner*, however, is neither binding nor persuasive. For example, *Lardner* failed even to cite *Common Cause*. Moreover, *Lardner* analogized to a circumstance in which an individual's particular need for access to privileged documents might overcome the presidential communications privilege in civil discovery, even though need is irrelevant in an Exemption 5 case. *Id*. (discussing *FTC v. Grolier Inc*., 462 U.S. 19 (1983)). But individualized need is irrelevant in a FOIA case because Exemption 5 asks only whether a document "would be routinely or normally disclosed" in litigation, not whether the privilege underlying Exemption 5 could be overcome in rare litigation circumstances. *Grolier*, 462 U.S. at 26 (internal quotation marks omitted). Whether the presidential communications privilege is properly invoked determines whether the privilege applies to a document in the first place, and

thus determines whether such privileged document would be routinely or normally disclosed in litigation. *Cf. In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984) (providing that attorney-client privilege "applies only if … [it] has been … claimed").

OMB's argument establishes only that if the presidential privilege is properly invoked and a record falls within its scope, a court in a FOIA case should not inquire whether the privilege (which is qualified) would be overcome by a particularized need for the information if asserted in litigation. OMB's attempt to expand the reasoning of *Grolier* beyond those bounds would suggest that an agency can invoke a privilege under FOIA, without evidence of *any* element the agency finds inconvenient to prove (whether the inconvenience is to an agency, the President, or anyone else). Nothing in FOIA law supports such a rule. *See, e.g.*, *Pub. Citizen*, 598 F.3d at 876 (requiring proof that a document is predecisional *and* deliberative to withhold it under the deliberative process privilege); c*f. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001) (rejecting an application of Exemption 5 that would "drain[]" the requirement that documents be intra-agency or inter-agency "of independent vitality"). And OMB's concern for the burden on the President is unwarranted given the narrowness of the privilege and the limited occasions for its assertion in FOIA litigation.

Finally, the perverse consequences of the rule created by *Lardner* cast further doubt on that decision's rationale and OMB's other attempts to escape the holding of *Common Cause*. Under *Lardner*, an agency could rely on Exemption 5 to avoid disclosure of material for which the President would *not* wish to invoke privilege, so long as the President *could* have invoked the privilege had he wished to do so. It strains credulity to believe that Congress, in adopting

Exemption 5, intended to permit agencies to withhold material as privileged where the privilege holder does not wish to assert it.

D. OMB cannot withhold earlier emails replicated in *Vaughn* index items, on the basis of the presidential privilege.

Plaintiff's opening memorandum explained (at 41-42) that in asserting the presidential communications privilege, OMB failed to address—and thus cannot sustain—its withholding of any earlier emails that were replicated in *Vaughn* index items 1 through 15, but that OMB did not identify separately. Such earlier emails (with their attachments) are standalone records that OMB must produce, absent any showing that the privilege applies to them specifically.

In its opposition, OMB ignored this argument entirely, only noting in a separate part of its memorandum that it believes its production practices are routine. *See* Def.'s Opp. 13. The relevant facts, Pl.'s Statement of Additional Material Facts ¶¶ 16-17, 19-20, should be considered admitted, as OMB provides no response. *See* Fed. R. Civ. P. 56(e)(2); Local Civ. R. 7(h)(1). And because OMB has still made no attempt to explain or justify its withholding of any such earlier emails, it must produce them.

E. OMB has failed to carry its burden to withhold items 1 through 15 under the deliberative process privilege.

1. OMB has not established that items 1 through 15 are privileged.

OMB's barebones and conclusory descriptions of items 1 through 15 also fail to establish that the documents are predecisional and deliberative, and thus properly withheld under the deliberative process privilege. *See* Pl.'s Mem. Supp. Summ. J. 42. In its opposition, OMB responds only with assertions that are unsupported and internally contradictory.

For instance, OMB asserts that items 1 through 15 concern the CFPB's Payday Rule and "no other potential topic." Def.'s Opp. 11. This statement is made without supporting evidence and is inconsistent with OMB's earlier submission: OMB's *Vaughn* index and Walsh Declaration (¶ 9) say that items 1 through 13 concern a draft of a Department of Treasury report. The report, in turn, discussed the Payday Rule as just one topic among many, when it was published, and the *Vaughn* index and Walsh Declaration do not relate items 1 through 13 to that aspect of the report.[6] Regarding item 14, OMB's *Vaughn* index mentions "financial regulation" but not the Payday Rule, and suggests, through the document's title ("Re: Various"), that other, unidentified subjects are discussed. Regarding item 15, the Walsh Declaration (¶ 11) and the *Vaughn* index refer back to item 14, and imply that item 15 regards meeting scheduling. And though OMB asserts that the records would not have been identified as responsive to plaintiff's request if they did not relate to the Payday Rule, OMB mischaracterizes the request (and, in any case, provides no basis for its suggestion that whatever made these documents responsive to the request was the only topic at issue). The request sought records regarding payday, vehicle title loans, or longer-term consumer installment loans, whether or not they related to the CFPB Payday Rule. *See* Pl.'s Statement of Additional Material Facts ¶ 13; Borné Decl. Ex. A; *see also* Joint Status Report of Sept. 25, 2019 at 2, ECF No. 16 (confirming that OMB was reviewing any identified document for responsiveness to any part of plaintiff's FOIA request).

[6] *See* Steven T. Mnuchin & Craig S. Phillips, *A Financial System that Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation* (July 2018), https://tinyurl.com/y823jpjf.

OMB also suggests (at 11) that it has satisfied its burden because it described the roles of the individuals and documents at issue. But to establish that a document is predecisional and deliberative, OMB must show "the nature of the specific deliberative process involved," as well as "the function and significance of the document in that process, and … the nature of the decisionmaking authority vested in the document's author and recipient," *New Orleans Workers' Ctr. for Racial J.*, 373 F. Supp. 3d at 50 (citation omitted). And OMB has not made even the showings it purports to identify. For example, OMB has not explained the "decisionmaking roles" of all the individuals involved or shown that items 1 through 13 were used "to help formulate advice to the President," Def.'s Opp. 11, *see supra* at pp. 8-12, let alone established that all the material is "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters," *Pub. Citizen*, 598 F.3d at 876 (citation omitted). With regard to item 14, OMB's declaration makes a general reference to advice to the President but fails to identify a "clear 'process' leading to a final decision on" *any* particular issue, *Coastal States Gas Corp.*, 617 F.2d at 868 (stating that without such a process, "there is an additional burden on the agency to substantiate its claim of privilege"). At most, what OMB characterizes as advice, with regard to items 14 and 15, appears to be "information" (Walsh Decl. ¶ 10) and a scheduling discussion, *see Vaughn* index item 15 (titled "Meeting this afternoon"), neither of which would necessarily be deliberative or predecisional—especially as OMB as failed to identify "what deliberative process is involved," *Coastal States Gas Corp.*, 617 F.2d at 868.

2. OMB has not linked the withheld material to foreseeable harm or carried its burden regarding segregability.

OMB does not contest that to withhold items 1 through 15 under the deliberative process privilege, it must establish that it "reasonably foresees that disclosure would harm an interest

protected by" that privilege, 5 U.S.C. § 552(a)(8)(A)(i)(I), as well as "demonstrate that all reasonably segregable information has been released," *Am. Immigr. Council*, 21 F. Supp. 3d at 83 (citation omitted). *See* Pl.'s Mem. Supp. Summ. J. 43-44.

OMB asserts that it satisfied its burden by withholding only the parts of the records that are deliberative and that would cause foreseeable harm, and by making a generic claim about "frank discussions being chilled" by disclosure of deliberative materials, Walsh Decl. ¶ 17. *See* Def.'s Opp. at 11-12. That argument is wrong, for two reasons.

First, because OMB simultaneously relied on the presidential privilege and the deliberative process privilege with regard to items 1 through 15, OMB did not segregate and withhold only deliberative portions of the records that would cause foreseeable harm (or otherwise indicate any determination as to which portions could be withheld under the deliberative process privilege, if the Court concludes that this privilege, but not the presidential communications privilege, applies). Instead, OMB withheld these items in full. *See* Def.'s Opp. 6 (referring to the presidential privilege protecting documents in their entirety); *see also* Pl.'s Mem. Supp. Summ. J. 43-44 (explaining insufficiency of OMB's conclusory statements about segregation). The reference in OMB's opposition (at 11) to plaintiff's exhibits makes no sense. Plaintiff's exhibits, which principally consist of emails reflected in items 16 through 27 of the *Vaughn* index, shed no light on the content of items 1 through 15, the consequences of disclosing such records, or any analysis as to which parts of those records are deliberative and would cause foreseeable harm if disclosed.

Second, OMB nowhere responds to the authority that plaintiff cites, showing that OMB's generic reference to a chilling effect, which would be equally applicable to anything that fell within

the scope of the deliberative process privilege, is insufficient to show foreseeable harm under FOIA. *See* Pl.'s Mem. Supp. Summ. J. 26-28, 43.

OMB's suggestion (at 12), that providing more detail would undermine the deliberative process privilege, is nonsensical. In *Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364 (D.C. Cir. 2020), for instance, the agency satisfied its burden to provide more than "'generalized' assertions" of foreseeable harm, *id.* at 371, but did so without revealing the precise content of the withheld records. *See id.* at 370-71. Similarly, an agency can explain "the reasons behind" its segregability conclusions and "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document," without revealing deliberations themselves. *Mead Data*, 566 F.2d at 261 (holding that "unless the segregability provision of the FOIA is to be nothing more than a precatory precept," agencies must provide such reasons).

III. OMB must link emails with their attachments.

In addition to producing withheld material, OMB should link the emails—including the earlier emails replicated in any identified email thread—to their attachments, to the extent it has not already done so. As plaintiff has explained (at 44-45), this information will enable plaintiff to understand email documents as they were sent. And to comply with FOIA's requirement to indicate "[t]he amount of information deleted … on the released portion of [a] record," 5 U.S.C. § 552(b), OMB should have provided such information with emails that it produced in part.

OMB protests that further information is unnecessary because it placed attachments after emails when it produced documents. *See* Def.'s Opp. 14. But that assertion does not resolve the concern. Plaintiff only seeks such information for the emails and attachments at issue in the parties' cross motions. And that set of documents includes emails and attachments that OMB did *not*

produce together. *Vaughn* items 1 through 15 are ones that OMB withheld in full. *See* Walsh Decl. ¶ 8. *Vaughn* items 16 through 27 include attachments that OMB withheld in full and whose link to particular emails OMB only confirmed in response to an inquiry by counsel. *See* Smullin Dec. ¶¶ 11-13 & Ex. N. Further, OMB has not systematically identified which attachments belong to which emails, when it is not obvious from a production: these circumstances include when an attachment was withheld or when the attachment was made to an email whose text was replicated in a later email thread, but not produced separately. *See* Smullin Decl. ¶¶ 6, 10-13.

When OMB produces emails, the headers of produced email documents generally identify the names of attachments—to the most recent (that is, top) email in a thread. Providing any other missing information to link all the emails at issue (including earlier emails replicated in produced threads) and their attachments should be a straightforward matter for OMB.

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 the withheld material at issue and to identify which emails, or earlier emails reproduced in such emails, contain attachments and which documents constitute such attachments.

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Respectfully submitted,

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