UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL CONSUMER LAW CENTER, Plaintiff, vs. UNITED STATES DEPARTMENT OF EDUCATION, Defendant.	Civil Action No. 18-10763-IT

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

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INTRODUCTION

Plaintiff National Consumer Law Center (NCLC) filed this lawsuit against defendant U.S. Department of Education (ED) after receiving a plainly insufficient response to its Freedom of Information Act (FOIA) request and no response to its administrative appeal challenging that response. Only after NCLC sued did ED finally undertake a meaningful search for responsive records and produce thousands of additional pages. One record produced by ED is a "Borrower Defense Unit Claims Review Protocol" (Protocol) that provides guidance to agency employees processing applications from student borrowers asserting defenses to loan repayment. ED, however, withheld portions of the Protocol providing guidance as to when partial relief under the borrower defense regulations is appropriate and examples of information used by ED to evaluate borrower defense applications. Because neither the deliberative process privilege nor the attorney-client privilege applies to this explanatory information, ED wrongly withheld this information. Accordingly, the Court should deny ED's motion for summary judgment and grant summary judgment to NCLC on the challenged redactions.

BACKGROUND

Under the Higher Education Act, ED is required to promulgate regulations identifying "which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment" of federal Direct Loans. 20 U.S.C. § 1087e(h). In November 2016, ED promulgated revised borrower defense regulations to, among other things, "specify the conditions and processes under which a borrower may assert a defense to repayment of a Direct Loan." Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926, 75,926 (Nov. 1, 2016); *see also* Student

Assistance General Provisions, 82 Fed. Reg. 6253 (Jan. 19, 2017) (collectively, "Revised Borrower Defense Regulations"). On June 16, 2017, ED postponed the July 1, 2017, effective date of the Revised Borrower Defense Regulations, citing pending litigation challenging the regulations. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 27,621 (June 16, 2017) (citing *Cal. Ass'n of Private Postsecondary Sch. v. DeVos* (*CAPPS*), No. 1:17-cv-00999 (D.D.C. May 24, 2017)).

On June 30, 2017, NCLC submitted a FOIA request seeking communications that "discuss, describe, refer to, or otherwise reference" *CAPPS* or any potential litigation regarding the Revised Borrower Defense Regulations. Decl. of Persis Yu ¶ 2; Decl. of Lauren Wilson ¶ 4, Ex. 2 (Doc. 31-1 at 2–3, 16–19). NCLC further identified particular persons—including ED employees—whose communications would likely contain responsive records. *Id.*

On December 7, 2017, ED responded to NCLC's FOIA request, producing 121 pages of responsive records, which contained redactions under FOIA exemptions 5 and 6. Yu Decl. ¶ 3; Wilson Decl. ¶ 8, Ex. 5 (Doc. 31-1 at 4, 27–29). On January 10, 2018, NCLC submitted an administrative appeal of ED's partial denial of the FOIA request. Yu Decl. ¶ 4. Specifically, NCLC appealed ED's response for failure to conduct an adequate search for responsive records and for improperly relying on exemption 5 to withhold certain information from the responsive records. *Id.* NCLC did not receive a determination of its administrative appeal, *id.* ¶ 5, and on April 19, 2018, it filed this case, *see* Compl. (Doc. 1).

In discussions between the parties after the lawsuit was filed, NCLC identified for ED deficiencies in ED's response to the FOIA request. Wilson Decl. ¶¶ 10–11, Exs. 6 & 7 (Doc. 31-1

at 4–5, 31–32, 34–37). On October 5, 2018, ED produced an additional 4678 pages of responsive records to NCLC. Wilson Decl. ¶ 12, Ex. 8 (Doc. 31-1 at 5, 39–40). One of the records contained within ED's additional production was the Protocol, which it released with redactions. *See* Wilson Decl. ¶ 14, Ex. 10 a 1–2 (Doc. 31-1 at 5, 51–52). On May 2, 2019, the agency released a new copy of the Protocol with fewer redactions, but it continued to redact information under the title "Example of Eligibility Determination" and information under the title "Relief Determination." *See* Wilson Decl., Ex. 11 at 9, 10 (Doc. 31-1 at 88, 89).

LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "FOIA cases are typically decided on motions for summary judgment." *Am. Civil Liberties Union Found., Inc. v. ED*, 320 F. Supp. 3d 270, 276 (D. Mass. 2018).

Where, as here, the government has withheld responsive information, "[t]he government bears the burden of proving that withheld materials fall within one of the statutory exemptions." *Carpenter v. DOJ*, 470 F.3d 434, 438 (1st Cir. 2006); 5 U.S.C. § 552(a)(4)(B). Although the agency may satisfy its burden by declarations, declarations that "contain only general and conclusory assertions concerning the documents" are insufficient. *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 231 (1st Cir. 1994). Summary judgment based on declarations is only appropriate "when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of

agency bad faith." *Am. Civil Liberties Union Found. of Mass. v. FBI*, No. 14-cv-11759, 2016 WL 4411492, at *3 (D. Mass. Aug. 17, 2016) (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). This Court reviews the agency's claimed exemptions *de novo*. *Reilly v. EPA*, 429 F. Supp. 2d 335, 341 (D. Mass. 2006); 5 U.S.C. § 552(a)(4)(B).

ARGUMENT

"[FOIA's] basic purpose is 'to ensure an informed citizenry, vital to the functioning of a democratic society,' or, stated more specifically, 'to open agency action to the light of public scrutiny.'" *Church of Scientology*, 30 F.3d at 228 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), and *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772 (1989)). "The policy underlying FOIA is … one of broad disclosure, and the government must supply any information requested by any individual unless it determines that a specific exemption, narrowly construed, applies." *Id.*

Exemption 5—the only exemption at issue in this case—exempts from disclosure "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). As the Supreme Court and the First Circuit have instructed, exemption 5 must be construed "as narrowly as is 'consistent with efficient Government operation.'" *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 557 (1st Cir. 1992) (quoting *EPA v. Mink*, 410 U.S. 73, 89 (1973)).

Two types of withheld information in the Protocol are at issue: (1) guidance for agency employees on when partial relief under the borrower defense rules is appropriate; and (2) examples of how the agency determines eligibility for relief under the borrower defense rules. The government invokes the deliberative process privilege and the attorney-client privilege, but neither justifies withholding either category of information.

I. The Deliberative Process Privilege Does Not Justify Withholding Either the Guidance or the Examples.

Exemption 5 incorporates the deliberative process privilege, which covers documents that are "both 'predecisional' and 'deliberative.'" *Providence Journal*, 981 F.2d at 557. To be predecisional, the government must "(i) pinpoint the specific agency decision to which the document correlates, (ii) establish that its author prepared the document for the purpose of assisting the agency official charged with making the agency decision, and (iii) verify that the document precedes, in temporal sequence, the decision to which it relates." *Id.* (internal quotation marks and citations omitted). A document is deliberative if it "(i) formed an essential link in a specified consultative process, (ii) reflects the personal opinions of the writer rather than the policy of the agency, and (iii) if released, would inaccurately reflect or prematurely disclose the views of the agency." *Id.* at 559 (internal quotation markets and brackets omitted). In other words, the document "must 'reflect the give-and-take of the consultative process.'" *Id.* (quoting *Access Reports v. DOJ*, 926 F.2d 1192, 1195 (D.C. Cir. 1991)). The privilege protects documents that "relate[] to the process of formulating policy," that is, those that "contain[] considerations of a policy's merits, rather than mere facts or articulations of existing policy." *National Immigration Project of the National Lawyers Guild v. DHS* (*NIPNLG*), 868 F. Supp. 2d 284, 292 (S.D.N.Y. 2012); *see also Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) ("The deliberative process privilege, we underscore, is centrally concerned with protecting the process by which *policy* is formulated.").

Tellingly, neither ED's memorandum nor its declarant directly states that the Protocol is either predecisional or deliberative.[1] Instead, ED claims that the agency's "ability to reach the best

[1] ED's first production of the Protocol included an attachment that ED identified as a "draft (continued…)

possible decisions would be undermined if employees and contractors were unable to candidly share advice and recommendations." Def. Mem. 9 (Doc. 31). That statement is inapposite, as the name of the document itself reflects. "Protocol" in this context denotes a "convention" that others are expected to follow; it is a particular "usage or custom" or "a rule of conduct or behavior." *Protocol*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/protocol (last visited June 6, 2019); *Convention*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/convention (last visited June 6, 2019). The rule or custom by which agency employees are instructed to process borrower defense applications does not reflect the "give-and-take of the consultative process," *Providence Journal*, 981 F.2d at 559; it is a statement of agency policy. Review of the specific information withheld—the partial relief guidance and the borrower defense examples—further demonstrates the fallacy of ED's position.

A. Partial Relief Guidance

Under the heading "Relief Determination," ED has redacted a portion of the explanation concerning "[p]artial relief" under its borrower defense regulations. *See* Wilson Decl., Ex. 11 at 10 (Doc. 31-1 at 89). Although ED claims the deliberative process privilege, the partial relief guidance is an explanation of agency policy, not a deliberation underlying the development of agency policy, as the directional flow of this information within ED confirms. Moreover, ED's claim that disclosure would cause public confusion and chill agency deliberations is unfounded.

First, ED's own description of this information in its *Vaughn* index makes clear why the deliberative process privilege does not apply: The information is "guidance on when partial relief under the borrower defense to repayment rules may be appropriate." Wilson Decl., Ex. 12 at 2

schedule of potential Agency actions related to borrower defense." Wilson Decl., Ex. 10 at 6 (Doc. 31-1 at 56). NCLC does not seek disclosure of this attachment.

(Doc. 31-1 at 93); *see also id.* ¶ 19 (referring to the Protocol as "the guidance document"). Because guidance "reflects … the policy of the agency," and not "the personal opinions of the writer," it is not deliberative. *Providence Journal*, 981 F.2d at 559; *see, e.g.*, *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (holding that advice memoranda from agency chief counsel to field personnel intended to promote "uniformity" of decisionmaking and not "formally binding" were statements of "government policy" not subject to deliberative process privilege); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980) (explaining that the deliberative process privilege does not cover documents that "represent interpretations of established policy on which the agency relies in discharging its regulatory responsibilities").

The key distinction between a document covered by the deliberative process privilege and a document not covered is whether the document "assist[s] officers within an agency with [agency] policy formulation" or merely concerns the explanation of existing agency policy. *NIPNLG*, 868 F. Supp. 2d at 292. Here, according to ED, the document was created by "[a]gency counsel who specialized in borrower defense" to provide advice and guidance to other agency "attorneys and contract attorneys who were responsible for making initial determinations on" borrower defense applications. Wilson Decl. ¶ 19; *see also id.*, Ex. 12 at 2 (Doc. 31-1 at 93) (similar *Vaughn* index description). The agency counsel who drafted the document were not assisting borrower-defense processing staff in developing agency policy; they were explaining agency policy so that processing staff could do their jobs. Accordingly, the Protocol identifies one of its four "Guiding Principles" as to "[a]chieve consistency among similarly-situated borrowers." *Id.*, Ex. 11 at 3 (Doc. 31-1 at 82).

In many respects, this guidance is similar to that at issue in *Johnson v. CIA*, 330 F. Supp. 3d 628 (D. Mass. 2018). There, this Court considered an agency's redaction under the deliberative

process privilege of information that provided guidance to agency employees about "the risks and benefits of certain activities on social media" to "inform their decision-making process" about an agency social media account. *Id.* at 646. Although the document was "used to aid employees in making decisions" concerning the agency's social media account, it did not fall within the scope of the privilege. *Id.* ("Although it may aid the deliberative process, the document itself is not actually deliberative."). The same is true here: The partial relief guidance may aid the processing staff in evaluating borrower defense applications, but the guidance itself is neither deliberative nor predecisional. Instead, it sets forth agency policy. Although the guidance precedes individual determinations on particular applications, it does not precede the development of the agency policy it reflects. *See ACLU v. ED*, 320 F. Supp. 3d at 280 (rejecting agency claim that emails at issue were predecisional because they were created "prior to a final decision with respect to a particular borrower issue" because "such a decision would not necessarily reflect the formulation of a new policy, rather than the application of an existing policy to a particular set of facts").

Second, the flow of the information confirms that the guidance is not covered by the deliberative process privilege. *See Reilly*, 429 F. Supp. 2d at 334 ("[W]hether a particular document is exempt under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process." (quoting *Lead Indus. Ass'n v. Occupational Health & Safety Admin.*, 610 F.2d 70, 80 (2d Cir. 1979))). As courts have explained, information moving "from a subordinate to a superior official is more likely to be predecisional," whereas information "moving in the opposite direction" is more likely to be instructive or explanatory. *Coastal States*, 617 F.2d at 868; *see also Taxation With Representation Fund v. IRS*, 646 F.2d 666, 683 (D.C. Cir. 1981) ("[The documents] flow from the Assistant Commissioner (Technical) and Chief Counsel to subordinate attorneys and other staff persons within the agency

to be used as interpretative guides and research tools. As such, they cannot be viewed as deliberative/predecisional documents."). Similarly, a document that moves "'horizontally' between agency components" "does not match the 'classic case of the deliberative process at work,' which involves a vertically-moving memorandum simply recommending legal strategy." *Evans v. U.S. Office of Pers. Mgmt.*, 276 F. Supp. 2d 34, 40–41 (D.D.C. 2003) (quoting *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1154 (D.C. Cir. 1979)); *cf. Nat'l Day Labor Organizing Network v. ICE*, 811 F. Supp. 2d 713, 752 (S.D.N.Y. 2011) (holding an email seeking clarification of agency policy moving "along horizontal lines" from one component to another of the same agency was not subject to the deliberative process privilege).

Although ED has not specified the exact hierarchy of the staff involved, the fact that the the Protocol is referred to as a "guidance document" and was created by "[a]gency counsel who *specialized in borrower defense*" for use by attorneys that make "*initial* determinations" on borrower defense applications, Wilson Decl. ¶ 19 (emphases added), demonstrates that it is a top-down communication. Because the guidance is moving from agency counsel who develop agency policy on borrower defense to "subordinate attorneys" who use the guidance to implement agency policy, it cannot properly be deemed deliberative. *Taxation With Representation Fund*, 646 F.2d at 683.

Lastly, rather than provide the Court with any facts that would support its invocation of the deliberative process privilege, ED parrots two policy justifications underlying the privilege, baldly asserting that releasing the guidance would "cause public confusion" and would "chill[]" discussions between ED employees. Def. Mem. 9; Wilson Decl. ¶¶ 20–21.[2] As an initial matter,

[2] ED's memorandum and supporting declaration are unclear as to whether its "public confusion" assertion applies to both the guidance and the examples or only the latter.

these statements are no more than "general and conclusory assertions concerning the documents" that are wholly insufficient to satisfy the government's burden. *Church of Scientology*, 30 F.3d at 231. Moreover, there is no logical basis for them.

With respect to "public confusion," ED's only explanation is that the guidance "is not all the information [ED] considered to determine loan forgiveness, and may not be an accurate reflection of the reasons and rationale applied in other borrower defense determinations." Def. Mem. 9; Wilson Decl. ¶ 20. ED fails to explain, however, how "guidance" included in an agency "Protocol" that attorneys specializing in borrower defense prepared to aid staff processing borrower defense applications could be so incomplete that its disclosure would cause public confusion. With respect to "chilling" discussions in the agency, disclosure of the guidance could not chill the communications the deliberative process privilege is intended to protect: those concerning the formulation of agency policy. *See NIPNLG*, 868 F. Supp. 2d at 292; *Petroleum Info. Corp.*, 976 F.2d at 1435. Because, as explained above, the guidance is an explanation of agency policy and not part of "the give-and-take of the consultative process," *Johnson*, 330 F. Supp. 3d at 646 (quoting *Stalcup v. CIA*, 768 F.3d 65, 70 (1st Cir. 2014)), its disclosure would not chill the discussions that occur during the consultative process of developing agency policy.

B. Borrower Defense Examples

On a page of the Protocol labeled "Example of Eligibility Determination," ED redacted examples of particular factors used to determine eligibility for borrower defense claims, which it also asserts are covered by the deliberative process privilege. Wilson Decl., Ex. 11 at 9 (Doc. 31-1 at 88); Def. Mem. 9. Again, the claimed harms from disclosure are unsupported.

To begin with, the examples in the Protocol are not subject to the deliberative process privilege for many of the same reasons already discussed with respect to the partial relief

guidance—because the Protocol sets forth guidance for agency decisionmaking and provides information from a superior official to a subordinate. *See supra* Part I.A.

In addition, although ED does not state clearly whether the "examples" are real, hypothetical, or a mixture, its declarant indicates that they are likely real examples pulled from ED's analysis of borrower defense applications from Corinthian Colleges students. *See* Wilson Decl. ¶ 19. However, "[t]he deliberative process privilege does not shield documents that simply state or explain a decision the Government has already made." *In re Pharm. Indus. Average Wholesale Price Litig.*, 254 F.R.D. 35, 40 (D. Mass. 2008). Using examples of information from already processed borrower-defense applications to "illustrate the legal framework for determining eligibility for student loan forgiveness," Def. Mem. 8, thus does not reveal deliberative material. *See also Providence Journal*, 981 F.2d at 557 (predecisional document must "precede[], in temporal sequence, the 'decision' to which it relates"). On the other hand, to the extent that the examples are hypothetical scenarios offered to illustrate how to apply agency policy, they are indistinguishable from the guidance discussed in Part I.A.

In analogous circumstances, the D.C. Circuit has rejected the argument that the deliberative process privilege covered an agency's application of its policy to both real and hypothetical examples. In *Coastal States*, the court explained that the advice memoranda at issue were "more akin to a 'resource' opinion about the applicability of existing policy to a certain state of facts, *like examples in a manual*, to be contrasted to a factual or strategic advice giving opinion." 617 F.2d at 868 (emphasis added). As in that case, here, "[n]o 'decision' is being made or 'policy' being considered; rather the documents discuss established policies and decisions [concerning] the agency regulations in the light of a specific, and often hypothetical, fact pattern." *Id.*

Nonetheless, ED again claims that disclosure of these examples would have a chilling effect and would cause public confusion. Def. Mem. 9. Again, these assertions are conclusory. *See supra* Part I.A. Moreover, ED is wrong that disclosure of the examples would cause public confusion because they are "not all the information [ED] considered to determine loan forgiveness, and may not be an accurate reflection of the reasons and rationale applied in other borrower defense determinations." Def. Mem. 9. As the face of the document makes clear, these are "examples" of particular factors considered in the borrower defense analysis and obviously not the full rationale of a particular determination. Illustrating this point—and belying ED's position that the examples cannot be disclosed—ED has disclosed one set of examples: "Corinthian misrepresent[ations]" to students that "the credits they earned would be generally transferrable to other institutions." Wilson Decl., Ex. 11 at 9 (Doc. 31-1 at 88). What follows that heading are statements (likely from processed applications of Corinthian Colleges students that applied for borrower defense) that ED determined to be evidence of misrepresentations. *Id.* ED offers no explanation why the sets of examples that it withheld—evidence that a "representation was made," of "falsity," and of a "misrepresentation giv[ing] rise to a cause of action under applicable state law"—would create confusion that this set would not. In any event, a statement provided as an "example" of a particular factor would not reasonably be construed to represent the sum of all evidence considered by ED in processing an application.

II. The Attorney-Client Privilege Does Not Justify Withholding Either the Guidance or the Examples.

As to both partial relief guidance and the borrower defense examples, ED has invoked in the attorney-client privilege to justify its redactions under exemption 5. Def. Mem. 9. Critically, though, ED does not explain how disclosure of this information would reveal client confidences,

and there is no reason to conclude that it would. Moreover, ED has not argued that any privilege has been maintained. As such, the attorney-client privilege does not apply.

A party asserting the attorney-client privilege must show:

(1) that he was or sought to be the client of the attorney;
(2) that the attorney in connection with the document acted as a lawyer;
(3) that the document relates to facts communicated for the purpose of securing a legal opinion, legal services or assistance in legal proceedings; and
(4) that the privilege has not been waived.

Maine v. U.S. Dep't of Interior, 298 F.3d 60, 70–71 (1st Cir. 2002) (internal brackets omitted). "[T]he attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth." *In re Keeper of Records*, 348 F.3d 16, 22 (1st Cir. 2003).

To satisfy the third element of the test, ED cannot "assume[] that the requirement of client communicated confidentiality is satisfied merely because the documents are communications between a client and attorney." *Maine*, 298 F.3d at 71. Instead, the agency must explain in a nonconclusory fashion "how the documents claimed to be protected establish that they relate to a confidential client communication." *Id.* In other words, "the attorney-client privilege 'does not allow the withholding of documents simply because they are the product of an attorney-client relationship. … *It must also be demonstrated that the information is confidential*.'" *Id.* (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977)).

Here, ED provides scant support for its invocation of the attorney-client privilege, summarily asserting that releasing the redacted portions of the Protocol "would impair the attorneys' ability to provide candid, forthright advice." Def. Mem. 9. Yet ED "has failed to explain, or even attempt to explain except in conclusory statements, how the [Protocol] establish[es] that [it] relate[s] to a confidential client communication" and further "fails to identify any circumstance

expressly or inferentially supporting confidentiality." *Maine*, 298 F.3d at 71, 72. Instead, the facts provided by ED's declarant make clear that the Protocol contains no client confidences: "Agency counsel who specialized in borrower defense created the 'Borrower Defense Unit Claims Review Protocol' document to provide legal guidance to Department attorneys and contract attorneys who were responsible for making initial determinations." Wilson Decl. ¶ 19. That is, rather than the processing staff seeking advice from agency counsel about specific determinations, the Protocol represents agency counsel explaining to the processing staff how to implement agency policy. Moreover, that ED has disclosed eight pages in full and two pages in part of a ten-page document belies any claim that the Protocol was intended as a confidential attorney-client communication.

As to the fourth element, "the party who invokes the privilege bears the burden of establishing … that it has not been waived." *In re Keeper of Records*, 348 F.3d at 22. ED has neither argued that the privilege has been maintained nor provided a factual basis to conclude that the privilege has not been waived. Accordingly, any redacted information contained in the Protocol that has been disclosed to third parties cannot be privileged and, thus, is not exempt from disclosure. *Id.* at 22 ("When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised.").

CONCLUSION

For these reasons, the Court should grant NCLC's cross-motion for summary judgment and deny ED's motion for summary judgment.

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Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that on June 18, 2019, I filed the foregoing through the Court's CM/ECF system, which causes a copy to be served on counsel for the defendant below by ECF and electronic mail:

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