UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FARMWORKER JUSTICE, Plaintiff, v. U.S. DEPARTMENT OF AGRICULTURE, Defendant.	Civil Action No. 19-1946 (DLF)

REPLY IN SUPPORT OF PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

This Freedom of Information Act (FOIA) case involves three documents and two issues. First, defendant U.S. Department of Agriculture (USDA) claims that an email between a nursery executive and Georgia Farm Bureau (GFB) staff commenting on proposed legislation (Bates Nos. 363–67)—which was shared with the 265,000 members of the GFB before it was forwarded to the USDA—is "confidential" within the meaning of FOIA Exemption 4. Second, USDA claims that a portion of an email (Bates Nos. 373) and portions of the minutes of an inter-agency meeting (Bates Nos. 952–53), both of which relate to USDA's November 2017 Farm Labor Survey, can be withheld under FOIA Exemption 5. As to each of these documents, USDA has failed to sustain its burden to show that the information at issue is exempt from disclosure. Accordingly, the Court should grant plaintiff's cross-motion for summary judgment.

ARGUMENT

I. USDA has failed to carry its burden of showing that Exemption 4 applies to the withheld record.

A. Information shared with more than 265,000 people is not "confidential" within the meaning of Exemption 4.

USDA concedes that the information in the email chain bearing Bates Nos. 363–67, Kirkpatrick Decl., ECF No. 18-1, Ex. 1, was shared with the membership of the GFB, McCorkle Decl., ECF No. 17-5, ¶ 4; Graves Decl., ECF No. 17-3, ¶ 10. And USDA concedes that the GFB has a membership of about 265,000 families. Def.'s Resp. to Pl.'s Statement of Facts, ECF No. 23-1, ¶ 13. USDA's concessions resolve the Exemption 4 issue in plaintiff's favor. In *Food Marketing Institute v. Argus Leader* (*FMI*), 139 S. Ct. 2356 (2019), the Supreme Court held that information is "confidential" for purposes of Exemption 4 only if it is "both customarily *and actually* treated as private by its owner," *id.* at 2366 (emphasis added); the information must be "closely held" and "known only to a limited few," *id.* at 2363 (citing dictionaries). Because it is undisputed that the information at issue was shared with 265,000 families, USDA cannot satisfy the *FMI* standard.

USDA asserts that whether the email was *actually* kept secret and closely held—the standard set forth by the U.S. Supreme Court—is "a red herring and immaterial." Def.'s Opp., ECF No. 23, at 2. Instead, USDA relies on a post-*FMI* decision of this court that, USDA contends, held that information is confidential if it is of the type that the submitter would "ordinarily" keep private, regardless of how the submitter *actually* treated the information. *Id.* (citing *Ctr. for Investigative Reporting v. CBP* (*CIR*), 436 F. Supp. 3d 90, 110 (D.D.C. 2019)). As an initial matter, the standard articulated by the Supreme Court in *FMI* would control even if there was a conflicting district court decision. In any event, the decision in *CIR* does not conflict with *FMI*. Rather, *CIR*

expressly recognizes that *FMI* held that information is "confidential for the purpose of Exemption 4 when it is '*both customarily and actually* treated as private by its owner.'" *Id.* at 109 (quoting *FMI*, 139 S. Ct. at 2366) (emphasis added). In *CIR*, the court found that the agency had failed to establish that the information at issue was customarily kept private by the submitters. *Id.* at 110–12. Thus, the court had no reason to address whether the information had actually been treated as private.

USDA also argues that the submitter's declaration asserting that the information at issue "is the type of information ordinarily kept confidential" by the submitter, Def.'s Opp. at 2, shows that USDA has satisfied the *FMI* standard. Again, USDA's argument ignores *FMI*'s requirement that information be "actually" treated as private to be covered by Exemption 4. Moreover, the notion that information can be deemed confidential based on the assertion that the information is of a type that is usually kept private, even where the information at issue has been broadcast widely, is absurd.

B. A governmental assurance of privacy cannot be implied retroactively based on the government's post-submission review of the information.

In *FMI*, the Supreme Court suggested—without deciding—that even where information is both customarily and actually treated as confidential, the information might lose its confidential character if it is provided to the government without an assurance that the government will keep it secret. 139 S. Ct. at 2363. Here, USDA provided no such assurance. Rather, the submitter merely "assumed [his] comments would be held confidential." McCorkle Decl., ECF No. 17-5, ¶ 7. An assumption by the submitter is not an assurance by the government, and USDA does not argue otherwise. Instead, USDA asserts that a governmental assurance of privacy may be implied retroactively once the government reviews the information.

USDA is correct that an assurance of privacy may be either express or implied. Def.'s Opp. at 3 (citing *CREW v. Dep't of Commerce*, No. 18-cv-3022, 2020 WL 4732095, *3–4 (D.D.C. Aug. 14, 2020) (appeal filed)). USDA errs, however, by arguing that an implied assurance can be based on the government's determination, *after* receiving the information, that the information might provide an edge to the submitter's competitors. *FMI*'s assurance-of-privacy prong is based on the notion that shared information remains confidential "only if the party receiving it provides some assurance that it will remain secret." *FMI*, 139 S. Ct. at 2363. Thus, a governmental assurance of privacy, whether explicit or implied, must be provided *before* the information is submitted. Here, the government made no implied assurance of privacy before the information was submitted because it had no reason to anticipate that the email, which offered the submitter's thoughts on pending legislation, would contain information that might be useful to the submitter's competitors.

USDA's reliance on *CREW* is misplaced because the information at issue there was submitted pursuant to an agency program designed to help the submitter grow its business in foreign markets. Because of the nature of the program, the agency expected that the submission would contain proprietary business information, supporting the assertion that the agency had made an implied promise, before the information was submitted, that it would remain secret. *CREW*, 2020 WL 4732095, at *4.

II. USDA has failed to carry its burden of showing that Exemption 5 applies to the withheld records.

A. USDA has failed to show that the material it redacted from an email and meeting minutes is protected by the deliberative process privilege.

USDA asserts that it has properly invoked the deliberative process privilege to redact a paragraph of an email (Bates No. 373) and the third column on two pages of meeting minutes

(Bates Nos. 952–53).[1] The material redacted from both documents relates to USDA's November 2017 Farm Labor Survey (FLS).

As plaintiff explained in its opening memorandum, the deliberative process privilege extends to records that are both predecisional and deliberative. It does not protect material that explains actions that an agency has already taken, and it does not protect material that is not tied to policy considerations related to agency decisionmaking. *See* Pl.'s Mem. in Supp. of Summ. J., ECF No. 18, at 6–9. USDA does not dispute that plaintiff's opening memorandum correctly states the law.

Nonetheless, with regard to whether the redacted material is predecisional, USDA argues that the National Agricultural Statistics Service (NASS) continually considers improvements that might be made to all survey programs. Def.'s Opp. at 4–5. Thus, USDA argues, although the redacted material is not predecisional as to the November 2017 FLS to which relates, it might yet be predecisional because discussions about future surveys are on-going and information about the 2017 FLS could be used to inform such discussions. Similarly, USDA argues that to the extent the redacted information relates to on-going discussions about future surveys, it is necessarily deliberative even if USDA cannot identify any specific role that the material has played in formulating agency policy. *Id.* at 5–6.

USDA's assertions are too general to sustain its burden to demonstrate that the deliberative process privilege applies. First, even if the material is predecisional as to some post-2017 survey, USDA has failed to identify any such survey with particularity and has failed to explain the role

[1] USDA is correct that plaintiff challenges only the redactions on the last two pages of the five-page meeting minutes (Bates Nos. 952–53). *See* Def.'s Opp. at 4, n.5. Plaintiff included the entire five-page document as Exhibit 3 to the Kirkpatrick Declaration because the complete document provides context for the challenged redactions.

of the redacted material. *See Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (explaining that the inquiry regarding whether material is deliberative begins with an examination of the context in which the materials are used). USDA relies on the general statement that the redacted material was "part of the on-going deliberation relating to the FLS," Def.'s Opp. at 5, but that statement is too conclusory to sustain USDA's burden. Material related to the 2017 FLS does not necessarily involve policy considerations or recommendations. For example, the materials might describe "standard or routine computations or measurements over which the agency has no significant discretion." *Petroleum Info. Corp.*, 976 F.2d at 1436 (holding that such materials are not deliberative).

USDA cites *Public Citizen, Inc. v. OMB*, 598 F.3d 865 (D.C. Cir. 2010), as support for its assertion that material that is part of on-going internal discussions is both predecisional and deliberative, Def.'s Opp. at 5, but the decision supports plaintiff. As *Public Citizen* explains, "whenever an agency seeks to change a policy, it logically starts by discussing the existing policy, and such discussions hardly render documents explaining the policy predecisional." 598 F.3d at 875–76. And "a document that does nothing more than explain an existing policy cannot be considered deliberative." *Id.* at 876.

Finally, USDA barely addresses its failure to set forth the decisionmaking authority of those who allegedly used the redacted meeting minutes to formulate agency policy, other than to note that one presenter at the meeting at which the minutes were taken had the title "Senior Advisor to the Secretary [of Agriculture]" and another "was a Department of Labor employee." Def.'s Opp. at 6. That information is insufficient to establish the decisionmaking authority of whoever was involved in the policy discussions that supposedly relied on the meeting minutes. Indeed, USDA has still not identified either the email exchange to which the minutes are tied or the agency

officials involved. *See Vaughn* Index at 2 (stating that the minutes are "tied to an internal email exchange between an employee in the USDA's Office of the Secretary and several employees in the National Agricultural Statistics Service," but failing to identify the email exchange or the employees). Without such information, USDA cannot sustain its burden to show that the redacted material is protected by the deliberative process privilege. *See Access Reports v. DOJ*, 926 F.2d 1192, 1195 (D.C. Cir. 1991) ("A key feature under both the 'predecisional' and 'deliberative' criteria is the relation between the author and recipients of the document.").

B. USDA has failed to justify its Exemption 5 redactions under the FOIA Improvement Act because it has not linked its general explanation of harm to the specific material withheld.

USDA does not dispute that, even if the redacted material were subject to the deliberative process privilege or attorney-client privilege, it could be withheld only if USDA established that releasing the material would harm an interest protected by Exemption 5. USDA further concedes that, to satisfy this heightened standard, it cannot rely on generalized assertions, but must explain how release of *the specific information at issue* would cause the harm. Def.'s Opp. at 7 (citing *Machado Amadis v. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020)). Block quoting portions of the Graves Declaration and the *Vaughn* Index, USDA argues that the quoted material satisfies the standard. *Id.* at 8. But even a cursory review of the quoted material shows that it describes in the abstract the chilling effect that can arise from revelation of privileged information; it does not even *mention* the specific information at issue here. Indeed, the quoted material would apply equally in any case where the government invoked the privilege. As plaintiff explained in its opening memorandum (at 10), this Court routinely rejects general explanations and boilerplate language such as that put forward by USDA. *See, e.g.*, *Danik v. DOJ*, No. 17-1792, 2020 WL 2838584, *5 (D.D.C. May 31, 2020); *Ctr. For Investigative Reporting v. U.S. Dep't of Interior*,

No. 18-599, 2020 WL 1695175, at *4–5 (D.D.C. April 7, 2020; *Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d at 107; *Judicial Watch, Inc. v. DOJ*, No. 17-0832, 2019 WL 4644029, *5 (D.D.C. Sept. 24, 2019); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019).

USDA asserts that, because it has elsewhere stated that the material redacted under Exemption 5 relates to the 2017 FLS, it need not establish a link between its generic recitation of harm and the specific material withheld. Def.'s Opp. at 8. The only case cited by USDA, *Machado Amadis*, 971 F.3d 364, provides no support for that assertion. In *Machado Amadis*, the agency redacted portions of "Blitz Forms" used by line attorneys to make recommendations to the senior attorneys who decide administrative appeals of denials of FOIA requests. *Id*. at 370–71. The court found that the agency had satisfied the heightened standard because it "specifically focused on 'the information at issue' in the Blitz Forms under review, and it concluded that disclosure of that information 'would' chill future internal discussions." *Id.* at 371. In contrast, USDA has not specifically focused on the information at issue, and it has not described how release of that specific information would cause foreseeable harm.

C. In the alternative, the Court should review in camera the three pages with Exemption 5 redactions to determine whether the material contains legal advice and whether all reasonably segregable factual information has been released.

Because USDA has failed to carry its burden, the Court should grant summary judgment to plaintiff. However, if the Court has any doubt as to whether Exemption 5 applies, it should order USDA to present unredacted copies of the contested records for in camera review. The material redacted under Exemption 5 is less than three pages in total. It consists of one paragraph of an email (Bates No. 373) and the third column on two pages of meeting minutes (Bates Nos. 952–53). USDA has made the conclusory assertions that part of the paragraph redacted from the email is subject to the

attorney-client privilege and that no part of the final two pages of the meeting minutes contains any reasonably segregable factual information. There is reason to doubt both assertions.

First, although USDA claims that the redacted email contains "legal advice provided by USDA counsel," Def.'s Opp. at 10 (citing Graves Decl. ¶ 17), the Graves Declaration states only that it "relays advice provided by USDA counsel … relating to a regulatory issue." Graves Decl. ¶ 17. Although "legal advice" may be protected by the attorney-client privilege, a government attorney's "advice on political, strategic, or policy issues … would not be shielded from disclosure by the attorney-client privilege." *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998) (per curiam).

Second, although USDA claims to have met its segregability obligations by conducting a "page by page and line by line review" of the material redacted from two pages of meeting minutes, Def.'s Opp. at 9 (citing Graves Decl. ¶ 18), a comparison of the redacted and unredacted portions of the meeting minutes suggests that the portions redacted in their entirety contain factual information. *See* Pl.'s Mem. in Supp. of Summ. J. at 11–12.

Given that the volume of redacted information is minimal, in camera review may be the most efficient way to bring this matter to a close and minimize the possibility of further briefing, should USDA seek a second bite at the apple.

CONCLUSION

The Court should deny USDA's motion for summary judgment, grant Farmworker Justice's cross-motion for summary judgment, and order USDA to lift the challenged redactions. In the alternative, the Court should order USDA to present for in camera review unredacted copies of the records as to which it claims Exemption 5.

Dated: November 16, 2020

Respectfully submitted

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