UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMUNICATIONS WORKERS OF AMERICA, Plaintiff, v. U.S. DEPARTMENT OF LABOR, Defendant.	Civil Action No. 19-1943 (TSC)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff Communications Workers of America (CWA) hereby moves for summary judgment in this Freedom of Information Act case against defendant U.S. Department of Labor on the ground that there is no genuine issue of disputed material fact and that CWA is entitled to judgment as a matter of law.

In support of this motion, CWA submits the accompanying Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment; Plaintiff's Response to Defendant's Statement of Material Facts Not in Genuine Dispute; and Plaintiff's Statement of Additional Material Facts Not in Genuine Dispute; Declaration of Adam R. Pulver; and a proposed order.

Dated: August 6, 2020

Respectfully submitted,

/s/ Adam R. Pulver
Adam R. Pulver (DC Bar No. 1020475)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMUNICATIONS WORKERS OF AMERICA, Plaintiff, v. U.S. DEPARTMENT OF LABOR, Defendant.	Civil Action No. 19-1943 (TSC)

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

Adam R. Pulver (DC Bar No. 1020475)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org
Counsel for Plaintiff

August 6, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES, RULES, AND REGULATIONS

OTHER MATERIALS

INTRODUCTION

Plaintiff Communications Workers of America (CWA) filed this Freedom of Information Act (FOIA) lawsuit against the Department of Labor (DOL) seeking the production of documents responsive to two March 2018 FOIA requests. The requests relate to DOL's creation of the Customer Service Representative standard occupation series as part of its revision of the Service Contract Act Directory of Occupations in or around 2015.

After DOL released records pursuant to agreements and orders issued in this case, the Court ordered DOL to prepare and send to CWA a draft search declaration and a draft *Vaughn* Index. Based on that material, CWA identified and communicated to DOL a narrow set of issues that remain in dispute, all related to the agency's invocation of FOIA exemption 5. In its motion for summary judgment, DOL ignores this communication. Instead, DOL filed a cursory memorandum of law and declaration that do not address the specific documents or withholdings still at issue. Indeed, four pages of the agency's eleven-page memorandum are devoted to the adequacy of the search and the agency's invocation of FOIA exemption 6—issues that CWA has already informed DOL are not at issue.

As to DOL's invocation of exemption 5 and the nine documents that are at issue, DOL's generic recitations of the governing standard in its memorandum and the boilerplate statements in the *Vaughn* Index are insufficient to meet its burden to establish the propriety of its withholdings. DOL has not established the deliberative process privilege applies to the withheld information, nor has it shown that its segregability analysis was sufficient. Accordingly, Defendant's motion for summary judgment should be denied and Plaintiff's cross-motion should be granted.

FACTS

Background

First enacted in 1965, the Service Contract Act (SCA) "requires every service contract with the United States for an amount greater than $2,500 to include certain protections for the contractor's employees." *Tri-Cty Contractors, Inc. v. Perez*, 155 F. Supp. 3d 81, 85 (D.D.C. 2016) (citing 41 U.S.C. § 6703; 29 C.F.R. § 4.6). Among these protections, each contract must "specify[] the minimum wage to be paid to each class of service employee engaged in the performance of the contract or any subcontract," as determined by DOL "in accordance with prevailing rates in the locality," or the wage provided for in a collective bargaining agreement. 41 U.S.C. § 6703(a).

DOL's Wage and Hour Division (WHD) is responsible for administering the wage provisions of the SCA, including prevailing wage determinations. *See* WHD, Frequently Asked Questions Pertaining to the Issuance of Wage Determinations Under the McNamara-O'Hara Service Contract Act (SCA) of 1965, as Amended, https://www.dol.gov/agencies/whd/government-contracts/service-contracts/faq (last accessed July 27, 2020). WHD publishes standard, "area-wide" wage determinations for specific locations across the country. *See* WHD, Prevailing Wage Resource Book, Chapter 14, at 3 (May 2015), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/Tab14.pdf. Each one lists about 350 standard job classifications, which are defined in WHD's Service Contract Act Directory of Occupations ("SCA Directory"), and corresponding prevailing rates. *Id.* WHD periodically not only updates the wage rates, but also the standard job classifications and their scope. *See Bldg. & Const. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 628 (D.C. Cir. 1983) (noting that under the Davis Bacon and Related Acts "wage rates and classifications are essentially two sides of the same coin—they must be fixed in tandem to ensure that a given wage will be paid for given work"). In identifying the

appropriate wage determination for a given contract, contracting agencies and employers look to the SCA Directory. *See* 48 C.F.R. §22.1008-1(e)(1). The classifications used in the SCA Directory thus directly impact the minimum prevailing rates required in the performance of federal service contracts. Prevailing Wage Resource Book, Ch. 14, *supra*, at 13–15.

In 2015, WHD updated the SCA Directory. *See* WHD, All Agency Memorandum No. 218, Updates to Wage Determinations Issued Under the Service Contract Act, Dec. 8, 2015, https://www.dol.gov/sites/dolgov/files/WHD/AAM/AAM218.pdf. These updates included the addition of 27 new occupational classifications, including a new Customer Service Representative series. *Id.*; *see also* Torres Decl. (ECF 17-3) ¶ 6.

On March 7, 2018, CWA submitted FOIA requests to two different DOL components related to this update: one to WHD (FOIA Request 853659), Torres Decl. Ex. 1, and one to the DOL's Office of the Assistant Secretary for Administration and Management (OASAM) (FOIA Request 853661), Torres Decl. Ex. 2. Both requests sought "[a]ny and all documents and communications used" in creating the occupational classification, job descriptions, and federal grade equivalencies for the Customer Service Representative standard occupation series. Torres Decl., Exs. 1, 2.

On March 22, 2019, DOL issued a final determination with respect to FOIA Request 853659. DOL stated that WHD had located 2,000 pages of responsive records but was withholding all pages in full pursuant to FOIA exemption 7(A). Decl. of Alex van Schaick, Ex. 1. On May 10, 2019, CWA submitted an administrative appeal of this determination, challenging both the adequacy of DOL's search and the invocation of exemption 7(A). *Id.*, Ex. 2. DOL did not respond to the appeal within 20 working days as required by law, 5 U.S.C. § 552(a)(6)(A)(ii). *Id.* ¶ 4. CWA filed this lawsuit on June 28, 2019, seeking disclosure of the records sought in both requests.

The Withholdings in Dispute[1]

On April 16, 2020, after DOL completed its production of records to CWA, CWA informed DOL of several issues regarding the adequacy of DOL's search and redactions in DOL's production. *See* May 18, 2020 Joint Status Report (ECF 16) ¶ 2. On May 29, 2020, the Court ordered DOL to provide "Plaintiff with a draft declaration describing the nature of the Agency's searches and a Draft *Vaughn* Index concerning any remaining issues (including redactions) in dispute." May 29, 2020 Minute Order. DOL provided those materials on June 15, 2020, and also released additional responsive records. Pulver Decl., Ex. 2. On June 19, 2020, after reviewing the materials, CWA informed DOL's counsel that CWA was no longer challenging the adequacy of the search and was narrowing its challenge to the agency's withholdings to a subset of documents redacted pursuant to exemption 5. *Id.* at ¶ 2, Ex. 2.

Upon further review of the records produced and the agency's *Vaughn* Index of Withheld Information, Torres Decl. (ECF 17-3), Ex. 3 (hereafter, *Vaughn* Index), and eliminating duplicates, CWA continues to challenge DOL's withholdings of three categories of documents purportedly withheld or redacted pursuant to the deliberative process privilege under exemption 5.

First, CWA challenges DOL's withholding of documents (in whole or in part) related to a December 21, 2015, meeting at which DOL officials and staff of the Centers for Medicare and Medicaid Services (CMS) discussed the addition of the Customer Service Representative category to the SCA Directory that had been made earlier that month. *See* P5-133. The records at issue are:

(1) A "briefing paper" provided to DOL officials, the final version of which appears to be an attachment to a December 16, 2019, email produced at P5-119;

[1] All of the relevant pages of DOL's production are attached as Exhibit 1 to the Declaration of Adam R. Pulver. For ease of reference, CWA has Bates stamped each document with the production number and page number referenced in the *Vaughn* Index.

(2) Spreadsheets prepared for that meeting, marked as P5-64–P5-67; P5-87; P5-111, P5-112, or P5-113; and P5-126 or P5-127;

(3) A talking points document prepared for that meeting, the final version of which appears to be the document marked as either P5-126 or P5-127.

Second, CWA challenges DOL's withholding of several weekly and monthly reports in their entirety, marked as P3-138–P3-142, P4-14–P4-18, P4-19–P4-20, P5-75–P5-78, and P5-95.

Third, CWA challenges DOL's withholding of four pages of emails in their entirety, marked as P1-179 and P1-180–P1-182.

LEGAL STANDARD

Summary judgment is appropriate where "there is no 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).

In FOIA cases, "[a]gencies bear the burden of justifying withholding of any records, as FOIA requires the 'strong presumption in favor of disclosure.'" *Calderon v. U.S. Dep't of Agric.*, 236 F. Supp. 3d 96, 107 (D.D.C. 2017) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). "The court therefore analyzes all underlying facts and inferences in the light most favorable to the FOIA requester, even where the requester has moved for summary judgment." *Id.* (citing *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999)). The court reviews the agency's claim that an exemption applies *de novo*. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 755 (1989). "[E]ven when an exemption applies, the agency must disclose '[a]ny reasonably segregable portion of a record,' the 'amount of information deleted, and the exemption under which the deletion is made.'" *Hall & Assocs. v. EPA*, 956 F.3d 621, 624 (D.C. Cir. 2020) (citing 5 U.S.C. § 552(b)). Agency

declarations will satisfy the agency's burden of justifying withholdings only where they "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." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)). If the agency does not "carry its burden of convincing the court that one of the statutory exemptions applies," the requested records must be disclosed. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

ARGUMENT

FOIA Exemption 5—the only exemption at issue in this case—exempts from disclosure "inter-agency or intra-agency memorandums or letters which 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), including records subject to the deliberative process privilege. That privilege extends to records that are both "predecisional" and "deliberative." *See Judicial Watch, Inc. v. U.S. Dep't of Def.*, 847 F.3d 735, 739 (D.C. Cir. 2017). To fall within the scope of the privilege, records must be "generated before the adoption of an agency policy and reflect[] the give-and-take of the consultative process." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (internal citation omitted). Even where the privilege applies, to withhold documents from production "an agency must 'identify specific harms to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the withheld materials' and 'connect the harms in a meaningful way to the information withheld.'" *Danik v. U.S. Dep't of Justice*, No. 17-CV-1792 (TSC), 2020 WL 2838584, at *5 (D.D.C. May 31, 2020) (quoting *Judicial Watch, Inc. v. U.S. Dep't of Justice*, No. 17-CV-0832 (CKK), 2019 WL 4644029, at *5 (D.D.C. Sept. 24, 2019)).

The deliberative process privilege does not protect factual information, unless "it is intertwined with analytical, evaluative, or recommendatory content such that the two cannot be segregated or the material cannot be revealed without also revealing the mental impressions of the author and the deliberations of the agency." *Garza v. Hargan*, No. 17-CV-02122 (TSC), 2017 WL 11528518, at *2 (D.D.C. Dec. 22, 2017). Since the "focus of FOIA is information, not documents, …an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 733–34 (D.C. Cir. 2008) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 241, 260 (D.C. Cir. 1977)). "Under FOIA an agency must produce 'any reasonably segregable portion' of a record that is not exempt from disclosure and the court must affirmatively determine whether the agency has done so." *Ball v. Bd. of Governors of Fed. Reserve Sys.*, 87 F. Supp. 3d 33, 57 (D.D.C. 2015) (quoting 5 U.S.C. 552(b)).

Three categories of withheld information are at issue here: (1) documents prepared in connection with the December 21, 2015 meeting with the CMS *after* the creation of the new Customer Service Representative category; (2) entirely redacted weekly and monthly reports listing agency activities; and (3) four pages of emails withheld in their entirety. DOL has not met, and cannot meet, its burden in demonstrating the applicability of the deliberative process privilege to any of the three categories of records, which include *post*-decisional documents and segregable factual information.

I. DOL has not carried its burden of showing that the records related to the December 21, 2015, meeting are protected by the deliberative process privilege.

Invoking the deliberative process privilege, DOL has not produced, even in redacted form, the briefing memo, talking points, or spreadsheet from the meeting on December 21, 2015. Throughout its *Vaughn* Index, the agency combines multiple versions of these documents into a

single entry, identifying all the versions as "drafts." Yet the documents already released make clear that final versions exist, and the final versions cannot qualify for the deliberative process privilege because they *post*-date the decision to create a new Customer Service Representative category and were used to help explain a decision that was already made.

A. The Briefing Paper

DOL's *Vaughn* Index includes four different entries describing six different documents that all appear to be drafts of the same "briefing paper" (also referred to in the Index as a "briefing memorandum"). *See* P1-179; P5-56–P5-57; P5-59–P5-61; P5-81–P5-83; P5-106–P5-108; P5-111–P5-113. Although all of the entries refer to drafts, CWA seeks only the final version of the briefing paper, which appears to have been attached to an email included at P5-119, transmitted on December 16, 2015, *after* the SCA Directory was updated. That attachment is not accounted for in the *Vaughn* index. The email it was attached to was sent by Sandra Hamlett with the subject "RE: Briefing Paper on CSR," and states: "The attached copy supersedes the copy emailed to you last night. The copy last night was inadvertently sent. A hard copy will be delivered to you." P5-119. Making clear that a final version was indeed distributed, a subsequent email in the chain thanks staff for their part "in ensuring that the CSR Briefing Paper was a success." *Id*. The final version of the briefing paper, by definition, is neither predecisional nor deliberative.

"Exemption 5 does not apply" to records that "*explain actions the agency has already taken*." *Trea Senior Citizens League v. U.S. Dep't of State*, 994 F. Supp. 2d 23, 38 (D.D.C. 2013) (quoting *Ryan v. Dep't of Justice*, 617 F.2d 781, 790–91 (D.C. Cir. 1980) (emphasis in original)). Such records are not predecisional because they are not created "in the process of formulating policy." *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The final briefing paper is just such a record—created *after* the SCA Directory was adopted, to assist WHD leadership in

explaining the policy it had already decided to adopt to CMS. Although in the *Vaughn* Index DOL asserts that the briefing paper implicates "how to best describe an issue for the WHD administrator to consider," the timeline does not indicate that any issue remained open for "consideration" at the time. *See Campaign Legal Ctr. v. U.S. Dep't of Justice*, No. 18-cv-1187 (TSC), 2020 WL 2849907, at *6 (D.D.C. June 1, 2020) (holding that because the agency's position and the reasons for it "had already been decided," the record was not protected by the deliberative process privilege).

The timeline also makes clear that the final briefing paper is not deliberative, as it does not reflect the "give-and-take—of the deliberative process—by which the decision itself [was] made." *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 899 (D.C. Cir. 2015); *see Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) ("[D]eliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."). A document that explains a decision that has been made and communicated at large, and how that decision impacts another agency, does "not constitute 'the process by which policy is formulated,' nor could it 'reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment." *See People for the Ethical Treatment of Animals v. Dep't of Health & Hum. Servs.*, No. 17-cv-1395 (TSC), 2020 WL 2849906, at *6 (D.D.C. June 1, 2020) (quoting *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992)).

Here, DOL's conflation of various drafts and the final document muddies the *Vaughn* Index. DOL claims that the Briefing Paper is deliberative because branch managers "advise[d] and flag[ged] potential issues for the mid-level managers" and the drafts reflect "internal discussions over how to best describe an issue for the WHD administrator to consider." *Vaughn* Index at 16. The *final* document, however, would not reveal any such internal discussions. When that document

was transmitted on December 16, 2015, the discussion regarding "how best to describe an issue" had been resolved. *Cf. Tax Analysts v. IRS*, 294 F.3d 71, 81 (D.C. Cir. 2002) (citing *Coastal States Gas*, 617 F.2d at 869) (noting that documents that "discuss the wisdom or merit of a particular agency policy, or recommend new agency policy" are deliberative, but those that "simply explain and apply established policy" are not). Moreover, "flagging" potential issues for leadership regarding an already finalized decision is not "policymaking" of the sort protected by the deliberative process privilege. *See Petroleum Info.*, 976 F.2d at 1435; *Campaign Legal Ctr.*, 2020 WL 2849907, at *6.

Further, as the D.C. Circuit has emphasized, the "inquiry regarding whether material is 'deliberative,' and therefore exempt under Exemption 5, begins with an examination of 'the context in which the materials are used.'" *Nat'l Sec. Counselors v. CIA*, 206 F. Supp. 3d 241, 276 (D.D.C. 2016) (quoting *Petroleum Info.*, 976 F.2d at 1434). Here, the briefing paper was prepared to assist WHD leadership in explaining the finalized SCA Directory decision to officials from CMS. *See* P5-122–P5-124; P5-120–P5-121. Because CMS is not a policymaker for purposes of implementing the SCA, and since all policy choices had already been made, a memo addressing DOL's response to CMS's requests for information about the new wage directory category is not part of the policymaking process. A briefing paper "used to communicate [a] decision," rather than to make that decision, does not fall within the scope of exemption 5. *Campaign Legal Ctr.*, 2020 WL 2849907, at *7.

Finally, even if the briefing paper contained some information protected by exemption 5, it surely would not be exempt in full. "[B]efore approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld." *Stolt-Nielsen Transp..*, 543 F.3d at 734 (quoting *Sussman v. U.S. Marshals Serv.*, 494

F.3d 1106, 1116 (D.C. Cir. 2007)). DOL's recitation of boilerplate language that "factual information in this document is inextricably intertwined with the opinions, recommendations, and analysis," *Vaughn* Index at 1, 3 is inadequate to allow the court to make such a *de novo* finding. *See Mead Data*, 566 F.2d at 261; *see also Ctr. for Pub. Integrity v. U.S. Dep't of Commerce*, 401 F. Supp. 3d 108, 118 (D.D.C. 2019) (finding similar boilerplate assertion insufficient). "Rather, for *each* entry the defendant is required to 'specify in detail which portions of the document are disclosable and which are allegedly exempt.'" *Wilderness Soc'y v. U.S Dep't of Interior*, 344 F. Supp. 3d 1, 19 (D.D.C. 2004) (quoting *Animal Legal Def. Fund, Inc. v. U.S. Dep't of Air Force*, 44 F. Supp. 3d 295, 302 (D.D.C 1999)). Here, there is good reason to believe that portions of the briefing paper are disclosable—those portions that consist solely of factual information, or "describing and explaining existing policy and the current state of affairs." *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010); *see also Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 3d 155, 164–65 (D.D.C. 2017). To the extent that the briefing paper, for example, included background information about the SCA Directory, CMS contracts, and policy decisions already made, this information would not be exempt from disclosure under exemption 5, and should have been provided. *See Gatore v. U.S. Dep't of Homeland Sec.*, 292 F. Supp. 3d 486, 491–94 (D.D.C 2018) (discussing agency's obligation to produce segregable factual information).

B. The Talking Points

P5-85 and P5-126 or P5-127 are both entitled "Talking Points for Customer Service Representative Conformance."[2] DOL's *Vaughn* Index treats them as if they are one document,

[2] P5-126 and P5-127 are both referred to as the talking points in the agency's *Vaughn* Index. Based on the email produced at P5-125, however, it appears that one of those pages is the talking points and the other is a wage chart, discussed below at pp. 12–15.

which it estimates was created on December 7, 2015. *Vaughn* Index at 14. Document P5-85 does appear to have been created on December 7, 2015. *See* P5-84. However, the document attached to P5-125—which bears the same file name ("Talking Points -Customer Service Rep Conformance.docx")—was shared with DOL leadership on December 16, 2015. *See* P5-125. DOL justified its withholding of both documents as "draft" material and invoked exemption 5. *Vaughn* Index at 14. Other records produced by DOL make clear, though, that the document is not a "draft," and that it is neither predecisional nor deliberative.[3]

The talking points fail to qualify for the deliberative process privilege for the same reasons the briefing paper does not: The talking points do not "bear on the formulation or exercise of agency policy-oriented judgment." *Petroleum Info.*, 976 F.2d at 1435. They do not reflect any "back and forth" as part of a decision-making process, but simply explain a decision already made.

In addition, as with the briefing paper, even if the talking points contained some information protected under the deliberative process privilege, that information would be segregable. DOL's invocation of the same boilerplate explanation, that the "factual information in the document is inextricably intertwined with the opinions, recommendations, and analysis" is, again, insufficient. *See* pp. 10–11, *supra.*

C. The Wage Charts

DOL's *Vaughn* Index includes four documents that CWA believes are one or more versions of a single chart. The document titled "Wage Estimates for CSR," P5-64–P5-67, and the document titled "HHS Rate Comparison—Customer Service Representatives Pre-Publication Wage

[3] As DOL has completely redacted both documents, it is not clear if they are the same document. If they are, CWA only seeks the final version.

Estimates," P5-87, are described by DOL as "a draft chart of Wage Estimates," *Vaughn* Index at 12, and "a chart analyzing HHS's recommended wage rate for a CSR," *id.* at 15.[4] Additionally, the attachments to P5-110 and P5-125 are both titled "0150_001.pdf" and are described in the body of those emails as a "spreadsheet on the Customer Service Rep issue." P5-110; P5-125.[5] If these documents are in fact different drafts of the same chart, CWA seeks only the final version. If they are not, CWA seeks the final version of each document.

CWA's understanding is that these charts show the "comparison of [the] approved wage rate" for customer service representatives for various CMS service centers under the prior regime (the "conformed rate") with what it would be given the creation of the new wage category. *See* P5-62. WHD leadership requested this spreadsheet be provided to them in preparation for the meeting with CMS. P5-109. DOL justifies its withholding of all of these documents in their entirety on the grounds that they are "drafts" and that the "factual information in this document is inextricably intertwined with the opinions, recommendations, and analysis." *Vaughn* Index at 12, 15. As with the above-discussed documents, to the extent final versions of this document were prepared for the meeting with CMS—a meeting to explain a decision already made—the deliberative process privilege does not apply. A chart showing what the wages for existing contracts would have been had the new CSR category—a policy already adopted—been in place does not reflect deliberations about a decision to be made or a policy to be considered. *See Coastal States Gas*, 617 F.2d at 868.

[4] The *Vaughn* Index indicates that this document was created on December 7, 2020. *Vaughn* Index at 15. CWA assumes that "2020" is a typographical error and that this document was created on December 7, 2015.

[5] The *Vaughn* Index entries for P5-111–P5-113 and P5-126–P5-127 do not address the agency's withholding of the wage chart, describing only the withholding of, respectively, the briefing paper and talking points discussed above. *Vaughn* Index at 16. It is unclear if this attachment was P5-111, P5-112 or P5-113, or P5-126 or P5-127. *See* note 2, *supra.*

Even if the deliberative process privilege could conceivably apply to WHD staff's selection of what data should be included in the chart, any such privilege has been waived. To the extent that the requested information has already been released, the agency cannot properly claim an exemption. *Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 404 F. Supp. 2d 325, 334 (D.D.C. 2005). First, these documents appear to be the same as, or similar to, a document that DOL released to CWA in response to another FOIA request. *See* Decl. of Alex van Schaick ¶ 5, Ex. 3. Even if it is not, in an email it already released, DOL revealed that the chart included current conformed rates, what the new rates would be, how many conformances were at issue, and the new wage determinations that would cover them. *See* P5-109 (describing what is in "that spreadsheet"). All that remains to be revealed is pure factual information—the numbers in each cell in the chart—which is not privileged. *See Hardy*, 243 F. Supp. 3d at 164; *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 238 (D.C. Cir. 2008) ("Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended."). At the very least, these fields can be segregated and produced. And to the extent that the chart contains estimates as to what wages would be under the new Customer Service Representative category—a category that the agency had already decided to create—the chart is not deliberative.

DOL cites several cases that it claims justify withholding this purely factual material. However, each of those cases represent narrow exceptions to the general rule that factual material is not protected by exemption 5, none of which are applicable here. In *Quarles v. Department of the Navy*, 893 F.2d 390, 393 (D.C. Cir. 1990), and *Chemical Manufacturers Ass'n v. Consumer Product Safety Commission*, 600 F. Supp. 114, 118 (D.D.C. 1984), the courts found that the

material at issue would "chill discussion at a time when agency opinions are fluid and tentative"; here, in contrast, the policy decision has already been made. Additionally, DOL cannot reasonably claim that release of the records at issue here would disincentivize the compilation of similar data in the future, *cf. Quarles*, 893 F.2d at 393, or hamper future decision making, *cf. Hinckley v. United States*, 140 F.3d 277, 285 (D.C. Cir. 1998). Finally, unlike *Mead Data*, 575 F.2d at 935, the charts do not serve "primarily to reveal the 'evaluative' process by which different members of the decisionmaking chain arrived at their conclusions and what those predecisional conclusions are." Instead, the charts apply an established policy decision to a particular situation—CMS's major call centers—to explain to CMS the effect of that policy decision.

DOL claims that release of the charts would "frustrate the agency's ability to enforce the SCA statute as it would cause confusion in the regulated community over the proper rate of pay." *Id.* at 15. That DOL released the same or a similar chart to CWA in the past "severely weakens the [agency's] argument that release of the data base will confuse the public" *Petroleum Info.*, 976 F.2d at 1437. Even if it had not been previously produced, DOL has not explained why "its concerns with public confusion … could not be allayed by conspicuously warning FOIA requesters" that the chart reflected estimates. *Id.* Furthermore, there is no reason to believe anyone would rely on, or be confused by, the release of a chart listing estimated 2015 wage rates in 2020.

II. DOL has not carried its burden to show that the monthly and weekly reports are properly withheld.

DOL's *Vaughn* Index includes six documents that are weekly or monthly reports: P3-138–P3-142 and P3-238–P3-242 are both a "30-60-90 Report"; P4-14–P4-18 is a 60 day "Policy Report"; P4-19–P4-20 is a "Monthly Operation Report Branch of Service Contract Wage Determinations"; P5-75–P5-78 is a "Branch of Service Contract Act Weekly Status Report," and P5-95 is an email containing a completely redacted weekly report. DOL invoked exemption 5 to

justify its redacting these documents in full, and it provided essentially the same boilerplate justification that the "factual information in this document is inextricably intertwined with opinions, recommendations, and analysis" and that "release would reveal the deliberative process that the agency undertook for these matters" and "chill the free flow of information from mid-level managers to the WHD's senior management." *Vaughn* Index at 8, 9, 13, 15. For documents P5-75–P5-78 and P5-95, the agency also added that the information "contains a snap shot of ongoing internal deliberative processes" and that "[r]elease would cause confusion as it does not represent official policy positions of the final projects." *Id.* at 13, 15.

As to each of these reports, however, much of the content is likely neither predecisional nor deliberative. To the extent that the reports simply identify the existence of projects, they do not reflect "the formulation or exercise of agency policy-oriented judgment." *Petroleum Info.*, 976 F. 2d at 1435. None of the policy rationales underlying Exemption 5 are served by withholding such factual information. *See Coastal States Gas*, 617 F.2d at 867 (summarizing purposes of Exemption 5). DOL wholly fails to explain how revealing the list of projects on which agency staff are working at any particular time would "discourage candid discussion within the agency." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991).

The reports also likely include a variety of other information not covered by the deliberative process privilege, including information on decisions that have already been made, *see Pub. Emps. for Envtl. Responsibility v. EPA*, 288 F. Supp. 3d 15, 25 (D.D.C. 2017), updates on implementation of established agency policy, *see Coastal States Gas*, 617 F.2d at 868; *Public Citizen*, 598 F.3d at 876 ; *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006); purely factual information such as dates of events and deadlines, *see Public Citizen*, 598 F.3d at 876; and otherwise public information. Any such information should have been segregated and disclosed.

As with the documents relating to the December 21, 2015 meeting, DOL's conclusory statements that the agency conducted a "line-by-line review of all responsive records," and that "[f]urther segregation was not possible because any non-exempt information is inextricably intertwined with exempt information and releasing it would yield a product with little, if any, additional informational value while expending substantial DOL time and resources," Torres Decl. ¶ 28, are insufficient to meet DOL's segregability burden, as explained above. *See supra* pp. 10–11.

III. DOL has not carried its burden of justifying the redactions of the emails at P1-179 through P1-182.

Finally, DOL has not justified the withholding of the emails at P1-179 through P1-182. Very little information has been provided about these emails, which DOL has redacted in their entirety. In its *Vaughn* Index, DOL describes P1-179 as "Email 'Briefing Paper on SCA Directory" and P1-180–P1-182 as "Email 'SCA Directory.'" *Vaughn* Index at 1, 2. The *Vaughn* Index does not indicate the senders or recipients of either email.

DOL's *Vaughn* Index entries are insufficient to meet the agency's burden as to these documents. DOL has redacted all of the information on the actual document, including header information such as the date, sender, subject line, and recipients. The *Vaughn* Index does not provide any additional information about the sender or recipients. DOL's failure to provide this factual information renders its *Vaughn* Index "patently insufficient," *Center for Public Integrity*, 401 F. Supp. 3d at 118, as it is impossible for CWA and the Court to assess the propriety of its assertion of privilege. *See Coastal States Gas*, 617 F.2d at 868 (stating that "[t]he identity of the parties to a memorandum is important" to determine if the records are deliberative); *Def. of Wildlife v. U.S. Dep't of Agric.*, 311 F. Supp. 2d 44, 59–60 (D.D.C. 2004) (court cannot discern whether deliberative process privilege applies absent identification of authors and recipients).

The omissions from the *Vaughn* Index are particularly problematic given inconsistencies in the little information the Index *does* provide. DOL indicates that P1-179 was dated October 13, 2015, and describes the document as an "e-mail discuss[ing] edits to a briefing paper prepared for WHD leadership." *Vaughn* Index at 1. DOL indicates that P1-180–P1-182, which DOL describes as an "e-mail discuss[ing] drafts created by SCA branch managers and analysts," is dated both October 1, 2015, and December 15, 2015. *Id.* at 2. In light of the inconsistency in the dates, along with the facts that the only briefing paper referenced anywhere else in the production was that prepared for the December 2015 meeting with CMS, and that the pages immediately following in production are dated December 15, 2015, and concern the same briefing paper, the *Vaughn* Index appears to be inaccurate.

Notwithstanding the little information provided, these emails seem to be neither predecisional nor deliberative for the same reasons as the briefing paper itself. Any information sent on December 15, 2015, would not be predecisional because, by that date, DOL had finalized the decision to include the new Customer Service Representative category. And to the extent the emails discuss how best to present information to CMS at the December 21, 2015 meeting, they do not concern the development of a new policy or exercise of policymaking judgment. *See People for Ethical Treatment of Animals*, 2020 WL 2849906, at *6; *Campaign Legal Ctr.*, 2020 WL 2849907, at *7.

Finally, even if P1-180–P1-182 contains some information that is exempt under the deliberative process privilege, that information would be segregable from other sections of the record. As with the other documents, the agency's rote recitation that the material is "inextricably intertwined" and that the "[r]elease of such internal deliberations would stifle the creative thinking and candid exchange of ideas necessary to produce good sound policies" is insufficient to carry its

burden. *See Stolt-Nielson Transp.*, 534 F.3d at 734. Header information, for example, including the names of senders, recipients, date and timestamp, and subject line, is not generally protected by the deliberative process privilege as it does not in any way reveal the deliberative processes of agency decisionmaking. *See Garza*, 2017 WL 11528518, at *2; *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency,* 811 F. Supp. 2d 713, 757 (S.D.N.Y. 2011) (finding deliberative process privilege applied to document but ordering release of "the names of the high-ranking author and recipient, as well as the subject line").

CONCLUSION

For the above-stated reasons, the Court should deny DOL's motion for summary judgment, grant Plaintiff's cross-motion for summary judgment, and order production of nonredacted versions of the final briefing paper, talking points, and wage chart prepared for the December 21, 2015 meeting; the weekly and monthly reports, marked as P3-138–P3-142, P4-14–P4-18, P4-19–P4-20, P5-75–P5-78, and P5-95; and the emails marked as P1-179 and P1-180–P1-182.

Dated: August 6, 2020

Respectfully submitted,

/s/ Adam R. Pulver

Adam R. Pulver (DC Bar No. 1020475)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Plaintiff