UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF EDUCATION, Defendant.	)	Civil Action No. 18-1047 (CKK)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Public Citizen, Inc. hereby moves for summary judgment in this Freedom of Information Act case against defendant U.S. Department of Education on the ground that there is no genuine issue of disputed material fact and that plaintiff is entitled to judgment as a matter of law.

In support of this motion, Plaintiff submits the accompanying Memorandum in Support of Plaintiff's 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: January 14, 2019

Respectfully submitted,

/s/ Adam R. Pulver
Adam R. Pulver (DC Bar No. 1020475)
Patrick D. Llewellyn (DC Bar No. 1033296)
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

PUBLIC CITIZEN, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-1047 (CKK)
UNITED STATES DEPARTMENT OF EDUCATION,	)	
Defendant.	)	

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)
Patrick D. Llewellyn (DC Bar No. 1033296)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org
Counsel for Plaintiff

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STATUTES & REGULATIONS

Plaintiff Public Citizen, Inc. filed this lawsuit under the Freedom of Information Act (FOIA) seeking the production of records in response to an October 2017 FOIA request concerning an event held by defendant U.S. Department of Education (ED) on October 2, 2017. After Public Citizen filed the lawsuit, ED produced some responsive documents, while withholding and/or redacting others. Because the undisputed material facts establish that ED has not justified its invocation of exemption 5, the Court should deny ED's motion for summary judgment, grant Public Citizen's motion, and order ED to produce the improperly withheld records.[1]

BACKGROUND

On October 2, 2017, ED hosted an event it referred to internally as "Deregulation Day," which included a "one hour listening session" entitled "Cutting the Red Tape: Eliminating Excessive Regulatory Burdens on Schools and Teachers." *See* Pulver Decl. ¶ 2, Ex. 2 at OS 31. As ED described it, "the purpose of the session [was] for the Department to provide an update on its regulatory reform efforts in the area of elementary and secondary education and to allow the individual participants to provide their thoughts and to ask questions." *Id.* Similar events were held at other agencies throughout the federal government on the same day, which the Office of Information and Regulatory Affairs (OIRA) referred to as "Cut the Red Tape Day." *See, e.g.*, *id.* at OS 294; Pulver Decl. ¶ 1, Ex. 1 at OS 313. Although the events were supposed to be open to the public, *see* Pulver Decl. Ex. 2 at OS 258, ED sent individual invitations marked "This invitation is non-transferable," *see, e.g.*, *id.* at OS 31-32.

[1] Specifically, as explained further below, Plaintiff requests that the Court order production of unredacted versions of OS 8, OS 69, OS 313, OS 314, and OCO 8, and the subjects and senders/recipients of OS 307-08, OS 309, OS 310, OS 311-12. Plaintiff does not challenge ED's redactions pursuant to exemption 6, which appear to be limited to "partial email addresses for two individuals." Def. Mem. at 13 (citing Siegelbaum Decl. ¶ 26).

On October 3, 2017, Public Citizen, a non-profit public interest organization, sent FOIA requests to several federal agencies that were reported to have participated in "Cut the Red Tape Day." Pulver Decl. ¶ 9; Siegelbaum Decl. Ex. 2. Its FOIA request to ED sought:

> (1) All communications between any employee of the immediate Office of the Secretary, Office of Communications & Outreach, or Office of Planning, Evaluation & Policy Development, and any non-Department of Education (ED) entity or individual concerning "breakout sessions," "break-out sessions" or "roundtables" scheduled for October 2, 2017, relating to the regulatory agenda, regulatory reform, deregulation, rulemaking, and/or the regulatory process.
>
> (2) Any ED policies, procedures, or guidance regarding which individuals or organizations would be invited to the October 2, 2017 break-out sessions.
>
> (3) Any policies, procedures, or guidance received from the White House, Office of Management and Budget, and/or other non-ED individual or entity regarding which individuals or organizations should be invited to the October 2, 2017 break-out sessions.

Siegelbaum Decl. Ex. 2. While other agencies responded and produced responsive documents, *see, e.g.*, Pulver Decl. ¶ 9, Ex. 9 (USDA response), ED neither produced responsive records nor provided an estimated date of completion, *see id.* ¶ 10, Ex. 10. Accordingly, on May 3, 2018, Plaintiff commenced this lawsuit. ECF No. 1.

After the suit was filed, ED began to release responsive records. On July 6, 2018, it produced 19 pages of responsive documents. Siegelbaum Decl. ¶ 8. On August 6, 2018, it produced an additional 428 pages. *Id.* ¶ 9. From August through December, the parties negotiated over redactions in and withholdings from those productions, leading to the production of additional documents and the removal of multiple redactions. *See* Siegelbaum Decl. Ex. 1 at 5-6, 7; Pulver Decl. ¶ 11, Ex. 11. Redactions in nine separate email chains remain at issue.[2]

[2] While ED devotes nearly three pages of its brief to the adequacy of the search, Plaintiff previously made clear to ED that it is not challenging the adequacy of ED's search. *See* Siegelbaum Decl., Ex. 1 at 1; *see also* Siegelbaum Decl. at p.2 n.1 (stating "the adequacy of Defendant's search for responsive records … [is] not at issue in this litigation.").

LEGAL STANDARD

Summary judgment is appropriate when "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). "FOIA cases are typically resolved on motions for summary judgment." *Elec. Privacy Info. Ctr. v. Customs & Border Prot.*, 160 F. Supp. 3d 354, 357 (D.D.C. 2016).

Where an agency withholds responsive records, in whole or in part, the agency has the burden of proving that the withheld information comes within one of FOIA's nine statutory exemptions. *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998); 5 U.S.C. § 552(a)(4)(B). Summary judgment is appropriate only if the agency's "affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically fall within the claimed exemption[s], and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). This Court reviews the agency's claimed exemptions *de novo*. 5 U.S.C. § 552(a)(4)(B); *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

ARGUMENT

Summary judgment should be granted in Public Citizen's favor with respect to the challenged ED's redactions pursuant to exemption 5. First, although ED relies on the attorney-client privilege to support redactions on six communications, it has not identified any agency staff that works in a legal capacity as a sender or recipient of two of those communications. As to the remaining four, ED's redactions are unsupported and overbroad to the extent they include the

subject line and the name of the sender/recipient—a government attorney. Second, ED's conclusory invocations of the deliberative process privilege are insufficient to meet its burden. The little information provided does not justify its sweeping redactions. To the contrary, unredacted portions of some of the emails at issue indicate that the redacted material concerns decisions that were already made and/or communicated such decisions. The redacted material was not predecisional, nor was it part of the "give and take" of deliberation, as it must be to qualify for the privilege.

I. ED Has Not Established That the Withheld Communications Are Protected by the Attorney-Client Privilege.

Agencies may invoke Exemption 5 to withhold documents subject to attorney-client privilege, that is, "confidential communications from clients to their attorneys, as well as communications from attorneys to their clients containing confidential information supplied by the client." *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 955 F. Supp. 2d 4, 20 (D.D.C. 2013) (citing *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997)). For a withholding to be upheld on this basis, the agency must show four things:

> (1) [T]he holder of the privilege is, or sought to be, a client; (2) the person to whom the communication is made is a member of the bar or his subordinate and, in connection with the communication at issue, is acting in his or her capacity as a lawyer; (3) the communication relates to a fact of which the attorney was informed by his client, outside the presence of strangers, for the purpose of securing legal advice; and (4) the privilege has been claimed by the client.

Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 841 F. Supp. 2d 142, 153–54 (D.D.C. 2012) (citing *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984)) ("*Judicial Watch I*"). ED has not established all four elements as to any of the six documents as to which it invokes the attorney-client privilege.

A. Communications that did not involve the Office of General Counsel are not privileged.

"It goes without saying that the attorney-client privilege only covers 'confidential communications between an attorney and his client.'" *Pub. Emps. for Envtl. Responsibility v. EPA*, 213 F. Supp. 3d 1, 20 (D.D.C. 2016) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (emphasis added). "The government bears the burden to prove that the 'person to whom the communication is made is a member of the bar or his subordinate and, in connection with the communication at issue, is acting in his or her capacity as a lawyer.'" *Id.* (quoting *Judicial Watch I*, 841 F. Supp. 2d at 154). Here, although ED addresses all six documents as to which it asserts the attorney-client privilege collectively as "consist[ing] of discussions between attorneys in the Department's Office of General Counsel ("OGC") and their client offices," Def. Mem. at 9, neither the *Vaughn* index nor the face of two of these documents (OS 8-10, OS 69) reflect any senders or recipients that are attorneys in the Office of General Counsel.[3]

Collectively, the *Vaughn* index lists seven individuals as either senders or recipients of these two documents. *See* Seigelbaum Decl., Ex. 8. Based on both publicly available documents and signature blocks in documents produced, the identities and titles of the senders and recipients of these documents at the time appear to be as follows:

Nathan Bailey	Acting Assistant Secretary for Communications and Outreach
Jason Botel	Deputy Assistant Secretary for Elementary and Secondary Education and Acting Assistant Secretary for Elementary and Secondary Education

[3] Although the *Vaughn* index entry for OS 309 does not indicate any OGC sender or receipient, *see* Seigelbaum Decl. Ex. 8, nonredacted portions of the email chain show that both OGC lawyer Steven Menashi and an OGC lawyer whom ED refuses to identify were on the chain. *See* Pulver Decl. Ex. 1 at OS 309.

Sara Broadwater	Special Assistant, Office of Communications and Outreach
Carrie Coxen	Confidential Assistant, Office of Elementary and Secondary Education
Robert Eitel	Senior Counselor to the Secretary
Elizabeth Hill	Press Secretary
Adam Honeysett	Managing Director, Office of Communications and Outreach, State and Local Engagement

See Pulver Decl. ¶¶ 3-8, Exs. 3-8; Ex. 1 at OS 10; Ex. 2 at OS 31, OCO-2 81. The agency's declaration provides no evidence that any of these individuals worked in OGC. *See* Siegelbaum Decl. ¶ 22.

ED argues that attorney-client privilege applies to communications with OGC attorneys. Because no OGC attorneys were involved in these communications, ED fails to meet its own test and its burden of proof as to these two documents. *See Pub. Employees for Envtl. Responsibility v. U.S. EPA*, 211 F. Supp. 3d 227, 231 (D.D.C. 2016) (quoting *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) ("the agency 'must prove that the withheld documents' fall within the scope of the attorney-client privilege"). Moreover, the record demonstrates that none of these individuals were serving in a legal capacity, but rather in political and communications capacities—discussing invitations to a purportedly public event and making comments about whom they had already decided to invite. *See, e.g.,* Pulver Decl. Ex. 1 at OS 8 ("You have the green light to send the invitation (as revised) to the following [REDACTED]: *id.* at OS 69 ("Please send the remaining invitations to everyone [REDACTED]"). Accordingly, even if certain of these individuals were attorneys, the record belies any assertion that "'obtaining or providing legal advice was one of the significant purposes' animating each communication withheld." *FTC v. Boehringer Ingelheim*

Pharm., Inc., 892 F.3d 1264, 1269 (D.C. Cir. 2018) (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014)).

Because ED has not met its burden of affirmatively establishing the elements of attorney-client privilege—most notably, the existence of an attorney-client relationship—the withholding of documents OS 8-10 and OS 69 cannot be sustained on attorney-client privilege grounds.

B. The agency's redactions on emails involving OGC are overbroad.

Four of the documents at issue involve OGC attorneys: OS 307-08, OS 309, OS 310, and OS 311-12. Although *portions* of these records may be within the scope of exemption 5, the agency's withholding of nearly the entire emails in which these communications appear, including the name of the OGC attorney who sent and/or received many of the communications and the subject line, are overbroad and unjustified by ED's conclusory *Vaughn* index. Without conceding that the privilege applies to the contents of OS 307-08, OS 309, OS 310, and OS 311-12, Plaintiff seeks disclosure of only (1) the identities of the senders and recipients, and (2) the subject lines.

1. The name of an OGC attorney is not properly withheld.

All four documents include correspondence to or from an individual whose name is redacted. ED has identified this individual as an "OGC attorney" whose "practice area is known publically." Seigelbaum Decl. ¶ 22. ED argues that "disclosure of the attorney's name would effectively release the substance of the aforementioned communications." *Id.* This argument is both illogical and inconsistent with binding precedent.

It is incredible that any individual employed by OGC has a practice area—particularly one "known publically"—that is so narrow that it would "effectively release the substance" of communications. Knowledge of the attorney's general practice area might reveal the *topic* of the communications, but ED has already stated that the communications entailed "legal guidance …

regarding individuals under consideration for invitation" to the purportedly open-to-the-public event. Def. Mem. at 9. Knowing, for example, that the attorney at issue worked on ethical issues, procurement issues, or regulatory compliance issues would not reveal the *substance* of his or her communications.

But this is not privileged information: The D.C. Circuit has held "that the general subject matters of clients' representations are not privileged, [n]or does the general purpose of a client's representation necessarily divulge a confidential professional communication, and therefore that data is not generally privileged." *United States v. Legal Servs. for N.Y.C.*, 249 F.3d 1077, 1081 (D.C. Cir. 2001); *see also Cause of Action Inst. v. U.S. Dep't of Justice*, 330 F. Supp. 3d 336, 350 (D.D.C. 2018) ("Under the general rule, the attorney-client privilege does not protect from disclosure … the general purpose of the work performed."); *United States ex rel. Barko v. Halliburton Co*., 74 F. Supp. 3d 183, 189 (D.D.C. 2014) ("[T]he mere fact of consultation with a lawyer about an issue is generally neither privileged nor protected").

ED has not cited a single case for the proposition that a lawyer's identity is privileged on the theory that it would reveal his or her practice area. And courts have regularly required parties to divulge the names of attorneys barring "exceptional circumstances." *Indian Law Res. Ctr. v. Dep't of Interior*, 477 F. Supp. 144, 149 (D.D.C. 1979); *see also Ellsberg v. Mitchell*, 709 F.2d 51, 60 (D.C. Cir. 1983) (requiring government to release names of which Attorneys General authorized wiretaps). ED's conclusory explanation does not demonstrate exceptional circumstances. Because revelation of the subject matter—not privileged information—is the only basis ED asserts for withholding the name of the OGC attorney, the name is not properly withheld under FOIA.

2. The agency has failed to establish that the subject lines of the email chains are privileged.

Not all correspondence between an attorney and his or her client is confidential. Yet here, ED has redacted the entirety of correspondence, including the subject line, other than the words "Thanks," "Thanks, Bob," "Thank you, Bob," "Good morning," "Good afternoon," and "Let us know if there are any concerns?". Again, the general subject matter of communications is not privileged. *See Legal Servs. for N.Y.C.*, 249 F.3d at 1081. ED has not explained why even the subject line of these emails is entitled to be withheld.

That the subject line of an email may reveal *something* about the substance of a communication is generally not deemed a sufficient reason for it to be withheld. Not only is the general topic of legal advice not privileged, *see id*., it is exactly the sort of information that agencies regularly produce to meet their burden to "convey[] the nature of the withheld documents in a manner that permits the court to critically evaluate the merit of the agency's claim of privilege." *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 128 (D.C. Cir. 1987). The subject lines of emails are regularly produced in *Vaughn* indices and in FOIA production, even where the communications contain some privileged materials. *Cf. S. All. for Clean Energy v. U.S. Dep't of Energy*, 853 F. Supp. 2d 60, 77 (D.D.C. 2012) (finding *Vaughn* index inadequate where "even the e-mail's subject line is redacted"); *Judicial Watch I*, 841 F. Supp. 2d at 155 ("egregious" example of unsupported redaction where "everything substantive" "[a]part from the subject line" was redacted).

Although an agency is "'entitled to a presumption that it complied with the obligation to disclose reasonably segregable material,' … that does not excuse the agency from carrying its evidentiary burden to fully explain its decisions on segregability." *PEER,* 213 F. Supp. 3d at 24 (quoting *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013), and citing *Army Times Pub. Co. v.*

U.S. Dep't of Air Force, 998 F.2d 1067, 1068 (D.C. Cir. 1993)). Given the absence of a specific explanation, ED has not met its burden of showing that even the subject line of the emails is properly withheld.

II. ED Has Not Established That the Withheld Communications Are Protected by the Deliberative Process Privilege.

ED invokes the deliberative process privilege with respect to its redactions on all nine documents. This privilege applies only to documents that are "both predecisional and deliberative," and does not encompass purely factual information. *Williams & Connolly LLP v. U.S. SEC*, 729 F. Supp. 2d 202, 212 (D.D.C. 2010). A document is "predecisional if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). ED has not established that any of the challenged documents meet either requirement. Moreover, for at least some of the documents, the record shows that the redacted material is not privileged.

A. ED has failed to provide adequate information as to the basis for its privilege assertion.

In both its memorandum and agency declaration, without addressing any specific documents, ED states that the redacted information concerns four "deliberations":

> (1) "the scope of the guest list";
> (2) "potential impact of released guidance from [OIRA] Administrator Rao";
> (3) "discussion with White House employees regarding ED's proposed application of said guidance"; and
> (4) "suggested focus of the event on a particular topic."

Def. Br. at 11-12; Siegelbaum Decl. at ¶ 24. The agency's *Vaughn* index provides no greater detail, using identical sentences for six of the documents at issue.

The agency's cursory recitation of these four generic topics, followed by boilerplate recitations of the elements of the privilege, is insufficient to establish the deliberative process

privilege applies to each document, and to all contents within them.[4] "The need to describe each withheld document when Exemption 5 is at issue is particularly acute because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." *PEER*, 213 F. Supp. 3d at 11. Not only must the agency show "the 'function and significance of the documents in the agency's decisionmaking process,' the agency must describe 'the nature of the decisionmaking authority vested in the office or person issuing the disputed documents, and the positions in the chain of command of the parties…." *Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 168 (D.D.C. 2011) (quoting *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982)). ED's vague and conclusory assertions of privilege plainly are inadequate to sustain its burden here. *See, e.g.*, *McKinley v. FDIC*, 268 F. Supp. 3d 234, 244-45 (D.D.C. 2017); *Judicial Watch I*, 841 F. Supp. 2d at 161-62; *see also Morley v. CIA*, 508 F.3d 1108, 1115 (D.C. Cir. 2007) ("[C]onclusory and generalized allegations of exemptions are unacceptable[.]").

B. Communications relating to finalized invitees are neither predecisional nor deliberative.

In its *Vaughn* index, ED describes seven documents as concerning "potential lists of external invitees to a departmental event." Siegelbaum Decl., Ex. 8 (describing OS 8-10, OS 69, OS 307-08, OS 309, OS 310, OS 311-12 and OCO 8). Redactions on at least three of the documents, however, are contained in sentences that are not about *potential* lists of invitees, but about finalized lists. For example, OCO 8 includes the following redacted lines:

> The WH will invite the names on the attached Excel doc [REDACTED] and I have let them know that these names are good to go.

[4] Without conceding that the deliberative process privilege applies, Plaintiff does not challenge the withholding of the contents of the emails between OGC attorneys and ED policy staff contained in OS 307-08, OS 309, OS 310, and OS 311-12.

Pulver Decl. Ex. 1 at OCO-2 8. Similarly, OS 8 states "You have the green light to send the invitation (as revised) to the following [REDACTED]," followed by a list of seven, unredacted names. *Id.* at OS 8. The decision to invite these seven individuals was already made. *See also id.* at OS 69 ("Please send the remaining invitations to everyone [REDACTED]"). Thus any discussion of that already-completed decision is not privileged. *Cf. Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F. Supp. 2d 37, 45-46 (D.D.C. 2012) (privilege applied to back-and-forth over whom to invite to a meeting).

Documents are only predecisional to the extent "they were generated before the adoption of an agency policy." *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980)). Each of the redactions at issue here instead concerns post-decisional communications describing and/or implementing decisions to invite particular individuals. It is well-established that documents that explain choices that were already made are post-decisional and not privileged. *See, e.g.*, *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982); *Taxation with Representation Fund v. IRS,* 646 F.2d 666, 677 (D.C. Cir. 1981); *Pub. Employees for Envtl. Responsibility v. EPA*, 288 F. Supp. 3d 15, 25 (D.D.C. 2017).

Other features of these documents demonstrate that they are not deliberative. For example, OS 8 and OS 69 are both, at least in part, emails sent from Bob Eitel, a Senior Counselor to the Secretary who was involved in setting policy, to a lower-level special assistant in the Communications and Outreach office, whose job it was to email invitations to the event. As the D.C. Circuit has explained, a document "moving from senior to junior is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking rather than part of its give-and-take." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991). There

is no indication that the emails telling Ms. Broadwater to whom to send email invitations sought her input or otherwise reflected deliberation, rather than communicating to her what was already decided and directing her to carry out a task.

Based on this context, these particular redactions are not justified under the deliberative process privilege. As to the other redactions on these documents, ED has not provided sufficiently detailed information to permit an assessment of whether they also relate to decisions already made or whether they are non-deliberative status updates to Ms. Broadwater. Given that it was ED's burden to do so, summary judgment in favor of Plaintiff with respect to all of these documents is appropriate.

C. ED has not established that emails related to OIRA instructions were predecisional and/or deliberative.

The only documents at issue that do not relate to invitees are two responses to a September 28, 2017 email from OIRA Administrator Rao (OS 313 and OS 314). That email was sent to "Regulatory Reform Officers" throughout the federal government and was an "important reminder" that agencies' "Cut the Red Tape Day" events were to be "open to the public," explaining that "the Administration wants to encourage transparency in the regulatory reform process and invite comments and participation by the public." Pulver Decl., Ex. 2 at OS 258. Ms. Rao's email requested that each agency send OIRA "a copy of [its] notice of public meeting and where such notices are posted." *Id.* OS 313 and OS 314 are the only documents produced in response to the September 28, 2017 email, and the substance of both is entirely redacted.

In its *Vaughn* index, ED describes OS 313 as "consist[ing] of deliberations regarding potential complications posed by implementation of the information provided by Administrator Rao, and proposed solutions thereto." Siegelbaum Decl., Ex. 8. Based on this information, it appears that ED either did not plan to make the event open to the public or had not posted a public

notice of meeting. While OS 313 may contain some deliberation about "solutions" to ED's problem, it likewise likely contained factual information—such as what ED had already done or not done. That information is not privileged.

As for OS 314, it does not appear to be in any way predecisional or deliberative. *See* Pulver Decl. Ex. 1 at OS 314. It is a response to OIRA's request that ED provide a copy of its meeting notice and information about where the notice was posted. The email contains a factual question, not an invitation for deliberation, and facts contained in the response would not be privileged. For example, there would be nothing predecisional or deliberative about any statement that said, "We have not posted a notice of public meeting," or "We do not have space for members of the public." Indeed, another agency responded to this very same OIRA email in that way. *See* Pulver Decl. ¶ 12, Ex. 12.

Even the content of the email that contained ED's "solution" has not been shown to be predecisional or deliberative. The email ends "Please let me know if you have any questions"—which indicates that the email is not part of a "give and take," but rather communicating ED's determination of how it would proceed. Given that this communication is the *only* one from ED to OIRA identified in ED's production on this topic, it appears that ED's "proposal" was its final approach. The fact that OIRA *may* have had a problem with it, leading ED to change its approach, does not make its proposal predecisional if the proposal was adopted. *See Coastal States*, 617 F.2d at 866 ("[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public."). If OS 314 informed OIRA of ED's plan regarding public access to "Deregulation Day," and ED adopted that plan, "there is no danger of chilling agency debate and discussion," and thus no privilege. *Blank Rome LLP v. Dep't of the Air Force*, No. 15-CV-1200-

RCL, 2016 WL 5108016, at *10 (D.D.C. Sept. 20, 2016); *see also Tax Analysts*, 117 F.3d at 618 ("A ruling that the [deliberative process] privilege applies should … rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency.").

D. ED has not established that the subject lines of the invitee-related emails are privileged.

As discussed above, even in sensitive cases involving the attorney-client privilege and national security, federal agencies regularly produce the subject lines of emails to requesters and in *Vaughn* indices to aid courts in assessing the validity of agencies' privilege invocations. Without explanation, ED has refused to do so here, withholding the subject lines in OS 8-10, OS 69, OS 307-08, OS 309, OS 310, and OS 311-12, all of which are emails about discussions as to who to invite to the purportedly-public event.

While the agency makes much of the policy interests that underlie the deliberative process privilege, Def. Mem. at 9-10, its boilerplate assertion that releasing any "of the redacted information would be likely to chill open and frank discussion among Department employees," *id.* at 12, is unreasonable as applied to the subject line of emails—much less emails concerning invitees to a public event. It is difficult to see how the subject line of these emails would "discourage candid discussion within an agency," *Access Reports*, 926 F.2d at 1195, as it would likely reveal only the subject matter of the conversation, not the deliberations. As noted in connection with the attorney-client privilege above, *supra* at 10, e-mail subject lines provide the sort of information regularly produced to properly evaluate whether the contents are privileged.

As the agency has failed to justify its withholding of this general subject matter, the Court should order production of the subject line, regardless of whether the Court concludes that the content of these emails can be properly withheld. *Cf. 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 ED's motion for summary judgment, grant Public Citizen's cross-motion for summary judgment, and order production of unredacted versions of OS 8, OS 69, OS 313, OS 314, and OCO 8, and the subject lines and senders/recipients of OS 307-08, OS 309, OS 310, OS 311-12.

Dated: January 14, 2019

Respectfully submitted,

/s/ Adam R. Pulver
Adam R. Pulver (DC Bar No. 1020475)
Patrick D. Llewellyn (DC Bar No. 1033296)
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

PUBLIC CITIZEN, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF EDUCATION, Defendant.	)	Civil Action No. 18-1047 (CKK)

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

1. Plaintiff's request. On October 3, 2017, Plaintiff Public Citizen, Inc., submitted a Freedom of Information Act ("FOIA") request to the Department's FOIA Public Liaison seeking the following records:

   a. All communications between any employee of the immediate Office of the Secretary, Office of Communications & Outreach, or Office of Planning, Evaluation & Policy Development, and any non-Department entity or individual concerning "breakout sessions," "break-out sessions" or "roundtables" scheduled for October 2, 2017, relating to the regulatory agenda, regulatory reform, deregulation, rulemaking, and/or the regulatory process.

   b. Any ED policies, procedures, or guidance regarding which individuals or organizations would be invited to the October 2, 2017 break-out sessions.

   c. Any policies, procedures, or guidance received from the White House, Office of Management and Budget, and/or other non-ED individual or entity regarding which individuals or organizations should be invited to the October 2, 2017 break-out sessions.

Declaration of Jill Siegelbaum ("Siegelbaum Decl.") ¶ 4 & Ex. 2.

PLAINTIFF'S RESPONSE: Undisputed.

2. Search. In response to Plaintiff's FOIA request, searches for responsive records were conducted in the Office of the Secretary ("OS") and the Office of Communications and Outreach ("OCO"). Siegelbaum Decl. ¶ 6. OS was the office responsible for all coordination and implementation of the event referenced in the Subject FOIA Request, while OCO handled media outreach and inquiry for the event. *Id*. There were no other offices in the Department where responsive records were likely to be found. *Id*.

PLAINTIFF'S RESPONSE: Undisputed.

3. All employees at OS and OCO involved in the planning, implementation or media outreach for the event were identified and their email accounts were searched. Siegelbaum Decl. ¶ 7. The FOIA Coordinators for OS and OCO then reviewed the results of the search for actual responsiveness and for any information exempt from disclosure under FOIA, and the Office of General Counsel reviewed the scope and basis of the proposed redactions for legal sufficiency. *Id*.

PLAINTIFF'S RESPONSE: Undisputed.

4. Results of Processing. On July 6, 2018, Defendant provided Plaintiff with an interim response to the Subject FOIA Request consisting of 19 pages of records. Siegelbaum Decl. ¶ 8. On August 6, 2018, Defendant provided Plaintiff with its final response consisting of 428 additional pages of records. *Id*. ¶ 9.

PLAINTIFF'S RESPONSE: Disputed in part. Plaintiff disputes this statement only to the extent it suggests the August 6, 2018 production was the "final" response, in that ED produced previously withheld/redacted materials on October 24, October 25, and November 15, 2018. Siegelbaum Decl. Ex. 1 at 5-6 (Nov. 15), 7 (Oct. 25); Pulver Decl. ¶ 11, Ex. 11 (Oct. 24, 2018).

5. The parties conferred (*see* Siegelbaum Decl. ¶¶ 10-20), and on December 4, 2018, Plaintiff notified Defendant that the only outstanding issues in the litigation are the redactions asserted on

the following pages: OS 8-10, OS 69, OS 307-12 (including the identity of the sender/recipient), OS 313-14, and OCO 8. Siegelbaum Decl. ¶ 20 & Ex. 1.

PLAINTIFF'S RESPONSE: Undisputed.

6. Withholdings. Withholdings on the remaining pages at issue were attributed to FOIA Exemptions 5 and 6. Siegelbaum Decl. ¶¶ 21; *see also* 5 U.S.C. §§ 552(b)(5) & (6).

PLAINTIFF'S RESPONSE: Undisputed that ED purports to invoke FOIA Exemptions 5 and 6.

7. Segregability. All reasonably segregable, non-exempt responsive documents subject to FOIA have been produced to Plaintiff. Siegelbaum Decl. ¶ 27.

PLAINTIFF'S RESPONSE: Disputed. This statement is a legal conclusion that plaintiff challenges. *See* Pl. Mem. in Supp. of Cross-Mot. for Summ. J. and in Opp'n to Def. Mot. for Summ. J. and in Supp. of Memorandum. The cited declaration is insufficient to meet Defendant's burden.

Dated: January 14, 2019

Respectfully submitted,

/s/ Adam R. Pulver
Adam R. Pulver (DC Bar No. 1020475)
Patrick D. Llewellyn (DC Bar No. 1033296)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Plaintiff

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PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS NOT IN GENUINE DISPUTE

1. On October 2, 2017, Defendant United States Department of Education (ED) hosted an event it referred to internally as "Deregulation Day," which included a "one hour listening session" entitled "Cutting the Red Tape: Eliminating Excessive Regulatory Burdens on Schools and Teachers." *See* Pulver Decl. ¶ 2, Ex. 2 at OS 31.

2. As ED described it, "the purpose of the session is for the Department to provide an update on its regulatory reform efforts in the area of elementary and secondary education and to allow the individual participants to provide their thoughts and to ask questions." *Id.*

3. ED sent invitations to the event to specific individuals, each marked "This invitation is non-transferable." *See, e.g.*, *id.* at OS 31-32.

4. Similar events were held at other agencies throughout the federal government on the same day, which the Office of Information and Regulatory Affairs (OIRA) referred to as "Cut the Red Tape Day." *See, e.g.*, *id.* at OS 294; Pulver Decl. ¶ 1, Ex. 1 at OS 313.

5. The events at all of the agencies were supposed to be open to the public. Pulver Decl., Ex. 2 at OS 258.

6. In September 2017, Nathan Bailey served as ED's Communications Director, delegated the authority to perform the duties of the Assistant Secretary for Communications and Outreach. Pulver Decl. ¶ 3, Ex. 3.

7. In September 2017, Jason Botel served as Deputy Assistant Secretary for Elementary and Secondary Education and Acting Assistant Secretary for Elementary and Secondary Education. Pulver Decl. ¶ 4, Ex. 4; Ex. 2 at OCO-2 81.

8. In September 2017, Sara Broadwater was a Special Assistant in ED's Office of Communications & Outreach. Pulver Decl. ¶ 5, Ex. 5; Ex. 2 at OS 31.

9. In September 2017, Carrie Coxen served as a Confidential Assistant in the Office of Elementary and Secondary Education. Pulver Decl. ¶ 6, Ex. 6.

10. In September 2017, Robert "Bob" Eitel served as a Senior Counselor to the Secretary of Education. Pulver Decl. Ex. 1 at OS 10; Ex. 4.

11. In September 2017, Elizabeth ("Liz") Hill served as ED's Press Secretary. Pulver Decl. ¶ 7, Ex. 7.

12. In September 2017, Adam Honeysett served as the Managing Director of ED's Office of Communications and Outreach, State and Local Engagement. Pulver Decl. ¶ 8, Ex. 8 at 6-7.

13. On October 3, 2017, Public Citizen submitted a FOIA request to ED seeking:

> (1) All communications between any employee of the immediate Office of the Secretary, Office of Communications & Outreach, or Office of Planning, Evaluation & Policy Development, and any non-Department of Education (ED) entity or individual concerning "breakout sessions," "break-out sessions" or "roundtables" scheduled for October 2, 2017, relating to the regulatory agenda, regulatory reform, deregulation, rulemaking, and/or the regulatory process.
>
> (2) Any ED policies, procedures, or guidance regarding which individuals or organizations would be invited to the October 2, 2017 break-out sessions.

(3) Any policies, procedures, or guidance received from the White House, Office of Management and Budget, and/or other non-ED individual or entity regarding which individuals or organizations should be invited to the October 2, 2017 break-out sessions.

Siegelbaum Decl. Ex. 2.

14. Public Citizen also sent similar requests to other agencies. *See* Pulver Decl. ¶ 9.

15. Those other agencies responded and produced responsive documents. *See id.*, Ex. 9.

16. After multiple requests for a status update, on February 8, 2018, ED told Public Citizen it could not provide an estimated response date. Pulver Decl. ¶ 10, Ex. 10.

17. Since the suit was filed, ED has made a number of productions. On July 6, 2018, it produced 19 pages of responsive documents. Siegelbaum Decl. ¶ 8. On August 6, 2018, it produced an additional 428 pages. Siegelbaum Decl. ¶ 9.

18. Between August and December 2018, the parties engaged in negotiations in an attempt to resolve any remaining disputes. *See generally* Siegelbaum Decl. Ex. 1. This led to the production of additional documents and the removal of multiple redactions on October 24, 2018 (removal of redactions on six pages); October 25, 2018 (removal of redactions on five pages); and November 15, 2018 (production of five previously-withheld pages). Siegelbaum Decl. Ex. 1 at 5-6, 7; Pulver Decl. ¶ 11, Ex. 11 (Oct. 24, 2018).

19. In November 2018, Defendant's counsel provided information to Plaintiff that allowed it to discern that some of the documents ED was withholding were identical to those produced by other documents. *See* Siegelbaum Decl., Ex. 1 at 1-4.

20. On December 4, 2018, Plaintiff informed Defendant that it would only continue to challenge redactions and withholdings with respect to thirteen pages. *See* Siegelbaum Decl., Ex. 1 at 1.

Dated: January 14, 2019

Respectfully submitted,

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Adam R. Pulver (DC Bar No. 1020475)
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Washington, DC 20009
(202) 588-1000
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Counsel for Plaintiff