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)

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S CROSS-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

Defendant U.S. Department of Education (ED)'s opposition to Plaintiff Public Citizen's motion for summary judgment in this Freedom of Information Act (FOIA) case rests wholly on a misunderstanding of which party bears the burden in FOIA litigation. When a FOIA requester challenges an agency's assertion of privilege as the basis for its withholding of responsive documents, the government bears the burden of establishing the applicability of "the claimed privilege with 'reasonable certainty.'" *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, Civ. No. 18-47 (CKK), 2019 WL 1004042, at *4 (D.D.C. Feb. 28, 2019) (quoting *FTC v. TRW, Inc.*, 628 F.3d 207, 213 (D.C. Cir. 1980)). And "to sustain its burden of showing that records were properly withheld under Exemption 5, an agency must provide in its declaration and *Vaughn* index precisely tailored explanations for each withheld record at issue." *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 188 (D.D.C. 2013). ED has not done so here.[1] The Court should therefore grant Plaintiff's motion, and order ED to produce the improperly withheld records.[2]

ARGUMENT

I. ED Has Not Met Its Burden as to the Attorney-Client Privilege.

In its opening brief, Plaintiff challenged ED's assertion of the attorney-client privilege as to OS 8-10 and OS 69 in their entirety, and as to the identities of the senders and recipients and

[1] Contrary to ED's suggestion, Def.'s Reply (ECF 21) at 2, Plaintiff did not "fail[] to address" ED's argument about the adequacy of the search; Plaintiff explicitly noted that, as Defendant's own witness acknowledged in an affidavit, citing an email from Plaintiff's counsel, "the adequacy of Defendant's search for responsive records … [is] not at issue in this litigation." Pl.'s Opening Mem. (ECF 18) at 2 n.2, quoting Declaration of Jill Siegelbaum (ECF 16-1) (Siegelbaum Decl.) at p.2 n.1.

[2] Specifically, 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 through OS 312.

subject lines of OS 307-08, OS 309, OS 310, and OS 311-32. Neither ED's brief nor its supplemental declaration adequately buttresses its unsubstantiated privilege assertions.

A. ED's *Vaughn* Index is Incomplete and Insufficient as to OS 8-10 and OS 69.

In its opening brief, Plaintiff pointed out that ED's *Vaughn* Index did not reflect that anyone working in a legal capacity was a sender or recipient of two of the documents at issue, OS 8-10 and OS 69, and thus the attorney-client privilege does not apply. ED does not dispute that there are no attorneys listed in its *Vaughn* Index as recipients or senders of these documents, nor does it provide a supplemental *Vaughn* Index. Rather, ED faults Plaintiff for making the "incorrect assumption" that the *Vaughn* Index accurately listed the senders and recipients of the withheld communications. ECF 21 at 2. ED now indicates that these documents involved unlisted senders and/or recipients, including the mystery attorney whose identity ED refuses to provide. Supplemental Declaration of Jill Seigelbaum (Supp. Siegelbaum Decl.) ¶ 2.

Although it remains unclear, ED's brief suggests that OS 8-10 and OS 69 each consist of multiple emails, some of which have the mystery attorney as a sender or as a recipient. ED's refusal to segregate these emails from those not including attorneys dooms its privilege assertion, as ED has utterly failed to meet its burden of providing "precisely tailored" descriptions of "each withheld record." *Nat. Sec. Counselors*, 960 F. Supp. 2d at 188. Neither the Court nor Plaintiff has any idea which portions of the withheld documents involved communications with attorneys at all. As noted in Plaintiff's opening brief, the unredacted portions of these documents make clear that at least some of the redacted material is *not* subject to the attorney-client privilege. For example, ED has redacted parts of the sentence "You have the green light to send the invitation (as revised) to the following [REDACTED]. OS 8 (Pulver Decl. (ECF 18-1), Ex. 1 at 5). *See also* OS 69 (Pulver Decl., Ex. 1 at 8) ("Please send the remaining invitations to everyone

[REDACTED]"). ED appears to concede that these two emails do not have an attorney as sender or recipient, and does not explain how or why the attorney-client privilege could nonetheless apply.

Moreover, ED's admission that its *Vaughn* Index does *not* list every sender or recipient of the withheld communications makes it impossible for Plaintiff or the Court to determine whether the elements of the privilege are met. Its *Vaughn* Index thus fails to fulfill its very purpose: "to permit adequate adversary testing of the agency's claimed right to an exemption," *Pub. Employees for Envtl. Responsibility v. EPA*, 213 F. Supp. 3d 1, 9 (D.D.C. 2016) (quoting *Nat'l Treasury Emps. Union v. U.S. Customs Serv.*, 802 F.2d 525, 527 (D.C. Cir. 1986)). Given that ED had the opportunity to provide supplemental information in response to Plaintiff's opening brief, and chose not to do so, summary judgment should be entered in Plaintiff's favor on Defendant's withholdings of OS 8-10 and OS 69.

B. ED's conclusory statements and generalized assertions do not meet its burden in establishing attorney-client privilege.

Plaintiff maintains that ED should be required to disclose (1) the identities of the senders and recipients, and (2) the subject lines, of OS 307-08, OS 309, OS 310, and OS 311-12, and has cited extensive case law in support of the propositions that neither a lawyer's identity, the fact of consultation, nor the general subject matter of a consultation are privileged. *See* ECF 18 at 7-10 (citing *United States v. Legal Servs. for N.Y.C.*, 249 F.3d 1077, 1081 (D.C. Cir. 2001); *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 128 (D.C. Cir. 1987); *Ellsberg v. Mitchell*, 709 F.2d 51, 60 (D.C. Cir. 1983); *Cause of Action Inst. v. U.S. Dep't of Justice*, 330 F. Supp. 3d 336, 350 (D.D.C. 2018); *United States ex rel. Barko v. Halliburton Co.*, 74 F. Supp. 3d 183, 189 (D.D.C. 2014); *All. for Clean Energy v. U.S. Dep't of Energy*, 853 F. Supp. 2d 60, 77 (D.D.C. 2012);

Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 841 F. Supp. 2d 142, 155 (D.D.C. 2012); *Indian Law Res. Ctr. v. Dep't of Interior*, 477 F. Supp. 144, 149 (D.D.C. 1979)).

ED's response is simply to state that disclosure of the name of an attorney "would effectively release the substance of the aforementioned communications," and that the subject lines of emails are properly withheld where they "contain the specific topic of the deliberations and legal advice sought." ECF 21 (quoting Seigelbaum Decl. ¶ 22 and Supp. Siegelbaum Decl. ¶ 4). Such vague assertions do not meet ED's burden.

While ED cites case law about the presumption of good faith afforded to agency affidavits, the presumption of good faith does not convert conclusory assertions of the bare elements of the privilege into sufficient evidence that the privilege is properly invoked. *See, e.g.*, *Hall v. U.S. Dep't of Justice*, 552 F. Supp. 2d 23, 28–29 (D.D.C. 2008) (finding affidavit was inadequate to support privilege and noting that "Conclusory assertions of the privilege that merely parrot legal language or contain no factual support are insufficient."). Moreover, an agency affidavit is only given weight to the extent that it "demonstrates that the information withheld logically falls within the claimed exemption." *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 940–41 (D.C. Cir. 2013).

ED's repeated assertion that divulging the name of an attorney would reveal the substance of the attorney's communications with his or her client fails to meet this logic requirement. No government attorney is so well-known and serves such a niche practice that the mere revelation of his name would indicate the *substance* of the matter on which the client consulted the attorney, let alone the specific communications made by the client in seeking advice. As noted in Plaintiff's opening brief, "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," ECF 18 at 8, and ED has not explained otherwise.[3]

With respect to the subject lines of the withheld emails, ED's argument fares no better. All ED states is that the subject lines "contain the specific topic of the deliberations and legal advice sought." ECF 21 at 4 (citing Supp. Siegelbaum Decl. ¶ 4). This vague statement does not demonstrate that the *topic* of the advice sought would reveal the *substance* of the communications regarding that topic. *Cf. Legal Servs. for N.Y.C.,* 249 F.3d at 1081 (noting that proponent of privilege has burden of establishing exception to the general proposition that the subject matter of representation is not privileged).

II. ED Has Not Met Its Burden as to the Deliberative Process Privilege.

Public Citizen has made three separate arguments about ED's invocations of the deliberative process privilege. The first is that ED's cursory recitation of generic topics, followed by boilerplate recitations of the elements of the deliberative process privilege, were insufficient for ED to meet its burden as to all nine withheld documents. ECF 18 at 10-11. ED has not responded to that argument, and thus the Court may treat it as conceded. *See Davis v. Transp. Sec. Admin.*, 264 F. Supp. 3d 6, 10 (D.D.C. 2017). ED's brief also fails to address the deliberative process privilege at all with respect to OS 307-08, OS 309, OS 310, OS 311, and OS 312, and thus the Court may also treat Plaintiff's argument that ED has not met its burden as to this privilege for these documents as conceded. *See id.* ED's responses to Plaintiff's other arguments—that emails

[3] While ED cites to *Brinton v. Department of State*, 636 F.2d 600 (D.C. Cir. 1980), that case is irrelevant to a discussion of the extent of attorney-client privilege, as the court there explicitly declined to "affirm the district court's judgment on the basis of the attorney-client privilege." *Id.* at 604. As noted below, ED has not made any argument about the applicability of the deliberative process privilege to these documents and thus the court may treat the argument as conceded.

concerning (1) finalized lists of invitees and (2) ED's response to OIRA's request that it produce a copy of a public notice are neither predecisional and/or deliberative ―are also inadequate.

A. ED still has not provided adequate information to support its privilege assertion.

Putting aside ED's failure to address Public Citizen's argument about the adequacy of its explanation in its brief, the scant information ED provides in its supplemental agency affidavit does not rectify its inadequate *Vaughn* index. The supplemental declaration does not address two of the documents, OS 313 and OS 314, at all, and to the extent it addresses the other documents, it does so in vague generalities.

"Although, of course, the agency need not provide a description so rich in detail that it reveals the purportedly exempt information, this Circuit has consistently recognized that '[t]he description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection.'" *Animal Legal Def. Fund, Inc. v. Dep't of Air Force*, 44 F. Supp. 2d 295, 300 (D.D.C. 1999) (quoting *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996)). "To justify its application of the deliberative process privilege, an agency must address the following areas: '(1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient.'" *Hunton & Williams LLP v. EPA*, 248 F. Supp. 3d 220, 241 (D.D.C. 2017). As one court recently explained in rejecting an agency's assertion of the deliberative process privilege, an "agency 'cannot justify its withholdings on the basis of summary statements that merely reiterate legal standards or offer far-ranging category definitions for information.'" *Protect Democracy Project, Inc. v. U.S. Dep't of Health & Human Servs.*, No. CV 17-792 (RDM), 2019 WL 954810, at *4 (D.D.C. Feb. 27, 2019) (quoting *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't*

of Justice, 955 F. Supp. 2d 4, 13 (D.D.C. 2013)); *see also Trea Sr. Citizens League v. U.S. Dep't of State*, 923 F. Supp. 2d 55, 68 (D.D.C. 2013) ("broad and opaque description of the deliberative process involved does[] not provide the Court with enough detail about whether these documents are deliberative and predecisional.").

ED's repetitive, generic explanations of the nine documents withheld do not meet this standard.

B. ED's explanations as to OS 8 and OS 69 are contrary to the evidence in the record and illogical.

A justification contained in an agency affidavit is not entitled to deference when it is contrary to other evidence in the record, illogical, or implausible. *See ACLU v. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011). ED's explanations as to the propriety of the deliberative process privilege as to OS 8 and OS 69 fail to meet this standard.

ED's explanation that all of the redactions in OS 8 and OS 69 "consist of descriptions of ongoing deliberations regarding invitation decisions still pending" simply does not make sense in light of the context. Even if the decision whether to invite someone to a purportedly public event is a deliberative process subject to the privilege, in both documents, parts of sentences directing someone to send invitations to particular recipients are redacted. In OS 69, the identity of these recipients is redacted. Plainly, an instruction to "Please send the remaining invitations to everyone [REDACTED]" would make no sense if "everyone [REDACTED]" had not already been identified. In OS 8, ED has redacted the end of a sentence, and perhaps an additional sentence, between "send the invitation (as revised) to the following [REDACTED]" and the list of recipients. The redaction in OS 69 is even more illogical; all that has been produced is the words "Please send the remaining invitations to everyone [REDACTED]." The decision to send the remaining invitations to "everyone [REDACTED]" was made by the time this email was sent, yet the

redaction hides "everyone [REDACTED]"'s identity. A document that "announc[es] what the agency *is* doing (and why), not arguing for what it *should* be doing," is not protected by the deliberative process privilege. *Citizens for Responsibility & Ethics in Wash. v. U.S. Gen. Servs. Admin.*, No. 18-CV-377 (CRC), 2019 WL 1046366, at *2 (D.D.C. Mar. 5, 2019) ("*CREW v. GSA*").

C. ED's additional argument about OS 313, OS 314, and OCO 8 do not establish that those documents are entirely predecisional and deliberative.

Two of the withheld emails relate to ED's failure to comply with OIRA's instructions regarding public access to its "Cut the Red Tape Day" event. OS 313 is an email amongst ED employees purportedly discussing "solutions" to this problem (*see* Pulver Decl., Ex. 1 at 15), and OS 314 is ED's one and only response to OIRA's request that ED provide a copy of its meeting notice and information about where the notice is posted (*see* Pulver Decl., Ex. 1 at 16). ED's supplemental agency affidavit provides no further information as to these emails, and thus ED still has not met its burden of establishing that both emails, in their entirety, are predecisional and deliberative. In its brief, ED cites to the recitation of the elements of the privilege and sentences in the initial Siegelbaum Declaration that largely have nothing to do with these documents.

The only conceivably relevant sentences in the Siegelbaum Declaration are those that characterize unspecified "discussions regarding the potential impact of released guidance from Administrator Rao, and discussion with White House employees regarding our proposed application of said guidance." Siegelbaum Decl. ¶ 4. But the Court is not required to accept this characterization of these emails, as it is contradicted by the portions of the unredacted emails.

The documents ED has disclosed, as well as an email produced by another agency, Pulver Decl., Ex. 10, suggest the agency was supposed to produce a public meeting notice, and that, when it received the email from Administrator Rao, it realized it made an error. Discussions designed

"to support a past decision" are not predecisional, and thus are not protected by the deliberative process privilege. *CREW v. GSA*, 2019 WL 1046366, at *3 (quoting *Island Film, S.A. v. Dep't of the Treasury*, 869 F. Supp. 2d 123, 135 (D.D.C. 2012)). Administrator Rao's email did not consist of "released guidance" about which ED needed to deliberate how to "apply." Administrator Rao simply asked for "a copy of your notice of public meeting and where such notices are posted," OS 313, and ED replied to an assistant, OS 314. There is no indication that the one, and only, email to an OIRA assistant was part of "back and forth" between ED and OIRA. *Cf.* Pulver Decl., Ex. 10 (Agriculture's response to same email). If this "proposed application" of OIRA's "guidance," became the final application, it is not exempt from the privilege. If there were further communications indicating a "back and forth" which led to a different "application" of the "guidance," ED should have identified those documents, and produced the final conclusion.

Similarly, the unredacted portions of OCO 8 indicate that the document concerned a decision already made. The redactions in the September 19, 2017 email make particularly little sense, as they are half sentences referring to decisions that plainly were already made, and neither agency affidavit addresses these redactions or explains how they are predecisional and/or deliberative.

CONCLUSION

ED "has provided only a bare bones declaration and *Vaughn* Index, and it makes broad, conclusory arguments in relying on those materials to support its motion for summary judgment, none of which provide the Court with the necessary assurances that the exemption was properly invoked," *Pronin v. Fed. Bureau of Prisons*, No. 17-1807 (TJK), 2019 WL 1003598 (D.D.C. Mar. 1, 2019). Such arguments do not meet ED's burden. The Court should 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: March 15, 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