

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
COMPETITIVE ENTERPRISE)	
INSTITUTE)	
)	
)	
Plaintiff,)	Case No. 1:14-cv-01806-APM
)	
v.)	
)	
OFFICE OF SCIENCE AND)	
TECHNOLOGY POLICY)	
)	
Defendant.)	
_____)	

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant Office of Science and Technology Policy hereby moves for summary judgment on all of Plaintiff's claims. This motion is supported by a statement of material facts as to which there is no genuine issue, a memorandum of points and authorities, the declaration of Rachael Leonard, the administrative materials for Plaintiff's FOIA request, and a *Vaughn* index. A proposed order is attached.

Respectfully submitted,

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Dated: January 23, 2015

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
OFFICE OF SCIENCE AND TECHNOLOGY POLICY'S
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Competitive Enterprise Institute (“CEI”) has sued Defendant Office of Science and Technology Policy (“OSTP” or the “Agency”) under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), for documents related to a video posted on the White House web site in January 2014. CEI also seeks certain documents concerning two statements by OSTP officials about a topic related to global climate change.

As outlined in this memorandum, the attached declaration of Rachael Leonard, and an accompanying *Vaughn* index, OSTP has satisfied its burden under FOIA. OSTP conducted a thorough search for responsive documents and has released to CEI all responsive information not subject to an exemption under FOIA. *See* Declaration of Rachael Leonard (“Decl.”) ¶¶ 14, 16-29. And OSTP properly withheld certain drafts of a final agency document, as well as inter and intra-agency deliberations on scientific issues under 5 U.S.C. § 552(b)(5) (“Exemption 5”). Accordingly, the Court should grant summary judgment to OSTP as to all of Plaintiff’s claims and dismiss the Complaint with prejudice.

FACTUAL BACKGROUND

I. The Polar Vortex and Plaintiff’s Request for Correction

This case concerns Plaintiff’s disagreement with particular viewpoints on a topic related to global climate change. On January 8, 2014, the White House released a short video titled “The Polar Vortex Explained in 2 Minutes” (the “Video”). The Video was narrated by OSTP Director John Holdren and posted on the White House web site.¹

¹ *See* Decl. ¶ 2; *The Polar Vortex Explained in 2 Minutes*, January 8, 2014, available at <http://www.whitehouse.gov/photos-and-video/video/2014/01/08/polar-vortex-explained-2-minutes>.

Early in the Video, Dr. Holdren emphasized that “no single weather episode can either prove or disprove global climate change.”² Nonetheless, he argued, “a growing body of evidence suggests that the extreme cold being experienced by much of the United States as we speak is a pattern that we can expect to see with increasing frequency as global warming continues” (the “Video Quote”).³ Dr. Holdren went on to assert that rising temperatures in the Arctic could lead to “increased, larger excursions of cold air southward (that is, into the mid-latitudes),” creating more extreme winter weather.⁴ He concluded that, although “there will be continuing debate about exactly what is happening . . . I believe the odds are that we can expect, as a result of global warming, to see more of this pattern of extreme cold in the mid-latitudes and some extreme warm in the far north.”⁵

The same day the Video was released, OSTP posted a blog post on the White House web site by OSTP Senior Communications Advisor and Web Editor Becky Fried, titled “We the Geeks: ‘Polar Vortex’ and Extreme Weather.”⁶ Ms. Fried began the post by cautioning “that no single weather episode proves or disproves climate change.”⁷ She then said, however, that “we also know that this week’s cold spell is of a type there’s reason to believe may become more frequent in a world that’s getting warmer, on average, because of greenhouse-gas pollution” (the “Blog Post Quote”).⁸

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Decl. ¶ 5; Office of Science and Technology Policy, *We the Geeks: “Polar Vortex” and Extreme Weather*, Posted by Becky Fried on January 8, 2014 at 5:37 PM EDT, available at <http://www.whitehouse.gov/blog/2014/01/08/we-geeks-polar-vortex-and-extreme-weather>. Ms. Fried is currently OSTP’s Deputy Assistant Director for Strategic Communications. Decl. ¶ 5.

⁷ *Id.*

⁸ *Id.*

On April 14, 2014, CEI submitted a Request for Correction under the Information Quality Act,⁹ seeking “correction” of both the Video Quote and the Blog Post Quote (collectively, the “Statements”). Decl. Ex. A at 2. In support of its request, CEI asserted, among other claims, that “Director Holdren’s claim of ‘a growing body of evidence’ is contradicted by recent peer-reviewed studies” that, in CEI’s view, suggest “that global warming is not leading to increased atmospheric winter blocking, much less causing an increase in winter cold waves or cold weather.” *Id.* at 3.

In a letter dated June 6, 2014, OSTP denied CEI’s request. The letter pointed out that OSTP’s regulations implementing the Information Quality Act apply only to “Information.” Decl. Ex. B at 2. “[O]pinions and policy positions,” by contrast, are “expressly excluded from the legal definition of ‘information,’ and are not subject to OSTP’s Information Quality Act Guidelines.” *Id.* The letter went on to explain that the Statements were opinion not subject to the guidelines. *Id.* OSTP further noted that the Video “did not claim to present a comprehensive review of the scientific literature in its two-minute run time.” *Id.* And Dr. Holdren’s concluding statement—“I believe the odds are that we can expect, as a result of global warming, to see more of this pattern of extreme cold in the mid-latitudes and some extreme warm in the far north”—made clear that he was expressing an opinion. *Id.* Similarly, “the blog post by Ms. Becky Fried expressed a viewpoint and opinion using language including ‘there’s reason to believe.’” *Id.* Because “the Information Quality Act does not apply to the opinions stated by Dr. Holdren and Ms. Fried in the polar vortex video and blog post,” OSTP denied the request. *Id.* CEI appealed OSTP’s denial on June 19, 2014, and OSTP denied that appeal on August 4. Decl. ¶¶ 8-9 & Exs. C-D.

⁹ See Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 to 2763A-154 (2000), 44 U.S.C. § 3516, note.

II. Chronology of the FOIA Request, the Appeal, and OSTP's Responses

After OSTP denied CEI's Request for Correction but before the appeal was resolved, CEI filed a FOIA request dated June 13, 2014, which was assigned OSTP FOIA No. 14-66 (the "FOIA Request"). In the FOIA Request, OSTP sought the following:

- 1) "All documents referencing or discussing whether the [Video Quote] by Director Holdren is, or should be regarded as, the position or view of OSTP, or whether it is, or should be regarded as, the personal opinion of Director Holdren."
- 2) "All documents related to the production of the [V]ideo. That includes documents related to its cost of production, what agency resources were used in producing it, the amount of staff time that was spent producing it, and whose time was spent producing it."
- 3) "All documents referencing or discussing whether the [Blog Post Quote] by Ms. Fried is, or should be regarded as, the position or view of OSTP, or whether it is, or should be regarded as, the personal opinion of Ms. Fried."

Decl. Ex. E at 2.

Upon receipt of the FOIA Request, OSTP logged the request into its FOIA log and began processing it. Decl. ¶ 16. Based on their role in producing the Video, OSTP identified four individuals—Dr. Holdren, Dr. Holdren's assistant, Ms. Fried, and one other OSTP staff member who assisted him in connection with the Video—believed to have potentially responsive records. *Id.* OSTP asked these individuals to conduct a search of their records for any responsive materials. *Id.* Specifically, OSTP explained to them that the FOIA Request sought all documents related to "The Polar Vortex Explained in 2 Minutes" and that they should provide all records related to the Video. *Id.* These individuals searched their paper and electronic records and provided all responsive materials. *Id.* OSTP reviewed the documents provided, identified 11 pages responsive to the FOIA Request, and released all 11 pages to CEI on July 9, 2014, withholding portions of them under Exemption 5 and 5 U.S.C. § 552(b)(6) ("Exemption 6"). *Id.* ¶ 17. CEI appealed OSTP's response on August 4, 2014. *Id.* ¶ 12. In its appeal, CEI claimed

that OSTP had conducted an insufficient search and production. Decl. Ex. F. The appeal letter did not, however, challenge OSTP's redactions to the 11 pages that OSTP did produce. *Id.*

Based on statements and clarifications of the FOIA Request in CEI's appeal, OSTP directed relevant staff to undertake new searches for potentially responsive records:

(1) CEI's appeal letter stated that the FOIA Request "sought, among other things, 'documents related to [the Video's] cost of production.'" Decl. ¶ 20. OSTP had not previously undertaken a search for such materials because it does not generally maintain them. *Id.* Out of an abundance of caution, OSTP's Chief FOIA Officer contacted the staff person likely to have records related to the cost of production of the Video. *Id.* The staff person conducted a search of her records and located no responsive materials. *Id.*

(2) CEI declared that the FOIA Request sought "what agency resources were used in producing [the Video], the amount of staff time that was spent producing it, and whose time was spent producing it." Decl. ¶ 21 (quotation marks omitted). OSTP had not previously searched for these materials because it does not ordinarily break down such information on a project-by-project basis. *Id.* Out of an abundance of caution, OSTP's Chief FOIA Officer directed the staff person who maintains personnel and human resources to conduct a search of her records for timesheets, personnel records, and other records that might be responsive to the FOIA Request or the Appeal. *Id.* The staff person did so and located no responsive materials. *Id.*

(3) CEI's appeal clarified that, contrary to OSTP's interpretation, its response to CEI's Request for Correction was within the intended scope of the FOIA Request. Decl. ¶ 22. OSTP's Chief FOIA Officer identified the OSTP staff member likely to have records of OSTP's draft responses to CEI's Request for Correction. That staff member conducted a search of her records for materials related to that response to the Request for Correction. *Id.* OSTP located a

one-page calendar invitation, as well as the final version of its response to CEI's Request for Correction. *Id.* OSTP also located 47 pages of additional responsive material. *Id.* As discussed further below, these 47 pages are drafts of OSTP's response to CEI. *Id.*; pp. 11-13, *infra*.

On September 5, OSTP issued its response to CEI's appeal. Decl. Ex. H. It released the one-page calendar invitation uncovered by its second search. *Id.* By contrast, OSTP determined that the remaining 47 draft pages were protected from release by the deliberative process privilege included within Exemption 5. Decl. ¶ 22 & Ex. H. OSTP further concluded that there was no reasonably segregable non-exempt information responsive to CEI's request within those 47 pages and thus withheld them in full.¹⁰ Decl. ¶¶ 22, 29.

III. This Litigation

On October 29, 2014, CEI filed this action. *See* ECF No. 1 ("Compl."). CEI contends that OSTP's assertion of the deliberative process privilege over the 47 withheld pages "is directly at odds with its earlier claim that the [Statements] at issue were the personal opinions of Dr. Holdren and Ms. Fried." Compl. ¶ 18. Plaintiff seeks a declaratory judgment and injunctive relief requiring OSTP to produce records responsive to its request, as well as attorney's fees and costs. *Id.* ¶¶ 22-35. CEI has since clarified that it is not challenging OSTP's withholdings pursuant to Exemption 6, but only those materials withheld under Exemption 5. Decl. ¶ 15.

ARGUMENT

I. Standard of Review

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "FOIA cases

¹⁰ OSTP did not include the final version of its response to CEI's request for correction because it had previously provided CEI with a copy of that letter and CEI had included the letter as an attachment to its August 4 appeal. *See* Decl. ¶ 22 & Ex. G.

are typically and appropriately decided on motions for summary judgment.” *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). To obtain summary judgment, an agency must demonstrate that its search for responsive materials was adequate, and justify any non-disclosure of information. *Harrison v. EOUSA*, 377 F. Supp. 2d 141, 145-46 (D.D.C. 2005). “[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in affidavits or declarations when the affidavits or declarations describe ‘the documents and 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.’” *Id.* (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)).

In considering a search’s adequacy, “[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government’s search for responsive documents was adequate.” *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam). “There is no requirement that an agency search every record system.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), *superseded by statute on other grounds*, Pub. L. No. 104–231, 110 Stat. 3048 (1996). And “a search is not unreasonable simply because it fails to produce all relevant material.” *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986). “The adequacy of an agency’s search is measured by a ‘standard of reasonableness.’” *Citizens For Responsibility & Ethics in Washington v. Nat’l Archives & Records Admin.*, 583 F. Supp. 2d 146, 167 (D.D.C. 2008) (quoting *Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

When assessing a search’s adequacy, a court accords agency affidavits “a presumption of good faith.” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotations omitted); *see also Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir.

1981). Affidavits need not include “meticulous documentation [of] the details of an epic search.” *Perry*, 684 F.2d at 127. Instead, “affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice.” *Id.*

FOIA contains nine exemptions, which reflect “Congress’s recognition that the release of certain information may harm legitimate governmental or private interests,” *Summers v. Dep’t of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). To justify nondisclosure, “the agency bears the burden before the trial court of proving the applicability of claimed statutory exemptions.” *Id.* An agency may meet this burden by submitting a “Vaughn index”¹¹ justifying any exemptions. *Petrucelli v. Dep’t of Justice*, --- F. Supp. 2d ----, 2014 WL 2919285, at *12 (D.D.C. 2014). The index need not be arranged in a particular format, since “it is the function, not the form, of the index that is important.” *Keys v. DOJ*, 830 F.2d 337, 349 (D.C. Cir. 1987).

Courts review de novo an agency’s invocation of a FOIA exemption. 5 U.S.C. § 552(a)(4)(B); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). But “summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Wolf*, 473 F.3d at 374 (citations and quotation marks omitted). And in evaluating an exemption claim, a court “must accord substantial weight to [the agency’s] affidavits.” *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996)

II. OSTP Conducted an Adequate Search for Responsive Documents

The Complaint does not appear to challenge the adequacy of OSTP’s search for responsive materials¹² and, in any event, OSTP has met its obligation to conduct a reasonable

¹¹ See *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975).

¹² The Complaint does assert that OSTP’s initial search was inadequate. See Compl. ¶ 16. But it contains no allegations that the search OSTP undertook in response to CEI’s FOIA appeal was

search. *See* pp. 4-6, *supra*. OSTP responded to the FOIA Request by identifying all of the individuals within the Agency with a role in producing the Video, a total of four individuals: Dr. Holdren, Ms. Fried, Dr. Holdren's assistant, and one additional OSTP staffer who assisted Dr. Holdren in connection with the Video. Decl. ¶ 16. OSTP directed these individuals to conduct a search of their records for any responsive materials. *Id.* Specifically, OSTP informed these individuals that the FOIA Request sought “[a]ll documents related to the production of the” Video and directed them to provide any materials related to it. *Id.* And upon receiving CEI's appeal, CEI undertook new searches specifically tailored to the alleged deficiencies that the appeal identified. *See* pp. 5-6, *supra*.

Under the circumstances of this case, OSTP's search for responsive documents was reasonable. As discussed above, the FOIA Request was focused on the Video, a quote within the Video, and a virtually identical statement by Ms. Fried in a blog post published the same day as the Video. OSTP identified four people within the Agency likely to have responsive documents. Decl. ¶ 16. It then directed these individuals to provide any documents concerning the Video. *Id.* These individuals searched their paper and electronic records and provided all responsive materials. *Id.* This process is described in the declaration of OSTP's Chief FOIA Officer, and that declaration is “relatively detailed and nonconclusory and submitted in good faith.” *Weisberg*, 705 F.2d at 1351.

The fact that OSTP identified additional responsive material after receiving CEI's appeal does not raise questions about the adequacy of its search. OSTP's initial search did not uncover the 47 withheld pages only because OSTP did not understand the FOIA Request (which related to the Video and a related quote by Ms. Fried) to encompass its response to CEI's Request for

inadequate, and the relief Plaintiff seeks relates solely to the materials OSTP withheld. *See id.* ¶¶ 22-32.

Correction submitted more than three months after the Video was released. Decl. ¶ 22. That was, at the very least, a reasonable interpretation of an ambiguous FOIA Request. *See* 5 U.S.C. § 552(a)(3) (agency only required to release records when FOIA request “reasonably describes such records”) *LaCedra v. EOUSA*, 317 F.3d 345, 348 (D.C. Cir. 2003). OSTP’s interpretation certainly raises no inference of bad faith. And the additional categories of documents CEI highlighted in its appeal—documents related to the Video’s cost of production and the Agency time and resources spent producing it—involved materials that OSTP does not ordinarily maintain (and the Agency subsequently determined that it indeed did not have any such materials here). *See* p. 5, *supra*. In any event, OSTP cured any arguable problems in its initial search by expanding the search to address each of the alleged deficiencies CEI raised in its appeal letter. *See id.* at 5-6. OSTP has accordingly demonstrated that its search was adequate.

III. OSTP Properly Withheld Records Under Exemption 5

FOIA does not require disclosure of “matters that are . . . 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). “Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus protects the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege. *Id.*; *see also Rockwell Int’l Corp. v. Dep’t of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001).

The deliberative process privilege “allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). According to the D.C. Circuit,

There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds.

Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

The privilege is necessary because “those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.” *Sears*, 421 U.S. at 150-51 (quotation marks omitted). “[E]fficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to ‘operate in a fishbowl.’” *EPA v. Mink*, 410 U.S. 73, 87 (1973) (abrogated on other grounds, Pub. L. No. 93-502, 88 Stat. 1561 (1974)). There are “[t]wo requirements [that] are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative.” *In re Sealed Case*, 121 F.3d at 737.

OSTP has met its burden of establishing that its withholdings were appropriate. Each category of materials, and the corresponding basis for protection, are discussed below.

A. Drafts of OSTP’s Response to CEI’s Request for Correction

The 47 pages OSTP withheld in full pursuant to Exemption 5 are draft versions of OSTP’s final response to CEI’s Request for Correction. Decl. ¶ 26. As explained in the Leonard Declaration, these drafts are predecisional inasmuch as they were generated to assist the Agency in preparing its final response to CEI’s request. *See Quarles v. Dep’t of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (materials predecisional when “prepared in order to assist an agency decisionmaker in arriving at . . . decisions”). And they are deliberative in that they reflect edits,

comments and advice related to the content of that response. Decl. ¶ 26.

“[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.” *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (quotations omitted). Accordingly, “drafts are commonly found exempt under the deliberative process exemption.” *People for the Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007). Among other reasons for this, disclosure of “decisions to insert or delete material or to change a draft’s focus or emphasis would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.” *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987). Indeed, drafts are ordinarily exempt regardless of whether and to what extent segments of the draft made their way into the final product: “If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so.” *Exxon Corp. v. Dep’t of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) (quoting *Lead Industries Association v. O.S.H.A.*, 610 F.2d 70, 86 (2d Cir. 1979)); *cf. Marzen v. HHS*, 825 F.2d 1148, 1155 (7th Cir. 1987) (privilege “protects not only the opinions, comments and recommendations in the draft, but also the process itself”).

Likewise, the draft materials in this case were properly withheld under Exemption 5. These materials contain draft edits, redlines, and comment bubbles from OSTP staff. Decl. ¶ 27. Disclosure of such materials would deter OSTP employees from participating candidly during the drafting process in the future, and thereby threaten the quality of OSTP’s decisions. Decl. ¶

26. That is why “documents [that] include the . . . observations and questions of agency staff are precisely the type of candid discussion that the deliberative process privilege is designed to shield.” *Abraham Fruchter & Twersky LLP v. SEC*, No. 05 Civ. 00039, 2006 WL 785285, at *3 (S.D.N.Y. Mar. 29, 2006). OSTP thus properly withheld these draft materials in full pursuant to Exemption 5.¹³

B. Inter-Agency Communications Concerning Polar Vortex Inquiries

OSTP partially redacted two emails to withhold discussions regarding communications between NASA and a separate agency on how to address questions concerning the polar vortex, as well as a NASA official’s assessment of those discussions. Decl. ¶ 29. These materials were likewise protected by the deliberative process privilege. They are predecisional in that they reflect an effort to formulate the Executive Branch’s response to inquiries on a particular topic. And they are deliberative in that they reflect consultations among two agencies to address an ongoing scientific and policy issue. *See Gutman v. Dep’t of Justice*, 238 F. Supp. 2d 284, 292 (D.D.C. 2003) (documents “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated” are squarely within the scope of the deliberative process privilege) (quotation marks omitted). OSTP

¹³ The Complaint asserts that “OSTP’s claim of deliberative process privilege is directly at odds with its earlier claim that the statements at issue were the personal opinions of Dr. Holdren and Ms. Fried.” Compl. ¶ 18. Not so. OSTP denied CEI’s Request for Correction because *all* opinions—whether those of the Agency itself or its senior leadership (if there is a practical difference between the two)—are exempt from OSTP’s Information Quality Act Guidelines, which applies only to information as defined in the Guidelines. And opinions, of course, are central to the deliberative process privilege. *See, e.g., Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (“The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”); *accord Nat’l Sec. Archive v. C.I.A.*, 752 F.3d 460, 462-63 (D.C. Cir. 2014). The two claims are thus entirely consistent. The 47 withheld pages, moreover, are clearly predecisional, as they are drafts of OSTP’s final decision on CEI’s request for correction. *See* pp. 11-13, *supra*.

properly withheld these materials.

C. Communications Concerning Development of the Video

OSTP withheld portions of three emails discussing development of the Video, including comments and suggestions concerning potential content, and the timing of internal review. Decl. ¶ 30. And OSTP withheld portions of a fourth email to redact the website and password of a private video that was a draft of the Video ultimately posted on the White House website. *Id.*¹⁴

These materials were likewise properly withheld under the deliberative process privilege. As discussed above, both drafts and the drafting process are typically predecisional. *See* pp.12-13, *supra*; *Russell*, 682 F.2d at 1048. The Video, moreover, involved an issue attracting substantial public attention, and the study of which is central to OSTP’s role. Decl. ¶ 1. “Disclosure of this information would discourage officials from sharing their candid reactions and personal impressions regarding specific recommendations and proposals offered.” Decl. Ex. I. And since the draft video was itself protected by the deliberative process privilege, OSTP was obviously entitled to redact the password and related information needed to access it, since releasing that information is tantamount to releasing the draft video itself.

D. Communications between OSTP Director and Senior White House Staff

Finally, OSTP redacted a fragment of a sentence in one email to withhold discussion of communications on scientific issues between Dr. Holdren and senior Administration officials at a prior meeting. Decl. ¶ 31 & Ex. I. This discussion is protected by the deliberative process privilege. It is deliberative because it reflects the give and take of the consultative process in internal, informal exchanges at staff meetings. *Id.* Although this communication may not have led to a “final decision,” an “agency need not point to an agency final decision, but merely

¹⁴ In a separate email, OSTP had also redacted the room number where a meeting concerning the Video was held but it released that information to CEI before this motion was filed. Decl. ¶ 30.

establish what deliberative process is involved, and the role . . . that the documents at issue played in that process.” *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000). And if such internal exchanges were disclosed, that would deter officials from participating in full, frank, and open discussions at staff meetings. Decl. Ex. I.

IV. OSTP Processed and Released All Reasonably Segregable Information

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). But an agency need not disclose records in which the non-exempt information remaining is meaningless. *See Nat’l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005). “Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). And a court “may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated.” *Juarez v. Dep’t of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008).

Here, “OSTP conducted a careful, line-by-line review of each document withheld in full or in part and concluded that there was no reasonably segregable factual or non-deliberative information responsive to CEI’s request.” Decl. ¶ 32. There are no facts rebutting the presumption that OSTP complied with its segregability obligations. Indeed, the only documents withheld in full are drafts which, courts have consistently recognized, are presumptively predecisional and deliberative. *See pp. 12-13, supra.*

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to OSTP as to all of CEI’s claims and the Complaint should be dismissed with prejudice.

Respectfully submitted,

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Dated: January 23, 2015

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE)	
INSTITUTE)	
)	
)	
Plaintiff,)	Case No. 1:14-cv-01806-APM
)	
v.)	
)	
OFFICE OF SCIENCE AND)	
TECHNOLOGY POLICY)	
)	
Defendant.)	

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF OFFICE OF SCIENCE AND
TECHNOLOGY POLICY’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7(h)(1), the following is a statement of material facts as to which the movant, Office of Science and Technology Policy (“OSTP”), contends there is no genuine issue:

1. On January 8, 2014, a video titled “The Polar Vortex Explained in 2 Minutes” (the “Video”) was posted on the White House web site. Declaration of Rachael Leonard (“Decl.”) ¶ 4.
2. On January 8, 2014, a blog post titled “We the Geeks: ‘Polar Vortex’ and Extreme Weather” (the “Blog Post”) was posted on the White House web site. Decl. ¶ 5.
3. On April 14, 2014, Plaintiff Competitive Enterprise Institute (“CEI”) submitted to OSTP a request for correction under the Information Quality Act (the “Request for Correction”),

seeking “correction” of two claims made by OSTP employees, one in the Video and one in the Blog Post. Decl. ¶ 6 & Ex.¹ A at 1-2.

4. The Request for Correction sought correction of the following two statements (collectively, the “Statements”): (1) A statement by OSTP Director John P. Holdren in the Video that “a growing body of evidence suggests that the kind of extreme cold being experienced by much of the United States as we speak is a pattern that we can expect to see with increasing frequency as global warming continues” (the “Video Quote”); (2) A statement by OSTP Senior Communications Advisor and Web Editor Becky Fried in the Blog Post that “we also know that this week’s cold spell is of a type there’s reason to believe may become more frequent in a world that’s getting warmer, on average, because of greenhouse-gas pollution” (the “Blog Post Quote”). Decl. ¶ 6 & Ex. A at 1-2.

5. In a letter from OSTP to CEI dated June 6, 2014 (the “June 6 Letter”), OSTP denied the Request for Correction. Decl. ¶ 7 & Ex. B at 2.

6. The June 6 Letter explained that the Video Quote “was an expression of Dr. Holdren’s personal opinion and expert judgment on the balance of the evidence.” Decl. Ex. B at 2.

7. The June 6 Letter further explained that the Blog Post Quote represented a “viewpoint and opinion.” Decl. Ex. B at 2.

8. The June 6 Letter concluded that the Information Quality Act and OSTP’s regulations implementing the Information Quality Act did not apply to the Statements because opinions and policy positions are not subject to OSTP’s guidelines implementing the Information Quality Act. Decl. Ex. B at 2.

¹ For purposes of this statement of material facts, “Ex.” refers to the corresponding exhibit to the Declaration of Rachael Leonard.

9. CEI appealed OSTP's denial of the Request for Correction, in a letter to OSTP dated June 19, 2014. Decl. ¶ 8 & Ex. C.

10. In a letter from OSTP to CEI dated August 4, 2014, OSTP denied CEI's appeal. Decl. ¶ 9 & Ex. D.

11. CEI submitted a Freedom of Information Act ("FOIA") request to OSTP, dated June 13, 2014 (the "FOIA Request"). Decl. ¶ 10 & Ex. E.

12. OSTP assigned the FOIA Request identification number OSTP FOIA No. 14-66. Decl. ¶ 10.

13. In the FOIA Request, CEI sought the following:

- "All documents referencing or discussing whether the [Video Quote] by Director Holdren is, or should be regarded as, the position or view of OSTP, or whether it is, or should be regarded as, the personal opinion of Director Holdren." Decl. Ex. E at 2.
- "All documents related to the production of the [V]ideo. That includes documents related to its cost of production, what agency resources were used in producing it, the amount of staff time that was spent producing it, and whose time was spent producing it." Decl. Ex. E at 2.
- "All documents referencing or discussing whether the [Blog Post Quote] by Ms. Fried is, or should be regarded as, the position or view of OSTP, or whether it is, or should be regarded as, the personal opinion of Ms. Fried." Decl. Ex. E at 2.

14. In response to the FOIA Request, OSTP identified the four individuals at OSTP who had a role in producing the Video, and instructed these four individuals to conduct a search of their records for any responsive material. Decl. ¶ 16.

15. In doing so, OSTP explained to these four individuals that the FOIA Request sought all documents related to “The Polar Vortex Explained in 2 Minutes” and that they should provide all records related to the Video. Decl. ¶ 16.

16. These four individuals searched their paper and electronic records and provided all responsive records. Decl. ¶ 16.

17. In response to the FOIA Request, OSTP located 11 pages of responsive documents. Decl. ¶ 17.

18. OSTP responded to the FOIA Request in a letter to CEI dated July 9, 2014 (the “July 9 Response”). Decl. ¶ 11 & Ex. F.

19. OSTP released all 11 pages of the responsive documents it located to CEI as an enclosure to the July 9 Response. Decl. ¶ 17 & Ex. F. OSTP withheld portions of those documents under 5 U.S.C. § 552(b)(5) (“Exemption 5”), and 5 U.S.C. § 552(b)(6) (“Exemption 6”). Decl. ¶ 17 & Ex. F.

20. The July 9 Response advised CEI of its right to file an administrative appeal. Decl. Ex. F.

21. In a letter to OSTP from CEI dated August 4, 2014 (the “Appeal”), CEI appealed OSTP’s search for and production of documents in response to the FOIA Request. Decl. ¶ 12 & Ex. G.

22. In response to the Appeal, OSTP undertook a search for three additional categories of documents:

- Documents related to the cost of the Video’s production. Decl. ¶ 20.
- Documents—such as timesheets and personnel records—related to the agency time and resources used to produce the Video. Decl. ¶ 21.
- Documents related to OSTP’s response to the Request for Correction. Decl. ¶ 22.

23. OSTP responded to the Appeal in a letter to CEI dated September 5, 2014 (the “Appeal Response”). Decl. ¶ 13 & Ex. H.

24. The Appeal Response released one additional document that was not included with the July 9 Response. Decl. ¶¶ 13, 22 & Ex. H.

25. The Appeal Response advised CEI that OSTP was withholding in full 47 pages under Exemption 5. Decl. ¶¶ 13, 22 & Ex. H.

26. The Appeal Response did not include the final version of OSTP’s response to CEI’s Request for Correction because OSTP had previously provided that response to CEI and CEI had included it as an exhibit to its Appeal. Decl. ¶ 22.

27. CEI received all non-exempt records responsive to the FOIA Request and the Appeal between June 2014 and September 2014. Decl. ¶¶ 14, 16-32.

28. CEI filed its Complaint on October 29, 2014. ECF 1; Decl. ¶ 15.

29. In this lawsuit, CEI does not challenge redactions made pursuant to Exemption 6. CEI only challenges the withholdings under Exemption 5. Decl. ¶ 15.

EXEMPTION 5

30. The 47 pages withheld in full under Exemption 5 were withheld pursuant to Exemption 5’s deliberative process privilege. Decl. ¶¶ 24-27.

31. The 47 pages withheld in full under Exemption 5 were draft versions of OSTP's response to CEI's Request for Correction. Decl. ¶ 26.

32. All 47 withheld pages were marked DRAFT when they were created, and several pages contain draft edits, including redlines and comment bubbles from OSTP staff. Decl. ¶ 27.

33. In the 47 pages withheld in full under Exemption 5, OSTP staff were engaging in deliberative conversations regarding draft documents in order to help formulate OSTP's response to CEI's Request for Correction. Decl. ¶ 26.

34. The Exemption 5 redactions in the 11 pages OSTP provided to CEI with the July 9 response consist of the following categories of materials:

- Two partially redacted emails discussing communications between NASA and a separate agency on how to address inquiries concerning the polar vortex. Decl. ¶ 29 and Ex. I (IDs 3.01 and 3.02).
- Three partially redacted emails describing the Agency's collection of information and recommendations and the timing of internal review, a response to a particular recommendation, and discussion of comments and ideas concerning possible content for the Video, as well as portions of another email containing a website and password to access a privately hosted online video that was a draft of the Video ultimately posted on the White House website. Decl. ¶ 30 and Ex. I (IDs 2.01, 2.02, 2.03, and 2.04).
- One partially redacted email discussing the content of communications concerning scientific issues between OSTP Director Holdren and senior Administration officials during a prior staff meeting. Decl. ¶ 31 and Ex. I (ID 1.01).

35. In a separate email, OSTP had previously redacted the room number where a meeting was held, but OSTP has since made a discretionary release of that information to CEI. Decl. ¶ 30.

36. OSTP released all reasonably segregable non-exempt information. Decl. ¶ 32.

37. Disclosure of the information withheld under Exemption 5 would deter OSTP's ability to engage in candid, internal discussions. Decl. ¶ 25.

38. All records withheld in full or in part under Exemption 5 remained within the Executive Branch. Decl. ¶ 25.

39. OSTP submitted a declaration that describes the basis for withholding the 47 pages withheld in full, and the declaration is accompanied by a *Vaughn* index that describes the basis for withholding each part of the July 9 Response that OSTP has withheld pursuant to Exemption 5. Decl. ¶¶ 23-32 & Ex. I.

40. OSTP's declaration and *Vaughn* index adequately justifies these withholdings. Decl. ¶¶ 23-32 & Ex. I.

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