UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiff,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:20-cv-02761-AT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

LEGAL STANDARD 3

ARGUMENT 4

I. The CDC has improperly withheld information under the presidential communications privilege. 4

A. The CDC has failed to establish that these records were kept confidential in the manner required by the privilege. 6

B. The CDC has failed to establish that the communications were authored or solicited and received by an immediate presidential advisor. 9

C. The CDC has failed to establish that the communications were authored or solicited and received in the course of advising the president. 10

II. The CDC has improperly withheld information under the deliberative process privilege. 11

A. The CDC has improperly withheld information from emails applying clearance procedures for COVID-19–related communications. 12

B. The CDC has improperly withheld information from April and May 2020 emails conveying COVID-19–related communications clearance procedures. 14

C. The CDC has failed to establish that two versions of the "DRAFT CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response" can be withheld under the deliberative process privilege. 17

1. The CDC has not shown that Document 12 and Document 1 are deliberative and predecisional. 18

a. Document 12 18

b. Document 1 21

2. The CDC has failed to establish that the media strategy plan relates to substantive agency policymaking. 22

3. The CDC has failed to show that it released all segregable information. 23

III. This Court should review the withheld documents *in camera*. 23

IV. The CDC's search for records responsive to Items 1 and 2 was inadequate. 24

A. The CDC adopted an unreasonably narrow interpretation of Items 1 and 2 of Plaintiff's request. 24

B. The CDC's search terms and methods were unreasonable. 26

C. The CDC has failed to search all custodians who were reasonably likely to possess responsive documents. 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

ACLU v. DOD, 435 F. Supp. 3d 539 (S.D.N.Y. 2020) 8, 9

ACLU v. DOD, No. 15 Civ. 9317 (AKH), 2017 WL 4326524 (S.D.N.Y. Sep. 27, 2017) 15

ACLU v. DOJ, 90 F. Supp. 3d 201 (S.D.N.Y. 2015) 25, 26

ACLU v. DOJ, No. 15 Civ. 1954 (CM), 2016 WL 889739 (S.D.N.Y. Mar. 4, 2016) 7, 8, 9

Am. Immigr. Council v. DHS, 905 F. Supp. 2d 206 (D.D.C. 2012) 15

Brennan Ctr. for Just. v. DOJ, 377 F. Supp. 3d 428 (S.D.N.Y. 2019) 27

Brennan Ctr. for Just. v. DOJ, 697 F.3d 184 (2d Cir. 2012) 12, 13, 21

Campaign Legal Ctr. v. DOJ, No. 18-CV-1771 (TSC), 2020 WL 2849909 (D.D.C. June 1, 2020) 11

Charles v. Off. of Armed Forces Med. Exam'r, 730 F. Supp. 2d 205 (D.D.C. 2010) 26

Color of Change v. DHS, 325 F. Supp. 3d 447 (S.D.N.Y. 2018) 20

Ctr. for Biological Diversity v. OMB, No. C 07-4997 MHP, 2008 WL 5129417 (N.D. Cal. Dec. 4, 2008) 10

Ctr. for Effective Gov't v. Dep't of State, 7 F. Supp. 3d 16 (D.D.C. 2013) 6, 7

Ctr. for Investigative Reporting v. U.S. Customs & Border Prot., 436 F. Supp. 3d 90 (D.D.C. 2019) 16, 19, 21

Davis v. City of N.Y., No. 10 Civ. 0699 (SAS), 2011 WL 1742748 (S.D.N.Y. May 5, 2011) 14, 22

Dep't of State v. Ray, 502 U.S. 164 (1991) 4

DiBacco v. U.S. Army, 795 F.3d 178 (D.C. Cir. 2015) 29

Fox News Network, LLC v. U.S. Dep't of the Treasury, 678 F. Supp. 2d 162 (S.D.N.Y. 2009) 28

Fox News Network, LLC v. U.S. Dep't of the Treasury, 911 F. Supp 2d 261 (S.D.N.Y. 2012) 20, 22

Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473 (2d Cir. 1999) 23

Halpern v. FBI, 181 F.3d 279 (2d Cir. 1999) 4

Immigrant Def. Project v. U.S. Immigr. & Customs Enf't, 208 F. Supp. 3d 520 (S.D.N.Y. 2016) 24, 25

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) 6, 9, 11

Judicial Watch v. DOJ, 365 F.3d 1108 (D.C. Cir. 2004) 9, 10

Knight First Amendment Inst. at Columbia Univ. v. DHS, 407 F. Supp. 3d 311 (S.D.N.Y. 2019) 26, 27, 28, 29

LaCedra v. Exec. Off. for U.S. Attorneys, 317 F.3d 345 (D.C. Cir. 2003) 24

Miller v. Casey, 730 F.2d 773 (D.C. Cir. 1984) 26

N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 3

N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501 (S.D.N.Y. 2007) 17, 20, 22

N.Y. Times Co. v. DOJ, 756 F.3d 100 (2d Cir. 2014) 4

NAACP Legal Def. & Educ. Fund, Inc. v. DOJ, No. 18-cv-4354 (PKC), 2020 WL 5237765 (Sept. 2, 2020) 20

NAACP Legal Def. & Educ. Fund, Inc. v. DOJ, No. 18-cv-9363 (AJN), 2020 WL 2793015 (S.D.N.Y. May 29, 2020) 27

Nat'l Council of La Raza v. DOJ, 411 F.3d 350 (2d Cir. 2005) 11

Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't Agency, 811 F. Supp. 2d 713 (S.D.N.Y. 2011) 13, 22

Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't Agency, 877 F. Supp. 2d 87 (S.D.N.Y. 2012) ..... passim

Nat'l Res. Def. Council v. U.S. Env't Prot. Agency, No. 17-cv-5928 (JMF), 2019 WL 3338266 (S.D.N.Y. July 25, 2019) 14, 16

Nat'l Res. Def. Couns. v. U.S. Env't Prot. Agency, No. 17-cv-5928 (JMF), 2019 WL 4142725 (Aug. 30, 2019) 22, 23

Nation Magazine v. U.S. Customs Serv., 71 F.3d 885 (D.C. Cir. 1995) 24

PHE, Inc. v. DOJ, 983 F.2d 248 (D.C. Cir. 1993) 24

Prop. of the People, Inc. v. OMB, 330 F. Supp. 3d 373 (D.D.C. 2018) 9, 10

Pub. Citizen, Inc. v. OMB, 598 F.3d 865 (D.C. Cir. 2010) 15

Pub. Emps. for Env't. Resp. v. U.S. Int'l Boundary & Water Comm'n, 842 F. Supp. 2d 219 (D.D.C. 2012) 25

Rosenberg v. DOD, 342 F. Supp. 3d 62 (D.D.C. 2018) 14

Seife v. Dep't of State, 298 F. Supp. 3d 592 (S.D.N.Y. 2018) 6, 11, 12

Tigue v. DOJ, 312 F.3d 70 (2d Cir. 2002) 13, 14

Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321 (D.C. Cir. 1999) 30

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5 U.S.C. § 552 ..... 2, 3, 24

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Plaintiff the Knight First Amendment Institute at Columbia University (the "Knight Institute" or "Plaintiff") respectfully submits this memorandum of law in support of its cross-motion for partial summary judgment against Defendants the Centers for Disease Control and Prevention ("CDC") and the U.S. Department of Health and Human Services ("HHS"). It also submits this memorandum in opposition to the CDC and HHS's motion for summary judgment.

INTRODUCTION

We are in the midst of a global health crisis, inundated every day with conflicting information about the pandemic. Although we should be able to turn to our nation's public health experts in this time of crisis, there have been widespread reports that the Trump administration is restricting what CDC employees tell the public, even altering their message for political ends. As a result, the public does not know whom to trust. To enable the public to assess for itself whether and how the administration is stifling the speech of public health experts, the Knight Institute filed this lawsuit under the Freedom of Information Act ("FOIA"), seeking the release of records concerning restrictions on CDC employees' ability to communicate with the press and the public.

These records are a matter of urgent public concern. When the Knight Institute filed its request on March 19, there had been over 9,415 people in the United States diagnosed with COVID-19, and 150 deaths. Now, just six months later, there have been over 6.6 million reported COVID-19 cases in the United States, and 197,529 deaths. And the public still does not know the extent to which the administration is controlling the CDC's public statements about the pandemic.

The CDC has improperly withheld in full or in part several key records that would shed light on this question, invoking the presidential communications privilege and the deliberative process privilege under Exemption 5. It also impermissibly construed the Knight Institute's Request to exclude certain categories of urgently needed records from its search. As explained

below, the CDC's withholding of this vital information and its failure to search for and process all records requested are unjustifiable and cannot be upheld. The Knight Institute thus respectfully requests that the Court grant its motion for partial summary judgment and order the CDC to release records it has improperly withheld and to conduct a new search for the remainder of the records the Knight Institute seeks.

BACKGROUND

I. The Request

On March 19, 2020, the Knight Institute filed a FOIA request (the "Request") seeking records relating to restrictions on CDC employee speech and seeking expedited processing under 5 U.S.C. § 552(a)(6)(E). *See* Request at 4–8, ECF No. 1-1. The Request sought five categories of records, all related to policies or procedures governing the ability of CDC employees to communicate with the press and the public. *Id.* at 4.

On March 24, the CDC denied the request for expedited processing. Am. Compl. ¶ 20, ECF No. 17. On March 26, the CDC informed the Knight Institute that Items (1) and (2) of the Request were "overly broad." *Id.* ¶ 21. In an effort to decrease processing time, Plaintiff agreed to narrow the scope of those Items by limiting them to (1) records created on or after January 29, 2020, and (2) a list of eleven potential custodians and three offices within the CDC. *See* May 28 Joint Letter Ex. A at 1, ECF No. 23-1.

On April 2, the Knight Institute filed a complaint challenging the CDC's denial of expedited processing. ECF No. 1. On May 8, after the CDC failed to release responsive records by FOIA's statutory deadline, the Knight Institute amended its complaint. Am. Compl. ¶ 26. Consistent with the Court-ordered processing schedule, the CDC processed certain categories of

records by June 9, June 18, and July 6, and released the records it deemed non-exempt. ECF Nos. 24–25. On July 6, the CDC informed the Court that it had completed production. ECF No. 26.

II. Plaintiff's Challenges

On July 20, 2020, the parties informed the Court that they intended to file cross-motions for summary judgment. ECF No. 28. The Knight Institute also conveyed its intention to challenge the withholding of information from approximately forty-four records. *See* July 20 Joint Letter Ex. A, ECF No. 28-1. Just days before filing its motion for summary judgment, the CDC released previously withheld information from a number of those challenged records. Declaration of Roger Andoh ("Andoh Decl.") ¶ 18, ECF No. 34; Declaration of Jennifer Pinsof ("Pinsof Decl.") ¶ 9.

In light of the CDC's supplemental productions and the representations made in its *Vaughn* Index and Declaration, the Knight Institute now narrows its list of challenges. It challenges the CDC's invocation of Exemption 5 to withhold only: (1) the four records withheld under the presidential communications privilege that appear to convey clearance procedures for communications related to COVID-19 (Documents 9–11 and 35 on the *Vaughn* Index, ECF No. 34–1); (2) emails applying those procedures (Documents 27–28); (3) emails from April and May 2020 conveying clearance procedures for COVID-19 communications (Documents 33–35); and (4) two versions of the CDC's COVID-19 media strategy plan (Documents 1 and 12). The Knight Institute also challenges the adequacy of the CDC's search as to Items (1) and (2) of the Request.

LEGAL STANDARD

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The agency bears the burden of showing that its searches were adequate and that any withheld information falls within the claimed FOIA

exemptions. *See* 5 U.S.C. § 552 (a)(4)(B); *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The agency's affidavits must give "reasonably detailed explanations," *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014) (citation omitted), "without resort to conclusory and generalized allegations of exemptions," *Halpern v. FBI*, 181 F.3d 279, 290 (2d Cir. 1999) (internal quotation marks and citation omitted). The Court reviews the applicability of an exemption *de novo*, giving no deference to the agency's initial determination. *See Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 69 (2d Cir. 2009). The exemptions must be construed narrowly, and doubts are resolved in favor of disclosure. *Wood v. FBI*, 432 F.3d 78, 83 (2d Cir. 2005).[1]

ARGUMENT

I. The CDC has improperly withheld information under the presidential communications privilege.

When the Knight Institute filed its FOIA request seeking information about restrictions on the ability of CDC officials to communicate with the press and the public about COVID-19, it pointed in particular to two February 2020 events that raised concerns about the White House's level of control over such communications. *See* Request at 2–3. On February 25, Dr. Nancy Messonnier, a senior CDC official, explained on a press call that community spread was inevitable. *See* Request at 2. After Dr. Messonnier "came under fire from the administration" for her comments, she "toned down her advisories." *Id.* at 3 (citation omitted). And just two days later, on February 27, the White House reportedly "direct[ed]" federal scientists to "coordinate all statements and public appearances with the office of Vice President Mike Pence." Michael D. Shear & Maggie Haberman, *Pence Will Control All Coronavirus Messaging from Health Officials*, N.Y. Times (Feb. 27, 2020), https://perma.cc/822B-DWJH.

[1]For the reasons cited by Defendants, Plaintiff has not submitted a Local Rule 56.1 statement. *See* Gov't Br. 5 n.1.

The CDC withheld four records under the presidential communications privilege, three in full and one in part, that appear to relate to these events.

(1) Document 9: The first record is an email sent from the Executive Office of the President ("EOP") to "Senior Government Officials" on February 25—the same day as Dr. Messonnier's comments. *See Vaughn* Index ¶ 9; *see also id.* ¶¶ 17, 26 (duplicates of Document 9). The email, withheld in full, conveys a "coordinated media communication strategy," Andoh Decl. ¶ 23—one which tellingly includes a list of "designated speakers for various issues/topics," *Vaughn* Index ¶ 9.

(2) Document 11: The CDC also withheld an email from the CDC Office of the Director, forwarding Document 9 to other "Senior Government Officials." *Id.* ¶ 11.

(3) Document 10: The third record is a chain containing a February 27 follow-up email from someone in the EOP. *Id.* ¶ 10. This email—sent the same day federal scientists were reportedly directed to coordinate communications with the Office of the Vice President—conveyed an "[u]pdate and elaboration of proposed coordinated media communication strategy." *Id.*

(4) Document 35: The fourth record, withheld in part, is an April 30 email conveying "[i]nterim communication and media procedures" to a new CDC staffer. *Id.* ¶ 35; Pinsof Decl. Ex. 1. Although this email is internal to the CDC, the agency redacted "references to communications with the President or his immediate advisors." *Vaughn* Index ¶ 35.

For three independent reasons, the CDC has failed to show that this information qualifies for the privilege's protection. First, because the information appears to have been disseminated for non-advisory purposes, the CDC has failed to establish that it has been kept confidential in the

manner required by the privilege. Second, the CDC has failed to establish that the communications were authored or solicited and received by an immediate presidential advisor, relying instead on a conclusory assertion with no factual support. Third, the CDC has not alleged that the communications were "authored or received in the course of advising the President," as it must to sustain its invocation of the privilege. *Seife v. Dep't of State*, 298 F. Supp. 3d 592, 622 (S.D.N.Y. 2018). This Court should thus reject the CDC's assertion of the privilege.

A. The CDC has failed to establish that these records were kept confidential in the manner required by the privilege.

The CDC has impermissibly stretched the bounds of the presidential communications privilege by withholding what appear to be instructions disseminated to agency staff. Such records cannot be withheld because they have not been kept confidential in the manner required by the privilege, and preventing their release would not serve the interests the privilege is designed to protect. *See, e.g.*, *Ctr. for Effective Gov't v. Dep't of State*, 7 F. Supp. 3d 16, 24–26 (D.D.C. 2013). Because the CDC has failed to show otherwise, this Court should reject its attempt to withhold this information from the public.

The presidential communications privilege is narrowly circumscribed to serve a specific purpose: "the promotion of candor and effective presidential decision-making." *Id.* at 26. "Confidentiality is the touchstone of the privilege, for '[c]onfidentiality is what ensures the expression of "candid, objective, and even blunt or harsh opinions" and the comprehensive exploration of all policy alternatives before a presidential course of action is selected.'" *Id.* at 24–25 (quoting *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997)). If a presidential communication is distributed, "[t]he purpose underlying the distribution . . . beyond the President's closest advisers is paramount. If distribution is limited to advisory purposes, the privilege may apply; but if distribution is far broader, the purposes animating the privilege will not justify its

application." *Id.* at 29. This is because "documents distributed from the Office of the President for non-advisory purposes do not implicate the goals of candor, opinion-gathering, and effective decision-making that confidentiality under the privilege is meant to protect." *Id.* at 27; *see also ACLU v. DOJ*, No. 15 Civ. 1954 (CM), 2016 WL 889739, at *5 (S.D.N.Y. Mar. 4, 2016) ("[B]road dissemination to persons who were not i[n]volved in advising the President, but in implementing his announced policy, eviscerated the presidential communications privilege."). Indeed, "the transmittal of a document to persons who are unlikely to be in a position to give advice to the President waives the privilege." *ACLU*, 2016 WL 889739, at *4.

The CDC has not even alleged that the information was kept confidential in the manner required by the privilege, much less established this was so. *See* Andoh Decl. ¶ 23; *Vaughn* Index ¶¶ 9–11, 35. This is unsurprising, for two reasons: first, the information appears to have been disseminated widely; and second, this distribution was for non-advisory purposes.

First, although the full list of recipients is unknown, the withheld information appears to have been shared broadly. As described above, the February 25 EOP email was initially sent to a group of "[s]enior [g]overnment [o]fficials," and then forwarded by the CDC Office of the Director to another group of "[s]enior [g]overnment [o]fficials." *Vaughn* Index ¶¶ 9, 11. Similarly, the email chain containing the February 27 EOP email was also sent to a group of "[s]enior [g]overnment [o]fficials." *Id.* ¶ 10. Although the CDC's filings have failed to state who, ultimately, had access to this information, the production shows that the February 25 email made its way to Caitlin Shockey and Marty Cetron, two employees within the Division of Global Migration and Quarantine, *id.* ¶ 27; Pinsof Decl. Ex. 2, which is one of seven Divisions within one of the CDC's twelve Centers, *see CDC Organizational Chart*, CDC, https://perma.cc/2DQH-YPUG; *Division and Office Overviews*, CDC, https://perma.cc/N9VT-VZT6. Furthermore, "references to

communications with the President or his immediate advisors" found its way into Document 35, the April 30 email sent among CDC communications staffers—none of whom appear to be close presidential advisers. *See Vaughn* Index ¶ 35; Andoh Decl. ¶ 23; Ex. 1.

Second, this information was not disseminated for advisory purposes, but instead to convey instructions meant for implementation. Although the *Vaughn* Index describes the withheld information as a "proposed" media strategy, neither the agency's brief nor declaration include that qualifier. *Compare Vaughn* Index ¶¶ 9–11 *with* Andoh Decl. ¶ 23; Gov't Br. 15. Indeed, the records in the production demonstrate that these were not merely "proposals," but rather instructions broadly disseminated for implementation. To start, the unredacted content of the emails between Dr. Cetron and Shockey, as well as the agency's own description of it, show that these CDC employees did not receive this communication so that they could give advice to the president about its content. *See Vaughn* Index ¶ 28. Instead, the two discussed how to implement the "clearance process at issue" in light of an upcoming interview Dr. Cetron had scheduled. *See id.* (containing a "[d]iscussion of how to apply" the February 25 "EOP email"); Andoh Decl. ¶ 22; Ex. 2. Similarly, the April 30 internal CDC email contains a "[r]undown" of clearance procedures for the benefit of a new staffer. *See Vaughn* Index ¶ 35; Ex. 1. This email does not solicit the new staffer's advice on the processes, but rather informs her of the processes she must follow. *Id.*

Such "transmittal of a document to persons who are unlikely to be in a position to give advice to the President waives the privilege." *ACLU*, 2016 WL 889739, at *4, *5 ("The widespread dissemination of documents, to persons well beyond the circle of close presidential advisors, will eviscerate the presidential communications privilege."); *see also ACLU v. DOD*, 435 F. Supp. 3d 539, 559 (S.D.N.Y. 2020) (citation omitted) (same). Because the CDC has not asserted that the records remained confidential in the manner required by the privilege, and because the evidence

undercuts any argument the CDC *could* make, the Court should reject this expansive reliance on the privilege.

B. The CDC has failed to establish that the communications were authored or solicited and received by an immediate presidential advisor.

The CDC has failed to establish that the privilege applies for a second independent reason: it failed to show that these records involved an individual within the "limited circle of close presidential advisors" whose communications may be protected by the presidential communications privilege. *See ACLU*, 2016 WL 889739, at *4–5. The privilege protects only communications "authored" or "solicited and received" by "the President, the President's immediate White House advisers, and 'members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.'" *ACLU*, 435 F. Supp. 3d at 559 (quoting *In re Sealed Case*, 121 F.3d at 752). The question of who, in particular, qualifies as "an immediate White House adviser" for the privilege is an open one that has been the subject of much discussion by the courts. *See, e.g.*, *Judicial Watch v. DOJ*, 365 F.3d 1108, 1109 n.1 (D.C. Cir. 2004) (extending the privilege to the Office of the President); *Prop. of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 388 (D.D.C. 2018) ("[T]he heads of agencies that are subject to FOIA are not immediate White House advisers for purposes of the application of the privilege.").

Because the CDC has provided no information about the position or role of the particular individuals who authored or solicited and received these records, it has failed to establish that the presidential communications privilege applies. In a conclusory fashion, the agency simply refers to the author as a "senior presidential advisor" and the recipients as "senior government officials." *See* Andoh Decl. ¶ 23. For three of the records, the agency's *Vaughn* Index also notes that they originated within the EOP. *See Vaughn* Index ¶¶ 9–11. But this is not enough to establish that the

privilege applies: "not all EOP officials qualify to claim the privilege." *Ctr. for Biological Diversity v. OMB*, No. C 07-4997 MHP, 2008 WL 5129417, at *12 (N.D. Cal. Dec. 4, 2008). The EOP is a large agency, encompassing numerous offices, including the Office of Management and Budget ("OMB"), the Office of National Drug Control Policy, the Council on Environmental Quality, and others. *See The Administration*, whitehouse.gov, https://www.whitehouse.gov/the-trump-administration (last visited Sept. 18, 2020). In discussing the reach of the privilege, the D.C. Circuit has been careful to distinguish between the EOP and the Office of the President, the latter of which "is a smaller unit comprised of such immediate advisers as the Chief of Staff and the White House Counsel." *Judicial Watch*, 365 F.3d at 1109 n.1. The court's holding that "the principles underlying the presidential communications privilege limit its reach to documents and other communications 'solicited and received' by the Office of the President" makes clear that while some within the EOP qualify for the privilege's protection, others do not. *Id.* at 1112.

The CDC has thus provided no support for its assertion that the privilege applies. *See Prop. of the People*, 330 F. Supp. 3d at 389 ("[B]ecause OMB has not provided an entry-by-entry accounting of the positions of purported White House advisers involved in meetings for which the agency has asserted the presidential communications privilege, the Court is unable to discern whether any of [the] entries involve advisors for whom the privilege actually applies."). This omission is even more striking for the April 30 email, which was both authored and solicited and received by CDC staffers, *not* presidential advisers. *See* Ex. 1. In light of the agency's failure to establish this key element of the privilege, these records should be released.

C. The CDC has failed to establish that the communications were authored or solicited and received in the course of advising the president.

Even if the CDC were able to establish that the communications were authored or solicited and received by an immediate presidential advisor, that does not end the inquiry. The privilege

does not apply to all such communications: it "only applies to communications that . . . advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters." *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). Where an agency "does not state that the President actually did make the decision or that the communications were 'made by presidential advisers in the course of preparing advice for the President,'" the privilege does not apply. *Campaign Legal Ctr. v. DOJ*, No. 18-CV-1771 (TSC), 2020 WL 2849909, at *6 (D.D.C. June 1, 2020); *Seife*, 298 F. Supp. 3d at 622 (agency did not carry burden because neither the "declarations nor the *Vaughn* index indicate that the information . . . was gathered or created for the purpose of advising the President, or in the course of such advising"). Here, because the CDC makes no such assertion, the records may not be withheld.

II. The CDC has improperly withheld information under the deliberative process privilege.

Invoking the deliberative process privilege, the CDC improperly withheld information from seven records, including: (1) emails applying clearance procedures for COVID-19–related communications (Documents 27–28); (2) emails from April and May 2020 conveying clearance procedures for COVID-19–related communications (Documents 33–35); and (3) two versions of the CDC's COVID-19 media strategy plan (Documents 1 and 12).[2]

Under FOIA, information may be withheld pursuant to the deliberative process privilege only if the agency shows that it is both "(1) 'predecisional,' *i.e.*, 'prepared in order to assist an agency decisionmaker in arriving at [their] decision,' and (2) 'deliberative,' *i.e.*, 'actually . . . related to the process by which policies are formulated." *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005) (citation omitted). A record is predecisional if "the preparer was not

[2] The Knight Institute no longer challenges the other versions of the media strategy plan. *See Vaughn* Index ¶¶ 13–16, 18–25, 29, 31–32.

the final decisionmaker and . . . the contents confirm that the document was originated to facilitate an identifiable final agency decision." *Brennan Ctr. for Just. v. DOJ*, 697 F.3d 184, 202 (2d Cir. 2012) (citation omitted). And it is deliberative if it "formed an essential link in a specified consultative process, . . . reflects the personal opinions of the writer rather than the policy of the agency and . . . if released, would inaccurately reflect or prematurely disclose the views of the agency." *Id*.

Here, the CDC's declaration and *Vaughn* Index fall far short of making that showing. Instead, the agency offers only the most rote and conclusory justifications for its withholdings—at times undermined by the face of the records—that lack the detail necessary for this Court to determine that its redactions were appropriate. *See, e.g.*, *Seife*, 298 F. Supp. 3d at 607 (explaining that an agency's justifications are insufficient "where 'the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping'" (citation omitted)). Because the CDC has failed to carry its burden, FOIA requires the information's disclosure.

A. The CDC has improperly withheld information from emails applying clearance procedures for COVID-19–related communications.

The CDC has withheld under the deliberative process privilege information from two email chains that include a "[d]iscussion of how to apply" the new "clearance process" communicated from the EOP on February 25. *See Vaughn* Index ¶¶ 27–28 (Documents 27 and 28); Andoh Decl. ¶ 22. The information that can be gleaned from the agency's *Vaughn* index and one of the records, however, shows that the withheld information consists of post-decisional application, rather than predecisional deliberation, and thus cannot be withheld.

Document 28 is a partly redacted email chain consisting of a discussion between Marty Cetron and Caitlin Shockey, employees within the Division of Global Migration and Quarantine. *See* Ex. 2; *Vaughn* Index ¶ 28. As discussed above, the first part of the chain appears to forward

the February 25 instructions sent from the EOP. *Id.* ¶¶ 26, 28. The two then had a "[d]iscussion of how to apply" the new clearance process in light of Dr. Cetron's scheduled interview with a media outlet. *See id.* ¶ 28; Ex. 2. Although Document 27 was withheld in full, the CDC uses identical language to describe the two records (but did not identify it as a duplicate). *Compare Vaughn* Index ¶ 28 *with id.* ¶ 27; *see also* Andoh Decl. ¶ 22 (grouping the records).

The agency offers a boilerplate justification for its withholding, asserting that the records involve "open, frank, deliberative discussions on matters of policy between staff members." Gov't Br. 13. This is patently insufficient for three reasons.

First, to invoke the deliberative process privilege, an agency must show that records are both deliberative *and* predecisional. *Brennan Ctr.*, 697 F.3d at 194. Here, the agency has not made any showing that the records are predecisional: it has failed to identify a decision facing the agency to which these records relate, *see Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002), much less demonstrate that the records were "originated to facilitate" that decision, *see Brennan Ctr.*, 697 F.3d at 202 (citation omitted).

Second, because Dr. Cetron and Shockey were discussing an established policy and considering how to implement it, not developing the policy themselves, *see* Andoh Decl. ¶ 22–23, *Vaughn* Index ¶ 28, this record is not of the sort protected by the deliberative process privilege. *See Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't Agency*, 811 F. Supp. 2d 713, 736 (S.D.N.Y. 2011) ("The privilege . . . does not extend to materials related to the explanation, interpretation or application of existing policy, as opposed to the formulation of a new policy" (citation omitted)). "Not every minor question that is contemplated by an agency . . . can be considered an agency policy or decision. The [p]rivilege is properly limited to communications relating to policy formulation at the higher levels of government; it does not operate

indiscriminately to shield all decision-making by public officials." *Davis v. City of N.Y.*, No. 10 Civ. 0699 (SAS), 2011 WL 1742748, at *6 (S.D.N.Y. May 5, 2011) (citation and quotation marks omitted). At best, the emails are "merely peripheral to actual policy formation," and are therefore unprotected by the privilege. *See Tigue*, 312 F.3d at 80 (citation omitted).

Third, and finally, the CDC has not identified a harm that is reasonably foreseeable if the records are disclosed. Under the FOIA Improvement Act, an agency may withhold information pursuant to a FOIA exemption only if "the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption." *Rosenberg v. DOD*, 342 F. Supp. 3d 62, 73 (D.D.C. 2018) (quoting 5 U.S.C. § 552 (a)(8)(A)). This "impose[s] an independent and meaningful burden[]," requiring agencies to "explain how a particular Exemption 5 withholding would harm the agency's deliberative process." *Nat'l Res. Def. Council v. U.S. Env't Prot. Agency*, No. 17-cv-5928 (JMF), 2019 WL 3338266, at *1 (S.D.N.Y. July 25, 2019) (citation omitted). Because the agency has not even attempted to meet this burden, its withholdings are not justified.

B. The CDC has improperly withheld information from April and May 2020 emails conveying COVID-19–related communications clearance procedures.

The CDC has invoked the deliberative process privilege to withhold information from three records, all consisting of emails sent in late April and May 2020 detailing media clearance procedures. *See* Gov't Br. 13; Pinsof Decl. Exs. 1, 3–4. But because these records describe then-current procedures that are neither deliberative nor predecisional, they cannot be withheld.

The information withheld from each of these emails concerns a "clearance process" that was in place at the time the emails were sent. *See* Andoh Decl. ¶ 22. Document 35 is an April 30 email in which a CDC official circulates a partially redacted "rundown" of the processes for securing clearance of "media inquiries and discussion" to help an employee "navigate the new

role." *See* Ex. 1.[3] Document 33 includes largely redacted May 11 and May 15 emails from an official in the HHS Office of the Assistant Secretary for Public Affairs ("ASPA") to staffers at a number of agencies with the subject line, "for clearances." *See* Ex. 3. Finally, Document 34 is an email from HHS Assistant Secretary for Public Affairs Michael Caputo to communications staffers at various agencies. *See* Ex. 4. Caputo instructed employees that beginning on May 26, "all HHS operating and staff division media inquiries . . . must be passed solely to ASPA for clearance." *Id.* Part of this email has been withheld. *Id*.

The agency admits that each of these records contains information about the clearance processes then in effect. *See* Gov't Br. 13; *Vaughn* Index ¶¶ 33–35 (describing the withheld information as "[i]nterim" clearance and communications processes). Despite this, the CDC asserts that it is nonetheless entitled to withhold information about these processes because they were "not intended or expected to be a long-term or permanent one." Gov't Br. 13. The CDC cites no law in support of its apparent argument that the deliberative process privilege shields agency procedures that were final at the time they were circulated but were later supplanted. Nor can it: "a document embodying a then-final decision does not gain protection when it becomes outdated." *Am. Immigr. Council v. DHS*, 905 F. Supp. 2d 206, 219 (D.D.C. 2012); *see also id.* at 220 ("'More guidance soon,' . . . does not undercut the finality of the guidance already given."); *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 868, 876 (D.C. Cir. 2010) (requiring disclosure of "outdated" versions of a memo describing then-existing OMB policy); *ACLU v. DOD*, No. 15 Civ. 9317 (AKH), 2017 WL 4326524, at *9 (S.D.N.Y. Sep. 27, 2017) (explaining that sections of a document "provid[ing]

[3] As discussed in Part I, *supra*, the CDC also invoked the presidential communications privilege for this record.

directions to employees in the field" were not deliberative even though the agency characterized them as "preliminary" directions "in advance of a final decision").

The agency also appears to assert that these records "involved open, frank deliberative discussions on matters of policy between staff members." *See* Gov't Br. 13. This is unsupported by the record. First, the agency cites only to the *Vaughn* Index entries for *other* records for this assertion; the entries for Documents 33–35 do not make this claim. *See id.*; *Vaughn* Index ¶¶ 33–35. Second, as discussed above, these records are not deliberative within the meaning of FOIA because they discuss an already decided policy. Thus, because the withheld information is neither predecisional nor deliberative, the CDC must disclose it.

The CDC's withholding of these records also fails for an independent reason: the CDC fails to adequately articulate any harm that would result if the Court were to require their disclosure. While the agency's declaration and briefing are silent as to any purported harm that would befall the agency, the agency's *Vaughn* Index mentions the need to "protect against premature disclosure of proposed policies before they are actually adopted." *Vaughn* Index ¶¶ 33–35. But nowhere else in the CDC's filing are the records described as "proposed policies," and it is clear, for all the reasons stated above, that the description is incorrect: the records conveyed the then-final and operative agency clearance procedures. Even if that argument were relevant in the context of these documents, courts have rejected nearly identical language as impermissibly generic. *See Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 107 (D.D.C. 2019) (rejecting the assertion that disclosure could "creat[e] confusion . . . by disseminating policies and proposals that are not ultimately adopted" as an impermissibly "generic, across-the-board articulation[] of harm" (quoting *NRDC*, 2019 WL 3338266, at *1)).

C. The CDC has failed to establish that two versions of the "DRAFT CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response" can be withheld under the deliberative process privilege.

In response to the Knight Institute's FOIA request, the agency identified seventeen versions of a record titled "DRAFT CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response," each entirely redacted except for the cover page. *See Vaughn* Index ¶¶ 1, 12–16, 18–25, 29, 31–32. The agency's brief and declaration argue, in general terms, that all of the versions were properly withheld under the deliberative process privilege. Gov't Br. 10–12. After reviewing the CDC's arguments, the Knight Institute challenges the withholding of just two versions of the media strategy plan, Documents 1 and 12. *See Vaughn* Index ¶¶ 1, 12; Pinsof Decl. Exs. 5, 6. The CDC has not shown that those versions were deliberative and predecisional in nature; for both, the agency failed to provide the detail needed to demonstrate the records' "function and significance in the agency's decisionmaking process." *N.Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 515 (S.D.N.Y. 2007) (citation omitted). Indeed, despite the agency's conclusory assertions, Document 12—the March 18 version of the media strategy plan—appears to be the culmination of a drafting process rather than a continuation of it. *See Vaughn* Index ¶ 12; Ex. 5. And for Document 1, the agency has simply failed to provide the information needed for the Court to make a determination either way.

To withhold these records, the CDC relies heavily on its assertion that "no Communication and Media Strategy for the Coronavirus Disease 2019 Response policy was ever finalized." Gov't Br. 11 (quoting Andoh Decl. ¶ 20). But simply claiming this, without any support or explanation, is not enough. *See N.Y. Times Co.*, 499 F. Supp. 2d at 515 (explaining that an agency's use of the label "draft," without more, is "not a sufficient reason to automatically exempt it from disclosure" (citation omitted)). This is especially so given that the CDC's phrasing is susceptible to multiple

meanings: the CDC may have described the media strategy plan as never "finalized" because the CDC abandoned the plan before it ever took effect; or, more likely, it was not "finalized" because any operative iteration of a media strategy plan was intended to be revised and superseded as the situation developed. As further discussed below, the record strongly suggests the latter is the case, and the agency hasn't presented any evidence that would enable the court to conclude otherwise.

Even if the CDC's failure to show that these records were not predecisional or deliberative were not enough for this Court to reject the invocation of privilege, the CDC's withholding fails for a second and third reason as well: it has not shown that disclosure of the media strategy plan, even if never operative, would reveal deliberations about substantive agency policy, and it failed to show that it released all reasonably segregable information.

1. The CDC has not shown that Document 12 and Document 1 are deliberative and predecisional.

a. Document 12

As discussed above, the Knight Institute continues to challenge the agency's withholding of Document 12 because of the strong indicia that this document represents the culmination of the month-long drafting process for the first iteration of the media strategy plan. In particular, five characteristics distinguish this version from the others produced by the CDC.

First, the agency's description of this version in the *Vaughn* Index is unlike the rest. While the *Vaughn* Index states that the other versions contain "[p]roposed changes" or "edits to [the] Draft CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response," *see Vaughn* Index ¶¶ 1, 13–16, 18–25, 29, 31–32, not so for this version. Document 12 is instead described as containing the CDC's "[p]lan to provide timely, accurate, relevant, and actionable information for the public, healthcare providers, first responders, border officials, policymakers, media, and the public health community." *Id.* ¶ 12. Thus, while the CDC argues that all versions

of the media strategy plan "reflect initial preliminary edits," Gov't Br. 10 (quoting Andoh Decl. ¶ 20), the *Vaughn* Index does not support this claim for Document 12.

Second, and relatedly, Document 12 lacks any apparent comments or redlined edits in the document itself. *Compare* Ex. 5 *with* Pinsof Decl. Ex. 7.

Third, unlike some versions of the draft, Document 12 appears to contain a table of contents. *Compare* Ex. 5 *with* Pinsof Decl. Ex. 8.

Fourth, unlike nearly every other version, Document 12 appears in the production without any corresponding cover email circulating the document for review. *E.g.*, Pinsof Decl. Ex. 9.[4]

Fifth, and finally, while other versions of the media strategy plan appear to bear an autogenerated date in their footer that does not reflect the creation of the document, Document 12 is dated March 18, 2020. *Compare* Ex. 5 *with* Pinsof Decl. Exs. 8–10 (drafts dated May 8, 2020, despite circulation in February and March). This is significant because March 18 post-dates the circulation of the fifteen versions attached to cover emails soliciting or sharing feedback on the media strategy, the last of which was circulated on March 13, 2020. *See* Ex. 7.

Taken together, these factors provide compelling evidence that Document 12 "manifest[ed] decisionmaking authority" rather than the "give-and-take" of agency deliberations. *See Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 102 (citation omitted).

That the CDC would refer to an operative iteration of the media strategy as a "draft" or not "finalized" is bolstered by the CDC's history of labeling other operative agency policies and procedures as "drafts" or "living documents." For example, one record produced in this case describes an ASPA communications "playbook." Although operative at the time it was circulated,

[4] The only other version of the media strategy plan that does not contain a cover email is Document 1, which is discussed in Part II.C.1.b *infra*.

it was nevertheless labeled "draft" because it was "a living document that will continue to improve." *See* Pinsof Decl. Ex. 11. And during this litigation, the CDC admitted that it previously redacted records relating to a then-operative 2017 clearance policy based on its view of the policy as "tentative in nature because it had not yet been fully and formally released." Andoh Decl. ¶ 10.

Similarly, the goal of the drafting process here was "to finalize the first iteration of this strategy document," *see* Pinsof Decl. Ex. 12 at 1, showing that the agency envisioned continual updates. But if Document 12 was operative—even if only for a day—it must be disclosed. As explained above, such a document is not protected by the deliberative process privilege, regardless of any subsequent revisions or updates. *See* Part II.B (citing cases).

The government has failed to provide any evidence to enable the Court to conclude otherwise. In particular, it has not explained the "function and significance" of Document 12 "in the agency's decisionmaking process." *N.Y. Times Co.*, 499 F. Supp. 2d at 515 (citation omitted) (rejecting invocation of the deliberative process privilege where agency referred to the records as "drafts" without providing specific information to explain their "function and significance"). For example, unlike in the cases cited by the CDC, the agency has not shown that the media strategy plan was never finalized because it "died on the vine." *See Color of Change v. DHS*, 325 F. Supp. 3d 447, 451, 454 (S.D.N.Y. 2018) (explaining that the record was never finalized because the agency "chose to abandon the assessment"); *NAACP Legal Def. & Educ. Fund, Inc. v. DOJ*, No. 18-cv-4354 (PKC), 2020 WL 5237765, at *2, *7 (S.D.N.Y. Sept. 2, 2020) (explaining that a draft assessment was never finalized because of policy changes); *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 911 F. Supp. 2d 261, 283 (S.D.N.Y. 2012) (concluding that "a draft comment for news outlets" was properly withheld because the "perspective and tenor" of the draft was "rejected by the agency"). Nor has the agency identified "the relation between the author and recipients of

the document"—including who authored Document 12, whether it was circulated, and, if so, to whom and for what purpose—another factor used to determine whether the privilege applies. *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 103 (citation omitted).

Thus, especially in light of the evidence that this version constituted an operative iteration of the media strategy plan, the CDC has not borne its burden of establishing that Document 12 is protected by the deliberative process privilege.

b. Document 1

One other version of this media strategy plan stands out from the rest: Document 1, which the CDC itself identified as representing CDC "policies" or "guidelines."

The parties agreed that by June 9, the CDC would process "(i) the CDC's currently operative employee communications or speech policies and (ii) any policies or guidelines concerning the coordination of statements and/or public appearances with the Office of Vice President Mike Pence or the White House Coronavirus Task Force." ECF No. 24. This specific version of the media strategy guide was produced on that date, along with the operative CDC Media Relations Policy, a reminder email outlining COVID-19–related policies for staff, and an email conveying media clearance policies. *See* Pinsof Decl. Ex. 13.

Against that backdrop, the CDC's cursory explanation that this document contains "[p]roposed changes" to the media strategy plan, *Vaughn* Index ¶ 1, is not enough to establish that the privilege applies. The CDC has not identified the author or any recipients of Document 1, much less explained those employees' roles in the agency and their relationships to one another. *See Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 103. Nor has the agency shown that this version "reflects the personal opinions of the writer rather than the policy of the agency." *Brennan Ctr.*, 697 F.3d at 202 (citation omitted). Moreover, Plaintiff does not know at which point of the process

this record was drafted or for what purpose, information necessary to determine the "function and significance" of Document 1 "in the agency's decisionmaking process." *N.Y. Times Co.*, 499 F. Supp. 2d at 515. Without such support, the CDC's withholdings are unjustified.

2. The CDC has failed to establish that the media strategy plan relates to substantive agency policymaking.

Even if the government could demonstrate that neither Document 1 nor 12 were operative, it has failed to show that the media strategy plan relates to substantive agency policymaking such that it could be properly withheld under the deliberative process privilege.

The deliberative process privilege protects only those records that are originated to facilitate agency decisionmaking over matters of policy formation. *See Davis*, 2011 WL 1742748, at *6 ("The [p]rivilege is properly limited to communications relating to policy formulation at the higher levels of government; it does not operate indiscriminately to shield all decision-making by public officials." (citation omitted)). Several courts in the Southern District have concluded that deliberations over messaging strategy may be withheld under this privilege only if they "would reveal the deliberative process underlying a *not-yet-finalized* policy decision." *Nat'l Res. Def. Couns. v. U.S. Env't Prot. Agency*, No. 17-cv-5928 (JMF), 2019 WL 4142725, at *8 (Aug. 30, 2019) (citation omitted); *see also, e.g.*, *Fox News Network*, 911 F. Supp. 2d at 282; *Nat'l Day Laborer*, 811 F. Supp. 2d at 741. The decisions reflected in a media strategy plan—which may include delineating the agency's preferred media outlets, setting forth clearance protocols, or fine-tuning messaging over already decided COVID-19 prevention policies—may not implicate the agency's *substantive* policy decisions. *See NRDC*, 2019 WL 4142725, at *8 (explaining that "messaging" records can be privileged if they "compromise the agency's deliberative processes about the *substantive agency policies* to which the messaging documents relate" (emphasis added)). The CDC has not explained whether either document reflects any such "substantive

agency policies," *id.*, or whether they merely concern non-substantive agency discussions about messaging. However, the agency's description of Document 12 as the CDC's "[p]lan to provide timely, accurate, relevant, and actionable information," *Vaughn* Index ¶ 12, suggests that the media strategy plan falls in the latter category. Because the CDC has failed to show that disclosure would reveal substantive policy deliberations, the CDC's withholding is unjustified.

3. The CDC has failed to show that it released all segregable information.

As a final matter, the CDC failed to show that it released all segregable factual information from these versions of the media strategy plan. The deliberative process privilege "does not . . . cover 'purely factual' material." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citation omitted); *NRDC*, 2019 WL 4142725, at *3, *12 *15. Here, a comparison to the CDC's Ebola media strategy plan is illuminating—in particular because it appears to have been used as a model. *Compare* Ex. 9 (footer references "Eastern DRC") *with* Pinsof Decl. Ex. 14 (same); *see also id.* Ex. 15 (circulating Ebola media strategy plan with COVID-19 plan). That plan discusses factual background in detail in several sections, including an initial section titled "Situation," and others providing "Media Background." Ex. 14 at 2, 14, 17. To the extent that Documents 1 and 12 likewise contain segregable factual information, the CDC must release it.

III. This Court should review the withheld documents *in camera*.

As explained above, the CDC's challenged withholdings are improper. The extent of the redactions also indicate that the CDC has failed to "take reasonable steps necessary to segregate and release nonexempt information," as required by FOIA. 5 U.S.C. § 552 (a)(8)(A)(ii)(II). Plaintiff thus respectfully requests that the Court order the release of any improperly withheld information. Should the Court have any doubt about the propriety of ordering the release of any record, Plaintiff asks the Court to exercise its broad discretion to "examine the contents of such

agency records in camera." 5 U.S.C. § 552 (a)(4)(B). This review is especially appropriate where, as here, "agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims." *PHE, Inc. v. DOJ*, 983 F.2d 248, 252 (D.C. Cir. 1993).

IV. The CDC's search for records responsive to Items 1 and 2 was inadequate.

Although the CDC bears the burden to "show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents," *Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't Agency*, 877 F. Supp. 2d 87, 95 (S.D.N.Y. 2012) (citation omitted), it has failed to do so here.

The CDC's search for records responsive to Items 1 and 2 was inadequate for four reasons. First, the CDC relied on an indefensibly narrow reading of these two items of the Request to exclude plainly responsive materials from its search. Second, the CDC used search terms that were not "reasonably calculated to uncover all relevant documents." *Nat'l Day Laborer*, 877 F. Supp. 2d at 95 (citation omitted). Third, the CDC failed to "search[] all custodians who were reasonably likely to possess responsive documents." *Id.* at 96. And fourth, the Declaration did not specify the search cut-off date for Items (1) and (2). Accordingly, this Court should order the CDC to conduct a new search for all records responsive to the full terms of the Request.

A. The CDC adopted an unreasonably narrow interpretation of Items 1 and 2 of Plaintiff's request.

Consistent with FOIA's purpose, agencies "ha[ve] a duty to construe a FOIA request liberally." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995); *Immigrant Def. Project v. U.S. Immigr. & Customs Enf't*, 208 F. Supp. 3d 520, 526 (S.D.N.Y. 2016) (same). To that end, a search is inadequate when based on an overly narrow construction of a request. *See, e.g.*, *LaCedra v. Exec. Off. for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003) (rejecting the government's narrow interpretation of a FOIA request when it was "reasonably susceptible to the

broader reading"); *ACLU v. DOJ*, 90 F. Supp. 3d 201, 214 (S.D.N.Y. 2015) (finding search inadequate where DOJ improperly construed plaintiff's request for records "addressing or interpreting" a subject to reach only final documents); *Pub. Emps. for Env't Resp. v. U.S. Int'l Boundary & Water Comm'n*, 842 F. Supp. 2d 219, 225 (D.D.C. 2012) ("By impermissibly interpreting [plaintiff's] records request so narrowly, the [agency] could not have conducted an adequate search.").

Here, the CDC based its search on an unreasonably narrow reading of the Request. The Knight Institute requested "[*a*]*ny records relating to*" (1) "policies or procedures governing public communications by CDC employees or contractors about the coronavirus;" and (2) "policies or procedures for the coordination of communications strategy between the CDC (or its employees) and the Coronavirus Task Force led by Vice President Pence." Request at 4 (emphasis added). After the Knight Institute alerted the CDC that the production lacked emails discussing or disseminating these policies—records that, on their face, "relat[e] to" the policies or procedures at issue—CDC admitted that it construed the request to exclude such "incidental documents." *See* Andoh Decl. ¶ 17. Instead, the CDC said that it based its search "upon its understanding that the primary subjects" of Items 1 and 2 were "the actual policies, directives, and guidance regarding specific types of employee communications, and not incidental documents related to the manner in which those policies and other guidance were disseminated to agency employees." *Id.*

This interpretation of Items 1 and 2 is unreasonable for three reasons. First, it does not comport with the plain language of the Request. By interpreting this as a request for the policies and procedures themselves, the agency essentially reads the words "relating to" out of Items 1 and 2. *See Immigrant Def. Project*, 208 F. Supp. 3d at 531–32 (search inadequate where plaintiff requested records "related to" certain operations, yet agency construed press releases to be outside

the scope). In doing so, the CDC "[is] not adhering to the full scope or the precise language of [P]laintiff's request, as [it is] required to do." *Charles v. Off. of Armed Forces Med. Exam'r*, 730 F. Supp. 2d 205, 216 (D.D.C. 2010); *see also Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("The agency was bound to read [the request] as drafted, not as . . . agency officials . . . might wish it was drafted."); *ACLU*, 90 F. Supp. 3d at 214 (same).

Second, even if the scope were not clear on its face, the intended scope is evident when comparing the language of those Items with the rest of the Request. While Items 1 and 2 ask for records "relating to" certain policies, Item 4 directly requests "[t]he CDC's policies on employee communications"—*not* records "related to" those policies. Request at 4. Thus, if Plaintiff intended Items 1 and 2 to capture only the policies themselves, then it would have requested them directly.

Third, CDC's narrow interpretation renders Items 1 and 2 superfluous. Items 4 and 5 specifically ask for the CDC's "actual policies, directives, and guidance" on CDC employee communications in general, which would include any communications policies, directives, and guidance specifically related to the coronavirus. Request at 4. Narrowly reading Items 1 and 2 to cover those very same records is plainly unreasonable.

In sum, the CDC based its search on an unreasonably narrow interpretation of Items 1 and 2, excluding plainly responsive materials from its search. This reason alone is enough to render the search for Items 1 and 2 inadequate.

B. The CDC's search terms and methods were unreasonable.

The CDC's search was also inadequate because its search terms and methods were not "reasonably calculated to uncover all responsive records." *See Knight First Amendment Inst. at Columbia Univ. v. DHS*, 407 F. Supp. 3d 311, 325 (S.D.N.Y. 2019); *Nat'l Day Laborer*, 877 F. Supp. 2d at 95 (citation omitted). To identify responsive records, the agency used just five search

terms: "media strategy," "covid communication," "centralized communications," "social media and news media," and "communication strategy." Andoh Decl. ¶ 15. As an initial matter, because these search terms were designed to retrieve only records responsive to an unreasonably narrow reading of the Request, they are inadequate on their face. *See supra* Part IV.A.1; Andoh Decl. ¶ 17. But the CDC has also failed to establish the adequacy of its search for three additional reasons.

First, the CDC failed to "explain why certain search terms, clearly relevant, were not used." *Brennan Ctr. for Just. v. DOJ*, 377 F. Supp. 3d 428, 434 (S.D.N.Y. 2019); *NAACP Legal Def. & Educ. Fund, Inc. v. DOJ*, No. 18-cv-9363 (AJN), 2020 WL 2793015, at *6 (S.D.N.Y. May 29, 2020) ("[A]n agency must provide logical explanations for decisions it makes with respect to the search terms it does or does not use." (internal quotations and citation omitted)). For example, Item 2 sought records "relating to policies or procedures for the coordination of communications strategy between the CDC (or its employees) and the Coronavirus Task Force led by Vice President Pence." Request at 4. Yet, without any explanation, the agency did not use key words from the Request itself as search terms—including "Task Force," any term related to the Vice President, or "coordination" and its variants. *See* Andoh Decl. ¶ 15.

Second, the agency has not justified its failure to use common variants for the search terms it *did* employ. While an agency is not required to search for all possible variants of a particular term, if an agency does not "search for additional terms the agency itself would have used in referring to the" subject, it must provide a "reasonable justification to support its decision." *See Knight First Amendment Inst.*, 407 F. Supp. 3d at 325–26. Here, the agency has failed to include as search terms variants it used throughout its production. Take, for example, the agency's search term "covid communication." The production shows that agency employees also use "coronavirus," "nCoV," "n-Cov," "2019-nCov," and "COVID-19" interchangeably with "covid."

See Exs. 5, 8, 9, 12. Likewise, the production shows that the shorthand "comm" or "comms" is often used instead of "communication." *See, e.g.*, Ex. 8. Because the CDC has not explained its failure to use these common variants, it has not established its search was adequate. *See Knight First Amendment Inst.*, 407 F. Supp. 3d at 325–26; *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 678 F. Supp. 2d 162, 166 (S.D.N.Y. 2009) (concluding agency was required to adequately explain failure to use a common acronym as a search term).

Third, the CDC has failed to provide any detail about *how* the terms were used in its search. As explained in *National Day Laborer*, the government cannot establish the adequacy of its FOIA searches simply by reporting the search terms it used. 877 F. Supp. 2d at 107. It must also specify "[t]he method in which they are combined and deployed." *Id.* (citation omitted). This is because

> [s]eemingly minor decisions—whether intentional or not—will have major consequences. Choosing "subject field" rather than "subject field and message body" during a search using the Microsoft Outlook email client will dramatically change its scope and results. Boolean operators are also consequential: a search for "secure communities opt-out" may yield no results while a search for "'secure communities' and 'opt-out'" yields one hundred results and a search for "'secure communities' or 'opt-out'" yields ten thousand.

Id. Because the CDC has provided no such detail, it has failed to establish the adequacy of its search for records responsive to Items 1 and 2.

Fourth, the CDC "has not stated the time frames covered by each of the [agency's] searches . . . at any point in the declaration[] provided," thus "render[ing] summary judgment inapposite." *Heartland All. for Hum. Needs & Hum. Rts. v. U.S. Immigr. & Customs Enf't*, 406 F. Supp. 3d 90, 117 (D.D.C. 2019). Although CDC informed Plaintiff on July 14 that the search cut-off date was March 27, 2020, it is not clear if this date applies to the entirety of the Request—relevant because the Declaration indicates that the agency's searches for Items 1 and 2 did not begin until later. See Andoh Decl. ¶¶ 12, 15.

C. The CDC has failed to search all custodians who were reasonably likely to possess responsive documents.

The CDC's search was also inadequate because the agency failed to "search[] all custodians who were reasonably likely to possess responsive documents." *Nat'l Day Laborer*, 877 F. Supp. 2d at 96. Although the Knight Institute's initial Request was not limited to certain custodians, *see* Request at 4, in response to the CDC's request, the Institute agreed to narrow the scope of Items 1 and 2 to responsive records in the custody of eleven CDC officials and three CDC offices—those whose records most interested the Knight Institute. *See* Andoh Decl. ¶¶ 7, 9. The CDC did *not*, however, search all of these potential custodians. Instead, without informing the Knight Institute, the agency limited its search to the mailboxes of the "eight officials [who] were the most likely to contain documents responsive to the terms of Plaintiff's request." *Id.* ¶ 15.

The CDC's decision to limit its search to these eight custodians was unreasonable. "An agency must search *all* locations likely to contain responsive records; not simply where the records are 'most likely' to be found." *Knight First Amendment Inst.*, 407 F. Supp. 3d at 324 (emphasis added) (citation omitted); *see also Nat'l Day Laborer*, 877 F. Supp. 2d at 98 (same); *DiBacco v. U.S. Army*, 795 F.3d 178, 190 (D.C. Cir. 2015) ("'[M]ost likely' is not the relevant metric.").

Moreover, the released records show that the CDC failed to search a number of custodians who did indeed possess responsive records. These include two of the custodians the Knight Institute identified by name, Amy Heldman and Katherine Lyon Daniel. *See* Andoh Decl. ¶ 9. As evidenced by the production itself, both officials played an integral role in the drafting and revising the CDC's COVID-19 media strategy plan. *See, e.g.*, Ex. 9 (Amy Heldman receiving early draft of media strategy plan); Ex. 10 (Katherine Lyon Daniel circulating edits on the media strategy plan). The CDC also failed to search the offices Plaintiff requested: the Office of the Director, the Office of the Associate Director of Communications ("OADC"), and the Speaker's Bureau. *See*

Andoh Decl. ¶ 9. From the CDC's produced records, Plaintiff identified at least three individuals from the Office of the Director and ten from OADC involved in developing COVID-19 media strategy whose mailboxes were not searched, even though each was the sender or recipient of relevant emails. These include Loretta Lepore, Rachael Oury, and Michawn Rich from the Office of the Director, and Sara Bedrosian, Carol Crawford, Mansi Das, Jay Dempsey, Kate Galatas, Molly Gaines-McCollum, Benjamin Haynes, Jennifer Mitchell, Kera Patrick, and Lynn Sokler within OADC. *See* Pinsof Decl. Exs. 1, 9, 15, 16.

Although this list is by no means exhaustive—especially considering that the released records only represent those responsive to an unreasonably narrow interpretation of the Request—the CDC had an obligation to follow through on these leads "to discover requested documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999); *see also Nat'l Day Laborer*, 877 F. Supp. 2d at 97, 102–03 (finding unreasonable agency's decision not to search multiple custodians when emails indicated they were involved in relevant discussions). In light of this evidence, and the CDC's admitted failure to "search[] *all* custodians who were reasonably likely to possess responsive documents," *Nat'l Day Laborer*, 877 F. Supp. 2d at 96 (emphasis added), the CDC's search for records responsive to Items 1 and 2 is inadequate.

CONCLUSION

Plaintiff respectfully requests that the Court deny the CDC's motion for summary judgment and order the CDC to release improperly withheld information from the challenged records. Plaintiff also asks the Court to order the CDC to conduct a new search for records responsive to Items (1) and (2) of the Request.

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Respectfully submitted,

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