UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiff,

-against-

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

Defendants.

20 Civ. 2761 (AT)

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

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Defendants Centers for Disease Control and Prevention ("CDC") and the United States Department of Health and Human Services ("HHS" and collectively with the CDC, "Defendants"), by their attorney, Audrey Strauss, Acting United States Attorney for the Southern District of New York, respectfully submit this reply memorandum of law in further support of their motion for summary judgment and in opposition to the motion for partial summary judgment of plaintiff Knight First Amendment Institute at Columbia University.

PRELIMINARY STATEMENT

After reviewing Defendants' opening brief, Plaintiff has narrowed the scope of disputes substantially. Plaintiff challenges only the CDC's search for potentially responsive records in connection with Items 1 and 2 of their five-part request, and disputes Defendants' Exemption 5 withholdings for ten documents—five emails and two draft documents withheld under the deliberative process privilege and four emails withheld under the presidential communications privilege (one of which is also subject to the deliberative process privilege).

The CDC's submissions demonstrate that the search undertaken for Items 1 and 2 was reasonable and adequate. After attempting to seek clarification from Plaintiff regarding the overly broad nature of Items 1 and 2, the CDC conducted an electronic search building upon certain additional information supplied by Plaintiff, performed analyses on the search results, and consulted subject matter experts within CDC to ensure its search was reasonably calculated to find all relevant records.

Plaintiff's challenges to CDC's withholdings are equally unavailing. The CDC properly withheld drafts of a CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response policy under Exemption 5 because that policy was under consideration but never finalized. Plaintiff is unable to overcome this showing, instead relying on nothing more than speculation that two versions of the draft policy were at some point operative. In addition,

Plaintiff is unable to demonstrate that certain emails withheld under Exemption 5 are not protected by the deliberative process privilege. Rather, these emails reflect ongoing discussions about proposed and interim processes, which were subject to change. Lastly, the CDC properly withheld four emails pursuant to the presidential communications privilege because they are either authored by the President's then-Acting Chief of Staff, who is an immediate presidential advisor, or reflect information contained in one of the Acting Chief of Staff's emails.

ARGUMENT

I. CDC's Searches Responsive to Items 1 and 2 Were Reasonable and Adequate

Plaintiff only challenges CDC's search for records responsive to Item 1 and Item 2 of Plaintiff's FOIA request. But the CDC's original and supplemental declarations demonstrate that the searches undertaken in response to Item 1 and Item 2 were reasonable and adequate. None of Plaintiff's arguments to the contrary demonstrate otherwise.

As an initial matter, before undertaking any search, CDC informed Plaintiff that Items 1 and 2 were overly broad and specifically sought "clarification regarding the subject matter of the records" sought. *See* ECF No. 17-3 at 2; *see also* Supplemental Declaration of Roger Andoh ("Supp. Andoh Decl.") ¶ 7. As CDC explained to Plaintiff in its March 26, 2020 letter, Plaintiff needed to—consistent with the requirements of FOIA—"describe the category of records [it was] seeking or the actual document(s), and provide sufficient details to permit a search with reasonable effort." *See* ECF No. 17-3; *see also* 5 U.S.C. § 552(a)(3)(A) (FOIA requesters must "reasonably describe[]" the records sought.). Specifically because Items 1 and 2 sought "any records," CDC requested that Plaintiff provide CDC with "additional information, such as: names and email addresses of persons within the agency in whose records you seek; a date range for records; recommended non-universal coronavirus pandemic search terms; office(s) likely to have records requested; and/or, the precise document you seek" to aid CDC in conducting a

reasonable search. *See* ECF No. 17-3; *see also* Supp. Andoh Decl. ¶ 7. In response, Plaintiff stated that CDC could limit its search for Items 1 and 2 to records created on or after January 29, 2020, and also identified three offices within CDC and 11 individuals as potential custodians. *See* Supp. Andoh Decl. ¶ 7; *see also* ECF No. 23-1.

Thereafter, the CDC FOIA Office conducted an electronic "enterprise" search of the agency's email system for documents responsive to Items 1 and 2. *See* Supp. Andoh Decl. ¶ 8. The enterprise search—using the cutoff date supplied by Plaintiff of January 29, 2020, through April 6, 2020, the date of the search—examined the contents of the mailboxes of the 11 potential custodians identified by Plaintiff. *See id.*; *see also* ECF No. 23-1; Andoh Decl. (ECF No. 34) ¶ 12. The initial April 6, 2020 enterprise search identified approximately 60,000 documents potentially responsive to Items 1 and 2. *See* Andoh Decl. (ECF No. 34) ¶ 14; Supp. Andoh Decl. ¶ 8.

CDC ran a number of electronic analyses on the search results in order to better understand their composition, distribution among the individual accounts, and general responsiveness to the topics identified in the request. *See id.* ¶ 9. In addition, the CDC FOIA Office consulted and received advice from agency communications subject matters experts ("SMEs") about revising and refining the search, including the use of particular search terms, in order to strike a balance between fully and completely capturing emails dealing with the subject matter of Plaintiff's requests and eliminating the large number of nonresponsive emails captured by the first search. *See id.* ¶ 10. To address these issues, the CDC FOIA Office ran a revised enterprise search on or about May 6, 2020, using the same timeframe as the first search, but using search terms suggested by the SMEs of the mailboxes of ten of the eleven CDC officials

identified by Plaintiff. *See id.* ¶ 11.[1]

Based upon the plain language of Plaintiff's itemized request for documents, the CDC understood and believed that the focus of Plaintiff's request was upon the policies, procedures, and guidance identified in the request, with Items 1 and 2 specifically related to the policies and procedures regarding the coronavirus, whereas Items 3, 4, and 5 related to more general policies for communication with the news media and public. *See id.* ¶¶ 5-6. As a result, CDC applied the same search standards and parameters to its search for documents responsive to each of the four elements of Plaintiff's request, and sought to identify records related to the policies, procedures, and guidance themselves. *See id.* ¶ 6. Although Plaintiff argues that CDC adopted an unreasonably narrow interpretation of its FOIA request by "essentially read[ing] the words 'relating to' out of Items 1 and 2," Plaintiff incorrectly asserts that CDC "construed the request to exclude" certain documents. *See* Pl.'s Br. (ECF No. 39) at 25. But CDC's search—which used search terms identified by SMEs at CDC, and applied to custodians thought to possess responsive records—was carefully crafted to retrieve documents identified within the plain language of the request. Furthermore, there is no basis to conclude that CDC's focus on searching for records relating to the policies themselves necessarily "excluded" other types of related records. Lastly, Plaintiff's attempts to distinguish Items 1 and 2 as broader in scope from the remainder of its FOIA request are unavailing. *See* Pl.'s Br. at 26. Rather, the plain language

[1] Due to a drafting error, the original Andoh Declaration inaccurately indicated that this search only examined the contents of the mailboxes of eight of the eleven potential custodians also identified by Plaintiff in its narrowed request. *See* Supp. Andoh Decl. ¶ 11 n.1. However, only the mailbox of Amy Heldman was inadvertently, rather than intentionally, excluded from the search. *Id.* Fortunately, as evidenced by the documents the agency produced, Ms. Heldman's emails related to Plaintiff's request were nonetheless recovered because her supervisor, Ms. Bonds, was included in all correspondence to or from Ms. Heldman concerning items 1 and 2 of Plaintiff's request. *Id.*

of Plaintiff's FOIA request seeks both broader, more general policies on employee communications with the news media and public dating back to 2017 (Items 3, 4, and 5), as well as more specific policies related to communications by the CDC about the more-recent coronavirus (Items 1 and 2).[2] *See* Supp. Andoh Decl. ¶ 5. Rather than using an unreasonably narrow interpretation of Plaintiff's FOIA request, the search undertaken by CDC demonstrates that its methodology was reasonably calculated, and carefully tailored, to identify those records that were responsive to Plaintiff's specific requests.

Plaintiff's remaining attacks on CDC's search fail to establish that the search was either unreasonable or inadequate. *See* Pl.'s Br. at 26-30. Although Plaintiff criticizes the search terms used by CDC, *see* Pl.'s Br. at 27, Plaintiff did not provide CDC with any suggested search terms for the records sought, despite CDC requesting search terms, *see* Supp. Andoh Decl. ¶ 7. In any event, the CDC's supplemental declaration explains why CDC chose the search terms it used. To ensure the search results yielded potentially responsive emails and eliminate excess, nonresponsive emails, the SMEs working with the CDC's FOIA Office advised against using specific terms from the FOIA request, such as "task force" and "Vice President," because they were likely to be used in a variety of other contexts unrelated to the subject matter of the request such that they would fail to isolate materials pertinent to Plaintiff's inquiry. *See* Supp. Andoh Decl. ¶ 10. As for Plaintiff's criticism that the search terms used did not include common variants, *see* Pl.'s Br. at 27, CDC did not include variants of the search terms used because they

[2] Similarly, Plaintiff takes issue with the purported failure of CDC to search for emails discussing or disseminating coronavirus-related policies in connection with Items 1 and 2. *See* Pl.'s Br. at 25; *see also* Andoh Decl. (ECF No. 34) ¶ 17. But Plaintiff's own request reveals that Plaintiff knew how to ask for those types of records, and specifically did: Item 3 sought "[e]mails sent by CDC Public Affairs Office Jeffrey Lancashire on or around August 31, 2017, that contain instructions for employees regarding communications with members of the news media or the public." *See* Andoh Decl. (ECF No. 34) ¶ 7.

were unlikely to produce uniquely responsive documents, a decision that was validated by the number of responsive documents in the search results containing variants, *see* Supp. Andoh Decl. ¶ 10.[3]

Plaintiff also challenges the reasonableness of the CDC's search because the agency did not use every custodian suggested by Plaintiff, but as described above, *see supra* p. 4 n.1, CDC used ten of the eleven custodians identified by Plaintiff, and the one custodian who was inadvertently omitted was otherwise captured by the search because her supervisor, a custodian, was included on all relevant correspondence. *See also* Supp. Andoh Decl. ¶ 11 n.1. And although Plaintiff argues that the CDC's search was inadequate because it did not specifically include searches for records located in the Office of the Director, the Office of the Associate Director for Communications, and the Speaker's Bureau, the communications SMEs assisting with the search have knowledge of those offices and assisted the CDC's FOIA Office in constructing the search parameters. *See id.* ¶ 12. SME Loretta Lepore is the lead for communication issues in the Office of the Director, and SME Michelle Bonds (also a custodian identified by Plaintiff) is the agency's Associate Director for Communications, and her office includes the Speaker's Bureau; both Ms. Lepore and Ms. Bonds assisted in framing the search to ensure that all responsive documents located in those three offices were captured by the agency's electronic search. *See id.* Moreover, Dr. Robert Redfield, the CDC Director, and Dr. Anne Schuchat, the Principal Deputy Director, were two of the custodians identified by Plaintiff and used for the search. *See* Andoh

[3] Plaintiff also faults the CDC for failing to provide information regarding how the search terms were used, as well as the time frame for the search. *See* Pl.'s Br. at 28. As discussed in both the original and supplemental CDC declarations, the enterprise search was conducted across the entire contents of the email system, so the search terms were applied to all emails fields. *See* Andoh Decl. (ECF No. 34) ¶¶ 8, 15; Supp. Andoh Decl. ¶ 11. The time frame used for the search for Items 1 and 2 was January 29, 2020 through April 6, 2020. *See* Supp. Andoh Decl. ¶ 8.

Decl. (ECF No. 34) ¶ 9; Supp. Andoh Decl. ¶ 12. CDC remains confident that its search produced all documents responsive to the subject of the final narrowed request as it understood the meaning and scope of that request. *See* Supp. Andoh Decl. ¶ 13. The agency does not believe that any of the alternative search strategies suggested by Plaintiff after the fact would have uncovered additional responsive documents. *See id.*

II. CDC Properly Withheld Seven Documents Subject to the Deliberative Process Privilege

As CDC previously explained, it withheld in full 17 versions of a draft CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response policy, which "reflect initial, preliminary edits to a policy that was never ultimately finalized." Andoh Decl. (ECF No. 34) ¶ 20. The document was never finalized because the size, scope, and complexity of the coronavirus pandemic evolved and grew so rapidly that it was impossible for the agency ever to develop a static "final" strategy that could in any way adequately address all the novel and unexpected communications challenges it presented. *See* Supp. Andoh Decl. ¶ 19. Plaintiff no longer challenges 15 of the drafts, but speculates that two of the drafts are not actually drafts. *See* Pl.'s Br. at 11 n.2, 17-22. To do so, Plaintiff casts unsubstantiated doubt on CDC's assertion that the policy was never finalized, and argues that notwithstanding CDC's declaration and *Vaughn* index, that "the agency hasn't presented any evidence that would enable the court to conclude" that the policy was never finalized. *See id.* at 18. But the evidence before the Court demonstrates that all of the drafts, including the two Plaintiff challenges, are subject to the deliberative process privilege and properly withheld under Exemption 5.

In challenging Document 12, Plaintiff cited five factors as support for its assertion that the only truly distinctive draft of the strategy among the many versions of the document discovered by the agency was Document 12 on the *Vaughn* Index, and has suggested that this is

because Document 12 represents a final, or at least operational, version of the strategy. *See* Pl.'s Br. at 18-21. However, Plaintiff is mistaken. There is nothing unique about Document 12. For example, while it is true that only this draft carries the date of March 18, 2020, while the others are dated May 8, 2020, CDC is aware of no particular reason for that anomaly. *See* Supp. Andoh Decl. ¶ 21. Similarly, the reason why the description of the withheld information on the *Vaughn* Index is different for this draft than for the other versions is fairly straightforward. *Id.* The language was originally intended to be used for Document 1, the first of the drafts to be listed on the *Vaughn* Index; however, since Document 1 had been heavily edited, it was determined that the language should instead be used to describe the first of the many "clean," *i.e.*, unedited, versions of the strategy listed on the *Vaughn* Index. *Id.* By pure happenstance, Document 12 was the initial unedited iteration of the strategy to be listed. *Id.* Furthermore, while Plaintiff is correct in noting that Document 12 has a table of contents while most of the other versions do not, there are nonetheless four other copies (*Vaughn* entries 16, 23, 24, and 25) that also have tables of contents; one of those drafts (*Vaughn* entry 23) is unedited just like Document 12, as are eight drafts (*Vaughn* entries 14, 15, 19, 20, 21, 22, 31, and 32) without tables of contents. *Id.* Finally, while Document 12 lacks an introductory email, the absence of an explanatory document actually militates against any other possibility than that it is simply one of many predecisional drafts of a policy that was never implemented, much less finalized. *Id.*

Plaintiff also challenges the withholding of Document 1, one of the drafts, asserting that because CDC produced the draft—which was withheld in full—to Plaintiff on the date it agreed to 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," *see* Pl.'s Br. at 21, it somehow demonstrates that the draft was indeed final or operative. Yet, consistent with the Court's Order, CDC was obligated to produce by June 9 "responsive, non-exempt records that it ha[d] processed." *See* ECF No. 24. Plaintiff's attempts to differentiate Document 1 from the other drafts fail to overcome CDC's explanation in its transmittal cover letter accompanying the June 9 production to Plaintiff: "[t]he materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative, and do not contain or represent formal or informal agency policies or decisions. Examples of information withheld include the internal discussions and the draft document regarding the 'draft CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response.'" *See* Declaration of Natasha W. Teleanu, Ex. A. Furthermore, there were so many drafts of the strategy (many of them duplicates or near duplicates) discovered by CDC's search that there was no logical criteria available for CDC to identify any single version as being the nearest-to-final or even the most representative of the development process. *See* Supp. Andoh Decl. ¶ 20. Consequently, the version provided to Plaintiff as part of the agency's initial release (Document 1 on the *Vaughn* Index) was simply chosen at random; its lack of any sort of uniqueness is best illustrated by the fact that an exact duplicate of Document 1 also appears as Document 29. *Id.*

Because the CDC never finalized the Communication and Media Strategy for the Coronavirus Disease 2019 Response policy, Plaintiff's argument that CDC failed to establish that the policy relates to substantive agency policymaking is unavailing. *See* Pl.'s Br. at 22-23. As Plaintiff acknowledges, deliberations over an agency's messaging strategy are protected by the deliberative process privilege if a policy decision is "*not-yet-finalized*." *See id.* at 22 (quoting *NRDC v. EPA*, 2019 WL 4142725, at *8 (Aug. 30, 2019). Whether or not the CDC's communication and media strategy for the coronavirus response relates to the agency's

substantive policymaking is therefore irrelevant to the disclosure analysis because the draft messaging strategy was never finalized, and is therefore properly protected under Exemption 5. *See NRDC*, 2019 WL 4142725, at *8; Defs.' Mem. (ECF No. 33) at 10-12.

The remainder of Plaintiff's arguments regarding the emails CDC withheld under Exemption 5 fail to establish that the deliberative process privilege is inapplicable. Documents 27 and 28 reflect ongoing discussions within CDC about how to proceed in light of a proposed strategy. Mr. Mulvaney's emails addressed what was clearly a proposed strategy for what was then expected to be a short-term situation. *See* Supp. Andoh Decl. ¶ 16. Documents 27 and 28 in the *Vaughn* Index reflect an ongoing email conversation between Dr. Cetron and Caitlin Shockey, his division's Associate Director for Communications, and indicate that they did not consider the contents of Mr. Mulvaney's February 25, 2020 proposal to be a firm set of instructions (*i.e.*, a final policy) to which Dr. Cetron had no recourse but to obey. *See id.* In an email on February 25, Dr. Cetron indicated that he planned to suggest a change to the proposal Mr. Mulvaney had just distributed. *See id.* Moreover, in an email dated February 26, Ms. Shockey's view appeared to be that Dr. Cetron could ignore the framework Mr. Mulvaney had laid out the day before. *Id.* Finally, on February 27, Mr. Mulvaney sent out a follow-up to his earlier email that coincided with the White House announcement—effectively erasing the framework suggested in his February 25 email. *See id.* Thus, contrary to Plaintiff's arguments, these documents do not concern discussions about "post-decisional application" of an "established policy." *See* Pl.'s Br. at 12-13.

Lastly, Plaintiff's challenges to Documents 33-35 center on the nature of discussions regarding an interim media and communication clearance procedure. *See* Pl.'s Br. at 14-16. As described in the *Vaughn* Index, Documents 33 and 34 dealt with an interim clearance process for

HHS and EOP. *See* Supp. Andoh Decl. ¶ 23. An interim process is the equivalent of a first draft of a policy. *Id.* It is a suggestion about one way to try to deal with the issue at hand. *Id.* For the procedure at issue, no final decision has been made about the issue or the manner in which it will be addressed. *Id.* It is quite possible that the suggestion of the interim process will generate comments and other feedback that reveal it to be unwieldly or even completely unworkable. *Id.* It is the opportunity to offer such feedback that makes the interim offering a pre-decisional one. *Id.* Thus, these interim procedures were not final, and are properly protected by the deliberative process privilege.

III. CDC Properly Withheld Four Documents Subject to the Presidential Communications Privilege

Documents 9, 10, 11, and 35 are properly protected by the presidential communications privilege. As an initial matter, documents 9 and 10 are authored by Mick Mulvaney, who at the time the emails were authored, was the acting White House Chief of Staff, who is an immediate advisor to the President. *See* Supp. Andoh Decl. ¶ 14.[4] As Plaintiff recognizes, the Chief of Staff is "within the 'limited circle of close presidential advisors.'" *See* Pl.'s Br. at 9 (ECF No. 39) (quoting *ACLU v. DOJ*, 2016 WL 889739, at *4-5 (S.D.N.Y. Mar. 4, 2016)); *see also Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1109 n.1 (D.C. Cir. 2004) ("The Office of the President . . . is distinct from the Executive Office of the President and is a smaller unit comprised of such immediate advisers as the Chief of Staff and the White House Counsel."); *In re Sealed Case*, 121 F.3d 729, 758 (D.C. Cir. 1997). Document 11 is a copy of Mr. Mulvaney's February 25, 2020 email forwarded by the Office of CDC's Director to a small group of senior CDC officials—his Principal Deputy, his Chief of Staff, and CDC's Chief Operating Officer—and two members of

[4] Document 11 is an email forwarding Mr. Mulvaney's February 25, 2020 email. *See* ECF No. 34-1 at entry number 11.

the Director's personal staff who were routinely tasked with handling on his behalf the issues discussed in the email. *See* Supp. Andoh Decl. ¶ 14. Document 35 is an email to a new agency official that contains a direct reference to the subjects discussed in Mr. Mulvaney's two emails. *See id.*; *see also Seife v. U.S. Dep't of State*, 298 F. Supp. 3d 592, 621 (S.D.N.Y. 2018) ("The [presidential communications] privilege additionally protects records memorializing or reflecting such communications.").

The emails at issue involve strategy regarding communication about COVID-19 and were transmitted by or from the President's then-Acting Chief of Staff. *See* Supp. Andoh Decl. ¶ 14; *see also* ECF No. 34-1 (*Vaughn* index). While Plaintiff asserts that the CDC has failed to establish that these emails were authored in connection with advisory functions to the President, Plaintiff's reasoning is premised upon speculation that the emails were not authored by someone responsible for advising the President. *See* Pl.'s Br. at 10-11. But the Chief of Staff's role is exclusively to advise the President. *See* https://www.whitehouse.gov/the-trump-administration/ ("To provide the President with the support needed to govern effectively, the Executive Office of the President (EOP) was created in 1939 by President Franklin D. Roosevelt. The EOP has responsibility for tasks ranging from communicating the President's message to the American people to promoting our trade interests abroad. Overseen by the White House Chief of Staff, the EOP has traditionally been home to many of the President's closest advisors."). Thus, unlike the advisor at issue in *Seife v. Department of State*, cited by Plaintiff, this is not a scenario where "a presidential adviser is simultaneously responsible for performing functions other than advising the President" and the government must establish that the communications occurred in an advisory capacity. *See* 298 F. Supp. 3d at 622 (where the communications at issue were sent by the director of strategic communications at the National Security Council, who was a "dual hat

adviser"). Accordingly, because these emails are communications from the then-Acting Chief of Staff, an immediate presidential advisor whose role is focused exclusively on advising the President, they are protected by the presidential communications privilege. *See re Sealed Case*, 121 F.3d at 752, 758.

Contrary to Plaintiff's speculation that Mr. Mulvaney's emails were circulated broadly, *see* Pl.'s Br. at 6-8, the CDC's supplemental declaration provides additional detail that demonstrates that Mr. Mulvaney's emails were closely held, and were not widely disseminated either originally by Mr. Mulvaney or subsequently by CDC, *see* Supp. Andoh Decl. ¶ 15. There were 48 recipients of both of Mr. Mulvaney's emails, 36 of whom are individuals from the Executive Office of the President (EOP), with an additional seven individuals from the EOP copied on the second email. *Id.* Consequently, only 12 of the 48 recipients held non-EOP positions with any of the 15 Executive Branch Departments or any of the myriad other Federal agencies: of those 12, four were members of the White House COVID-19 Task Force. *Id.* In other words, Mr. Mulvaney's emails went to only 8 Executive Branch officials who were neither employed in the EOP nor members of the White House Task Force. *See id.*

Those eight government officials who received a copy of Mr. Mulvaney's emails included one individual from CDC, Dr. Martin Cetron, the Director of the Division of Global Migration and Quarantine. *Id.* Dr. Cetron received a copy of the email for the simple and straightforward reason that he led the CDC division responsible for the Federal Government's only direct action to limit the spread of COVID-19: screening (and quarantining when and if appropriate) travelers from Wuhan, China arriving at 3 U.S. airports starting on January 17, 2020 and screening (and quarantining when and if appropriate) all travelers from China arriving at 20 U.S. airports starting on January 31, 2020. *Id.* He was not simply a low-level functionary charged

with carrying out an already-established Presidential policy; he was, instead, the subject matter expert not just at CDC but within the Federal Government about issues involving quarantines (which CDC alone has the authority to enforce). *Id.* As such, he was deeply involved in the discussions about when, whether, and how to act in order to control and prevent the spread of coronavirus infections from China to the United States. *Id.*

The only other CDC employee who received Mr. Mulvaney's emails was Dr. Redfield, who was and still is a member of the White House Task Force; Dr. Redfield's office forwarded the email only to the three most senior CDC officials and two members of his staff whose work for him was directly affected by the subject of the emails. *Id.* For all these reasons, the email identified as Document 11 is entitled to protection under the presidential communications privilege. *See* Supp. Andoh Decl. ¶ 17. Mr. Mulvaney's email was kept confidential, and was forwarded by Dr. Redfield's office for information purposes only to an extremely small group consisting of CDC's top three officials after Dr. Redfield and the two members of his personal staff engaged in the activities addressed by Mr. Mulvaney's email. *Id.* In addition, while the contours of the information Mr. Mulvaney conveyed was ultimately disseminated to other CDC officials in general terms, neither the emails themselves nor their exact language was ever widely disseminated at CDC. *Id.* ¶ 15. Specifically, Document 35 is characterized in its subject line as a "rundown" for Rachel Oury, who had been detailed to handle communications efforts at CDC precisely because of her close connection to the President. *Id.* ¶ 18. Thus, she was a person in a position to give advice to the President, and her communication was of a confidential manner. *Id.* Although other CDC communications officials were copied on the email from CDC's Office of the Director, the details and full meaning of the privileged information being conveyed would have been understood only by her. *Id.*

IV. Plaintiff's Request for *In Camera* Review Should Be Denied

"*In camera* review is considered the exception, not the rule." *NRDC v. U.S. Dep't of Interior*, 73 F. Supp. 3d 350, 357-58 (S.D.N.Y. 2014) (internal quotations omitted) (citing *ACLU v. FBI*, 59 F. Supp. 3d 584, 589 (S.D.N.Y. 2014); *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988)). "It is appropriate only in unusual circumstances, such as where 'there is evidence of agency bad faith," *NRDC*, 73 F. Supp. 3d at 358 (quoting *ACLU v. FBI*, 59 F. Supp. 3d at 589), or "'[w]here the record is vague or the agency claims too sweeping,'" *id.* (quoting *Hopkins v. HUD*, 929 F.2d 81, 86 (2d Cir. 1991)).

Plaintiff does not allege that the CDC's declaration and *Vaughn* index were written or submitted in bad faith, but rather contends that the CDC's submissions are not sufficiently detailed to allow the Court to engage in meaningful review of the exemptions claimed. *See* Pl.'s Br. at 24. Plaintiff's cursory argument appears to focus on its belief that the CDC failed to release all reasonably segregable material, but the only basis put forth for Plaintiff's assertion is that the two draft policy documents contain purely factual material. *See id.* at 23. But the same ever-changing situation in which the various drafts were developed also explains why it was determined that no "factual" portions of the drafts could reasonably be segregated and released. *See* Supp. Andoh Decl. ¶ 22. While facts are usually thought to be static and unchanging, quite the opposite was the case in regard to the facts associated with the pandemic. *Id.* Because the agency's knowledge and understanding of the characteristics of the virus in specific and the pandemic in general was changing on an almost daily basis, decisions about what information to convey to the public and how and by whom it would best be conveyed were also changing. *Id.* Disclosing what might in other, less dynamic situations be considered "facts" would in the case of this document have been no more than the release of hypotheses advanced but later revised or rejected altogether. *Id.* To provide to the public even seemingly factual statements that were

based on imperfect, changing, and often inaccurate information would cause damage both to the agency—by contradicting and/or undercutting the more reliable information that it ultimately released—and to the public, by creating confusion and potentially sowing mistrust in the guidance provided by the CDC and other Federal agencies. *Id.*

Based on the foregoing, Plaintiff cannot demonstrate that *in camera* review is appropriate here. *See NRDC*, 73 F. Supp. 3d at 357-58 (denying request for *in camera* review where plaintiff did not allege that the agency declaration was written or submitted in bad faith and the declaration was adequate on its face). Further, where, as here, the determination as to whether the release of information would disclose the agency's deliberative process turns, in part, on the CDC's constantly evolving understanding of the pandemic, *in camera* review would not provide the Court with any further insight concerning the propriety of the withholdings. *See, e.g.*, *Sorin v. DOJ*, 280 F. Supp. 3d 550, 567 (S.D.N.Y. 2017) (denying *in camera* review where the agency declaration was sufficiently detailed for the court to determine that DOJ was justified in withholding an interview memorandum in full and noting that "*in camera* review would be of dubious utility" since the court was not familiar with the agency's day to day operations and therefore it was doubtful that the court could select which portions of the memorandum to release with the degree of certainty required to adequately protect the interests at stake). Accordingly, Plaintiff's request for *in camera* review should be denied.

CONCLUSION

For all the foregoing reasons and the reasons set forth in Defendants' moving memorandum and declaration, Defendants' motion for summary judgment should be granted and Plaintiff's request for *in camera* review should be denied.

Dated: October 2, 2020
New York, New York

Respectfully submitted,

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