No. 20-

IN THE

Supreme Court of the United States

CELESTINO G. ALMEDA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION AND UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether publicly-known, purely factual content selected, organized, and recited in an agency's records can be fully withheld from disclosure under the deliberative process privilege in Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5).

2. Whether the presumption of good faith attached to an agency's representation that it released all "reasonably segregable portion[s] of a record" otherwise withheld from disclosure under the deliberative process privilege, 5 U.S.C. §§ 552(b) & (b)(5), is rebutted by evidence that would warrant a belief by a reasonable person that segregable portions instead were withheld.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Celestino G. Almeda. Respondents are the United States Department of Education and the United States Department of Veterans Affairs. No party is a corporation.

STATEMENT OF RELATED CASES

Pursuant to SCR 14.1(b)(iii), all proceedings in the lower courts directly related to this case are:

- *Almeda v. United States Dep't of Education*, No. 20-5087 (D.C. Cir.) (order dated Aug. 18, 2020); and

- *Almeda v. United States Dep't of Education*, No. 1:17-cv-2641 (TSC) (D.D.C.) (final appealable order dated Feb. 7, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Celestino G. Almeda ("Almeda") respectfully petitions for a writ of certiorari to review the Order of the United States Court of Appeals for the District of Columbia Circuit entered August 18, 2020 granting respondents' motion for summary affirmance.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-4a) is not published but is available at 2020 U.S. App. LEXIS 26258. The decision of the district court (App. 5a-17a) is not published but is available at 2020 U.S. Dist. LEXIS 21320, 2020 WL 601628.

JURISDICTION

The court of appeals issued its decision granting summary affirmance on August 18, 2020 (App. 1a-4a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Accordingly, the deadline for filing a petition for a writ of certiorari in this case is January 15, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Pertinent statutory language from 5 U.S.C. § 552(b) is reproduced in the appendix to this petition (App. 18a).

INTRODUCTION AND STATEMENT OF THE CASE

At issue in this case is whether records overwhelmingly factual in nature, withheld from a FOIA requester by the United States Department of Education ("ED") and the United States Department of Veterans Affairs ("VA"), are fully exempt from disclosure under the deliberative process privilege, 5 U.S.C. § 552(b)(5), irrespective of evidence that a reasonable person would find "reasonably segregable," non-exempt portions pursuant to § 552(b).

The district court below held that "each of the contested Bates page ranges is predecisional and deliberative because each relates to the drafting process of a blog post." App. 12a. Despite smoking gun evidence compelling the antithesis—"*Almeda* provided an email and attachment that the VA withheld, *but that he nonetheless obtained*," revealing overwhelmingly segregable, factual content—the district court permitted the withholdings "because they represent the 'content[s] of drafts' and 'the drafting process itself.'" *Id.* (emphasis added). The district court further held that "because disclosure of the factual material could reveal deliberative judgments, the court finds that withholding this material does not violate the [agencies'] obligation to disclose reasonably segregable material." App. 13a. The agencies' declarations, representing that all segregable, nonexempt material had been released, were accepted at face value, *id.*, despite the required "quantum of evidence" that Almeda submitted which starkly demonstrated the polar opposite.

At the court of appeals, ED's and VA's motion for summary affirmance subsequently was granted, the court

finding, in a short Order, it immaterial that "the disputed documents may contain some factual material" and that "the factual material cannot be reasonably segregated." App. 2a-3a. In addition, according to the appeals court and despite Almeda's clear evidence to the contrary, "the record does not support appellant's argument that the government adopted the draft blog posts he seeks or used them in its dealings with the public." App. 3a.

Petitioner "submitted FOIA requests to the VA and ED for documents related to an Interagency Working Group [("IWG")] established to analyze the barriers faced by Filipino veterans in obtaining compensation for their service."[1] App. 6a. The agencies failed to timely respond and Almeda filed suit in 2017. *Id.* After some disclosures, the dispute narrowed to nineteen (19) Bates page ranges withheld by VA and ten (10) Bates page ranges withheld by ED. *Id.*

"The VA's Declaration . . . and the *Vaughn* index . . . describe the contents of each contested Bates page range and assert that each falls under the deliberative process privilege because it relates to the process of drafting

1. Among the agencies participating on the IWG were ED, VA, the Office of Management and Budget, the Department of Defense, and the National Archives and Records Administration. *See Recognizing the Extraordinary Contribution of Filipino Veterans* (July 9, 2013), available at https://obamawhitehouse.archives.gov/blog/2013/07/09/recognizing-extraordinary-contribution-filipino-veterans (last viewed Jan. 15, 2021); *Honoring Filipino World War II Veterans for Their Service* (Oct. 17, 2012), available at https://obamawhitehouse.archives.gov/blog/2012/10/17/honoring-filipino-world-war-ii-veterans-their-service (last viewed Jan. 15, 2021).

a blog post about the work of the IWG." App. 11a. ED likewise provided a Declaration and *Vaughn* index concerning its withheld documents. App. 15a-16a. The twenty-nine (29) records, in total, in dispute and withheld under FOIA Exemption 5 *all* relate to two blog postings of the IWG, which constitute the *only* public reports by that group concerning its efforts. Pet'r C.A. Resp. Br. 6.

The non-deliberative, factual content of the records in dispute is readily apparent from the withheld content of one of those records, a July 2, 2013 "final draft" of a "blog" posting comprising the final report of the IWG subsequently published on the web site of the Obama White House a week later on July 9, 2013.[2] Pet'r C.A. Resp. Br. 2. Almeda's "quantum of evidence" that he obtained outside this case, compared to the IWG's public blog posting on the web, indisputably demonstrates this. Hardly deliberative in nature but withheld-in-full by both ED and VA, the "final draft" of the blog posting also hardly changed when its words were adopted and published. *Id.* A mark-up demonstrates insignificant wordsmithing prior to publication on the web, with the blog post reporting in part:

> In 1941, more than 260,000 Filipino soldiers responded to President Roosevelt's call-to-arms and fought under the American flag during World War II. Many made the ultimate sacrifice as both soldiers in the U.S. Army Forces in the Far East, and as recognized guerrilla fighters during the Imperial Japanese occupation of the Philippines. Later, many of

2. *See* n.1, *supra*.

these brave individuals became proud United States citizens. However, because of the Rescission Acts of 1946, most Filipino World War II Veterans did not receive ~~equitable~~ compensation on par with United States veterans for their service to the United States.

President Obama recognizes the extraordinary contribution made by Filipino veterans. The American Recovery and Reinvestment Act of 2009, which the President signed into law, included a provision creating the Filipino Veterans Equity Compensation Fund. Eligible veterans who are U.S. citizens receive a one-time payment of $15,000; eligible veterans who are not U.S. citizens receive a one-time payment of $9,000.

To date, we are pleased that over 18,000 claims have been approved. However, many Filipino Veterans still believe that their claims were improperly denied, or that they did not receive a satisfactory explanation as to why their claims were denied. To address these concerns, in October 2012, the White House Initiative on Asian Americans and Pacific Islanders, in collaboration with the Office of Management and Budget and the Domestic Policy Council, created the Filipino Veterans Equity Compensation Fund Interagency Working Group (IWG) comprised of the Department of Veterans Affairs, the Department of Defense, and the National Archives and Record Administration. The IWG

> was tasked with analyzing the process faced by these Filipino veterans in demonstrating eligibility for compensation in order to ensure that all applications receive thorough and fair review.
>
> Over the last seven months, the IWG has worked toward increased transparency and a thorough accounting of the process to verify valid military service for Filipino World War II veterans. This effort culminates in the reports that follow from each member of the IWG. ~~The attached reports represent~~ This effort represents the first time all organizations involved in the verification process were brought together to examine the process from start to finish, and publicly post a collaborative report explaining each organization's role in the verification process. In addition to clarifying the claims process, the IWG digitized and made available online for the first time a report titled, "U.S. Army Recognition Program of Philippine Guerrillas." This crucial report explains how the recognition process was developed at the close of World War II. Most significantly, the Army publicly states their careful reasoning behind the current policies on service verification.

Pet'r C.A. Resp. Br. 2-4 & Exs. 1-2. The remaining twenty-one (21) paragraphs included insignificant wordsmithing—mainly edits concerning the use of acronyms such as replacing "VA" with "Department of Veterans Affairs (VA)," replacing "Army" with "United States Army," replacing "NARA" with "National Archives and Records

Administration," and removing the parenthetical "Board" from "Board of Veterans' Appeals (Board)." *Id.* at 4 n.1. In all, twenty (20) of the twenty-five (25) paragraphs in that blog posting had no edits whatsoever between the draft and final versions. *Id.* at 4. Yet both ED and VA withheld the final draft in its entirety.

A cover email with the draft blog posting, withheld-in-full by ED and VA pursuant to Exemption 5, states:

> Attached is a final draft of the Filipino Veterans blog post/report that includes agency and Executive Office of the President edits. Please let us know if you have any major concerns or factual edits by noon tomorrow, July 3. We apologize for the short deadline; the goal is to have the blog on line by Monday, July 8.
>
> If possible, please provide the necessary hyperlinks by tomorrow afternoon as well (noted in the document comments). Thank you!

Id. at Ex. 2.

In support of their decisions to withhold this record in full, both ED and VA relied on declarations from agency officials. ED's declarant represented:

> After carefully reviewing the withheld portions of the responsive records, I have determined that no portion of the withheld sections can be reasonably segregated and released. Release of any information from the redacted sections

> would reveal information that is exempt from FOIA disclosure . . . There is no non-exempt information that can be disclosed.

Id. at 4-5. Similarly, VA's declarant represented:

> As I reviewed the records, I also performed a line-by-line [sic] for segregable information and that all reasonably segregable nonexempt material has been released.

Id. at 5.

Almeda argued to the court of appeals that the representations of the agencies' declarants were contradicted by the evidence he proffered, such that any presumption of good faith to which the statements otherwise might be entitled was rebutted and overcome. *Id.* at 8. He further argued that entirely factual statements in the copy of the record he obtained outside the case could not be shielded by the agencies as deliberative. *Id.* Indeed, the agencies withheld-in-full factual content such as:

> . . . The American Recovery and Reinvestment Act of 2009, which the President signed into law, included a provision creating the Filipino Veterans Equity Compensation Fund. Eligible veterans who are U.S. citizens receive a one-time payment of $15,000; eligible veterans who are not U.S. citizens receive a one-time payment of $9,000.

* * *

In order to extend formal recognition to Philippine guerrilla units and individuals who contributed materially to the defeat of Japanese forces occupying the Philippines during World War II, the United States Army developed and administered a recognition program between late 1942 and June 30, 1948. Over 1.2 million individuals applied for recognition, and ultimately over 260,000 were recognized with positive service determinations for the Philippine Commonwealth Army. The recognition program ended on June 30, 1948, the date established by Congress for final liquidation of U.S. funds appropriated in 1946 to support the Philippine Army.

* * *

The National Personnel Records Center (NPRC), a component of the National Archives and Records Administration (NARA), serves as an agent for the U.S. Army, providing storage and reference services for records of the U.S. Army. Among the Army records held by NPRC are claim folders pertaining to Filipino nationals, which were adjudicated by the U.S. Army after World War II, and unit rosters created by the U.S. Army in conjunction with its recognition program.

* * *

By statute, in order to qualify for an FVEC payment, an individual must have served before

> July 1, 1946, in the Philippine Commonwealth Army, including recognized guerrilla units, or in the New Philippine Scouts. In adjudicating claims for benefits, including FVEC, VA is legally bound by military service department determinations as to what service a claimant performed. Under VA regulations, in the absence of a suitable document issued by a U.S. service department containing the needed information, VA must seek verification of service from the appropriate service department, in this case, the U.S. Department of the Army. The NPRC in St. Louis, Missouri, acts as the custodian of the Army's records, and VA sends its requests for service verification to that entity. VA also forwards to the NPRC any evidence provided by claimants to establish qualifying service.

Id. at 8-10 & Exs. 1, 2, & 4. Despite Almeda's evidence that a reasonable person would find otherwise, *id.* at 10-11, the court of appeals inconceivably concluded that all of this "factual material cannot be reasonably segregated." App. 3a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit Has Departed from This Court's Precedents Concerning FOIA Exemption 5.

The court of appeals has stretched the deliberative process FOIA exemption well beyond any elastic limit contemplated by Congress and this Court. Without a correction, permanent damage will be done to the

government transparency that FOIA is supposed to provide. In this case, the D.C. Circuit's willingness to sanction the withholding of purely factual material destined for public consumption—rather than created strictly for the internal use by an agency—not to mention clearly non-deliberative content confers impermissible plasticity to Exemption 5. The all-encompassing, disclosure-defeating standard applied to the records at issue has distorted the permissible scope of the agencies' withholdings.

This Court has recognized that "Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975) (citation omitted). To that end, Exemption 5 embodies the attorney-client privilege and attorney's work-product rule. *Id.* at 154.

"Exemption 5 . . . requires different treatment for materials reflecting deliberative or policymaking processes on the one hand, and purely factual, investigative matters on the other." *EPA v. Mink*, 410 U.S. 73, 89 (1973). Congress did not create a

> wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion. . . . Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved

> in litigation with Government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Id. at 91.

Shortly after *Mink*, the D.C. Circuit held that "[w]hen a summary of factual material on the public record is prepared by the staff of an agency administrator, *for his use* in making a complex decision, such a summary is part of the deliberative process, and is exempt from disclosure under exemption 5 of FOIA." *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974) (emphasis added). That holding, however, subsequently blossomed into a much more comprehensive exemption from disclosure.

"In some circumstances," the court of appeals found that "the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5)." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (footnote and citations omitted). The case law further gravitated away from "a commonsense approach" in 2011, when the court held that

> the legitimacy of withholding does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency's deliberative process.

Ancient Coin Collectors Guild v. United States Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011). According to the court of appeals, an agency's "'selection of the facts thought to be relevant' is part of the deliberative process; it necessarily involves 'policy-oriented *judgment*.'" *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 465 (D.C. Cir. 2014), quoting *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1359 (D.C. Cir. 1993). It is from this perspective that all form of Exemption 5 mischief may sprout.

According to the court of appeals, "[a]lthough the disputed documents *may* contain *some* factual material," those "drafts and corresponding emails were part of a deliberative process, spanning several months, during which the government summarized the benefits process for Filipino veterans from a large universe of facts." App. 2a (emphasis added). Relying on *Ancient Coin* and *Nat'l Sec. Archive*, *see id.*, the court held in short order that the government's withholdings are "justified." *Id.*

The court of appeals has misapplied this Court's precedents and created an amorphous standard under which factual materials readily may be withheld pursuant to Exemption 5. This case is proof. The appeals court has construed FOIA in a manner that contravenes "the basic policy that disclosure, not secrecy, is the dominant objective of [the statute]" and that exemptions, including Exemption 5, "must be narrowly construed." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citations omitted).

It simply is inconceivable that entire factual paragraphs describing that "[t]he American Recovery and Reinvestment Act of 2009, which the President

signed into law, included a provision creating the Filipino Veterans Equity Compensation Fund," "[t]he National Personnel Records Center (NPRC) . . . serves as an agent for the U.S. Army," and "VA sends its requests for service verification to that entity," to call attention to just a few, cannot be segregated from other purportedly deliberative material and released. Pet'r C.A. Resp. Br. 8-10 & Exs. 1, 2, & 4. The selection and organization of pure facts does not *per se* implicate any deliberative process so as to warrant withholdings.

This Court's holding in *Mink*, permitting "discovery of purely factual material appearing in [records] in a form that is severable without compromising the private remainder of the documents," 410 U.S. at 91, has been warped by the court of appeals, rendering Exemption 5 a means by which the FOIA statute no longer serves its pro-disclosure purpose. When purely factual material—in drafts or otherwise—is permitted to be withheld, as here, Exemption 5 simply is given undue breadth.

II. The D.C. Circuit Has Departed From a "Reasonable Person" Standard for the Rebuttable Presumption of Good Faith in an Agency's Representations.

The court of appeals has held that "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material" but "[t]he quantum of evidence required to overcome that presumption *is not clear*." *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (emphasis added); App. 13a. This leaves in limbo the standard for rebutting an agency's declaration concerning its release, if any, of segregable material, again permitting

all form of mischief by agencies seeking to shield records from disclosure.

This case presents the perfect example of how agencies' representations concerning segregability may not withstand basic scrutiny. Both VA and ED withheld records in their entirety and represented that no portions were segregable. Pet'r C.A. Resp. Br. 4-5. But Almeda put before both the district court and the court of appeals a complete copy of one of the withheld records that he obtained outside this case. App. 12a. That document proves false the agencies' representations that the record lacks segregable, non-exempt content. Pet'r C.A. Resp. Br. 8-10 & Exs. 1, 2, & 4. Indeed, the content of the record (the email and attachment) either is not deliberative or is factual, and is segregable; substantially all of the paragraphs of the final draft of the blog post comprise factual content that is readily segregable. *Id.*

In *Nat'l Archives & Records Admin. v. Favish*, this Court set a "reasonable person" standard for a rebuttable presumption in connection with FOIA Exemption 7(C):

> [W]here there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

541 U.S. 157, 174 (2004). But without such a firm standard with respect to segregability, the district court and indeed the court of appeals have adopted a 19th century, "wild west" approach. Both courts simply ignored Almeda's evidence proffered to rebut the presumption of good faith in the agencies' representations. App. 13a (district court holding that "because disclosure of the factual material could reveal deliberative judgments, the court finds that withholding this material does not violate the VA's obligation to disclose reasonably segregable material"); App. 3a (court of appeals conclusion, without any analysis of Almeda's evidence, that "the factual material cannot be reasonably segregated"). Such randomness cannot be countenanced in a FOIA segregability analysis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted

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Date: January 15, 2021

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 18, 2020

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5087

CELESTINO G. ALMEDA,

Appellant,

v.

UNITED STATES DEPARTMENT OF EDUCATION AND UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Appellees.

September Term, 2019
1:17-cv-02641-TSC
August 18, 2020, Filed

BEFORE: Henderson, Tatel, and Katsas, Circuit Judges.

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

Appendix A

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297, 260 U.S. App. D.C. 334 (D.C. Cir. 1987) (per curiam). On appeal, appellant challenges only the government's withholdings as to the drafts of the July 9, 2013 blog post and emails related to those drafts.

As to the material withheld under the deliberative process privilege in Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), the government has shown that its withholdings are justified. Although the disputed documents may contain some factual material, "the legitimacy of withholding does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency's deliberative process." *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 513, 395 U.S. App. D.C. 138 (D.C. Cir. 2011). Here, the drafts and corresponding emails were part of a deliberative process, spanning several months, during which the government summarized the benefits process for Filipino veterans from a large universe of facts. *See id.; Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 465, 410 U.S. App. D.C. 8 (D.C. Cir. 2014) ("In producing a draft agency history, the writer necessarily must cull the relevant documents, extract pertinent facts, organize them to suit a specific purpose, and identify the significant issues. . . . In doing so, the selection of the facts thought to be relevant is part of the deliberative process; it necessarily involves policy-

oriented judgment.") (internal citations and quotation marks omitted). And the factual material cannot be reasonably segregated. *Id.*

Additionally, the record does not support appellant's argument that the government adopted the draft blog posts he seeks or used them in its dealings with the public. *See Judicial Watch, Inc. v. Dep't of Def.*, 847 F.3d 735, 739, 427 U.S. App. D.C. 356 (D.C. Cir. 2017) ("To adopt a deliberative document . . . the agency must make an '*express*[ ]' choice to use a deliberative document as a source of agency guidance.") (internal citation omitted) (emphasis in original). Accordingly, the drafts have retained their predecisional status.

As to appellant's argument regarding the redactions of names of non-senior employees within the deliberative documents, the government has demonstrated that those withholdings fit within Exemption 6, 5 U.S.C. § 552(b)(6). Almeda has failed to identify any public interest that would be served by disclosure of the redacted names. *See Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 34, 353 U.S. App. D.C. 374 (D.C. Cir. 2002).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Appendix A

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/_____
Manuel J. Castro
Deputy Clerk

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED FEBRUARY 7, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:17-cv-2641 (TSC)

CELESTINO G. ALMEDA,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF EDUCATION, *et al.*,

Defendants.

MEMORANDUM OPINION

Plaintiff Celestino G. Almeda has sued Defendants U.S. Department of Education ("ED") and U.S. Department of Veterans Affairs ("VA") seeking to compel responses to his three Freedom of Information Act ("FOIA") requests. Pending before the court are Defendants' Motion for Summary Judgment (ECF No. 32 ("Defs. MSJ")), and Almeda's Cross-Motion for Summary Judgment (ECF No. 34 ("Pl. MSJ"). For the reasons set forth below, the court will GRANT Defendants' motion for summary judgment and DENY Almeda's cross-motion for summary judgment.

Appendix B

I. BACKGROUND

Almeda is a veteran who served during World War II as a guerrilla fighter against the Japanese occupation of the Philippines. (ECF No. 1 ("Compl.") ¶ 2.) In response to Rescission Acts in 1946 that prevented Filipino veterans from accessing United States veterans' benefits, and other continuous barriers to those benefits, Almeda has long advocated for proper recognition and compensation of Filipino veterans. (*Id.* ¶ 3.) On October 16, 2017, Almeda submitted FOIA requests to the VA and ED for documents related to an Interagency Working Group established to analyze the barriers faced by Filipino veterans in obtaining compensation for their service. (*Id.* ¶¶ 26, 33, 41.) Receiving no timely response to his FOIA requests, Almeda brought this suit on December 8th, 2017. (*Id.* ¶¶ 51-55.) Since that time, Defendants have satisfied portions of Almeda's requests, such that the remaining dispute presents only two narrow questions: whether the VA improperly withheld 19 Bates page ranges and whether the ED improperly withheld 10 Bates page ranges.

II. LEGAL STANDARD

A. *Summary Judgment*

Summary judgment is proper where the record shows there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Waterhouse v. District of Columbia*, 298 F.3d 989, 991, 353 U.S. App. D.C. 205

(D.C. Cir. 2002). "A fact is 'material' if a dispute over it might affect the outcome of a suit under governing law; factual disputes that are 'irrelevant or unnecessary' do not affect the summary judgment determination." *Holcomb v. Powell*, 433 F.3d 889, 895, 369 U.S. App. D.C. 122 (D.C. Cir. 2006) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "An issue is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* Courts must view "the evidence in the light most favorable to the non-movant[ ] and draw[ ] all reasonable inferences accordingly," and determine whether a "reasonable jury could reach a verdict" in the non-movant's favor. *Lopez v. Council on Am.-Islamic Relations Action Network, Inc.*, 826 F.3d 492, 496, 423 U.S. App. D.C. 328 (D.C. Cir. 2016).

B. *FOIA*

FOIA cases are typically and appropriately decided on motions for summary judgment. *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527, 395 U.S. App. D.C. 155 (D.C. Cir. 2011). "FOIA provides a 'statutory right of public access to documents and records' held by federal government agencies." *Citizens for Responsibility & Ethics in Wash. ("CREW") v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 123 (D.D.C. 2009) (quoting *Pratt v. Webster*, 673 F.2d 408, 413, 218 U.S. App. D.C. 17 (D.C. Cir. 1982)). FOIA requires that federal agencies comply with requests and make their records available to the public unless such "information is exempted under [one of nine] clearly delineated statutory [exemptions]." *Crew*, 602 F. Supp. 2d at 123; *see also* 5 U.S.C. §§ 552(a)-(b). The district court

conducts a *de novo* review of the agency's decision to withhold requested documents under any of FOIA's specific statutory exemptions. *See id.* § 552(a)(4)(B). The burden is on the government agency to show that nondisclosed, requested material falls within a stated exemption. *See Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433, 298 U.S. App. D.C. 125 (D.C. Cir. 1992) (citing 5 U.S.C. § 552(a)(4)(B)).

In cases where the applicability of certain FOIA exemptions is at issue, agencies may rely on supporting declarations that are reasonably detailed and non-conclusory. The declarations must provide enough information "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *King v. Dep't of Justice*, 830 F.2d 210, 218, 265 U.S. App. D.C. 62 (D.C. Cir. 1987). "If an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone." *ACLU v. United States DOD*, 628 F.3d 612, 619, 393 U.S. App. D.C. 384 (D.C. Cir. 2011) (citations omitted). However, a motion for summary judgment should be granted in favor of the FOIA requester where "an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption." *Coldiron v. United States DOJ*, 310 F. Supp. 2d 44, 48 (D.D.C. 2004) (quoting *Petroleum Info. Corp.*, 976 F.2d at 1433).

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III. ANALYSIS

Defendants raise several bases for their withholdings, only some of which Almeda contests. Although "a motion for summary judgment cannot be 'conceded' for want of opposition," *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 505, 427 U.S. App. D.C. 17 (D.C. Cir. 2016), "this does not mean . . . that the Court must assess the legal sufficiency of each and every exemption invoked by the government in a FOIA case." *Shapiro v. United States DOJ*, 239 F. Supp. 3d 100, 106 n.1 (D.D.C. 2017). Instead:

> Where the FOIA requester responds to the government's motion for summary judgment without taking issue with the government's decision to withhold or to redact documents, the Court can reasonably infer that the FOIA requester does not seek those specific records or information and that, as to those records or information, there is no case or controversy sufficient to sustain the Court's jurisdiction.

Id. Accordingly, the court will address only Plaintiff's arguments in response to Defendants' motion for summary judgment.

A. *Withholdings by the Department of Veterans Affairs*

Almeda contests the VA's invocation of Exemption 5, its assertion that it has made all reasonable segregations, and its withholding the names of non-senior employees.

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1. *Exemption 5 Withholdings*

Exemption 5 shields documents that would "normally [be] privileged from discovery in civil litigation against the agency," such as documents protected by the attorney-client, work-product, and deliberative process privileges. *Tax Analysts v. IRS*, 117 F.3d 607, 616, 326 U.S. App. D.C. 53 (D.C. Cir. 1997). To withhold a document under Exemption 5, the "document must meet two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Stolt-Nielsen Transp. Grp. Ltd. v. U.S.*, 534 F.3d 728, 733, 383 U.S. App. D.C. 1 (D.C. Cir. 2008) (citations and internal quotation marks omitted). There is no dispute that the first condition is met; the parties' dispute is directed to the second condition.

The VA withheld the contested Bates page ranges, or portions thereof, on the basis that they are protected by the deliberative process privilege or the attorney-client privilege or both. (Defs. MSJ at 13.)[1] Almeda argues that neither privilege applies, and therefore Exemption 5 does not apply.[2] To resolve such a dispute, a court must

1. When citing electronic filings throughout this opinion, the court cites to the ECF page number, not the page number of the filed document.

2. Based on the chart provided in Almeda's motion, he appears to contest the applicability of Exemption 5 as to 18 of the 19 contested Bates page ranges. For some entries, Almeda explicitly contests the applicability ("attorney-client privilege unsupported") but for others, he only does so implicitly ("email chain sent interagency and includes non-attorneys.") (Pl. MSJ at 15-17.)

decide whether the "agency's affidavit describes the justifications for withholding the information with specific detail," and "demonstrates that the information withheld logically falls within the claimed exemption." *ACLU*, 628 F.3d at 619 (citations omitted). If the affidavit meets these requirements, the agency is entitled to summary judgment unless the record includes "contrary evidence" or "evidence of the agency's bad faith." *Id.*

The VA's Declaration from Michael Davis, and the *Vaughn* index attached thereto, describe the contents of each contested Bates page range and assert that each falls under the deliberative process privilege because it relates to the process of drafting a blog post about the work of the IWG. (ECF No. 32-3 ("Davis Decl.") at 6-11.) The Declaration also asserts that some emails were protected not only by the deliberative process privilege, but also by the attorney-client privilege, because they involved consultation with lawyers about accurate statements of law. (*See* Defs. MSJ at 15.) Almeda contests the presence of both privileges, (ECF No. 39 ("Pl. Reply") at 3-4), but this court need not reach the issue of attorney-client privilege because the relevant material is protected by the deliberative process privilege.

Materials are protected by the deliberative process privilege if they are both "predecisional" and "deliberative." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537, 303 U.S. App. D.C. 249 (D.C. Cir. 1993). The privilege has been held to protect "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather

than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F. 2d 854, 866, 199 U.S. App. D.C. 272 (D.C. Cir. 1980). Here, each of the contested Bates page ranges is predecisional and deliberative because each relates to the drafting process of a blog post. (Davis Decl. at 6-11.) In his Reply, Almeda provided an email and attachment that the VA withheld, but that he nonetheless obtained, and argues that its contents are not deliberative. (Pl. Reply at 2-4). The court disagrees. "The deliberative process privilege protects not only the content of drafts, but also the drafting process itself." *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 132 (D.D.C. 2016). The email in question describes the timing of the publication, the draft at a particular stage in the process, and the roles played by various members in the drafting process. The email and associated attachment are thus protected because they represent the "content[s] of drafts" and "the drafting process itself." *Id.*[3]

Finding that the VA "describes the justifications" for withholding the contested documents and "demonstrates that the information withheld logically falls within" Exemption 5, and finding that there is no "contrary evidence" or "evidence of the agency's bad faith," the court thus finds that the VA has sufficiently established that the withheld material properly falls within Exemption 5. *ACLU*, 628 F.3d at 619 (citations omitted).

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3. Almeda also notes that a draft can lose its predecisional status if it is adopted as the position of the agency. *See, e.g., Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257-58, 220 U.S. App. D.C. 77 (D.C. Cir. 1980). Here, however, the comments in the margins of the relevant draft indicate that it was not the final version adopted by the agency.

2. *Failure to Segregate*

Almeda also argues that even if Exemption 5 applies, the VA failed to segregate and disclose non-exempt information from each of the 20 contested Bates page ranges. (Pl. MSJ at 15-17.) The VA's Davis Declaration states that Davis "performed a line-by-line for segregable information and that all reasonably segregable nonexempt material has been released." (Davis Decl. at 15.) Almeda argues that this cannot be the case, because the email and attachment he obtained (that otherwise remains withheld) includes what he considers to be "segregable, factual content." (Pl. Reply at 3.)

In resolving disputes about the release of segregable information, "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by a some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117, 377 U.S. App. D.C. 460 (D.C. Cir. 2007). Moreover, courts in this district have made clear that "[a]ny effort to segregate the factual portions of the drafts, as distinct from their deliberative portions, would run the risk of revealing editorial judgments." *Competitive Ent. Inst.*, 161 F. Supp. 3d at 132. This is because such a disclosure could reveal "decisions to insert or delete material or to change a draft's focus or emphasis." *Id.* Thus, because disclosure of the factual material could reveal deliberative judgments, the court finds that withholding this material does not violate the VA's obligation to disclose reasonably segregable material.

3. *Names of Non-Senior Employees*

Almeda argues that "there is no explanation as to why certain names . . . have been redacted." (Pl. MSJ at 17.) He specifically points to names redacted in Bates page ranges 226-233, 277-279, 322-325, and 347-351. (*Id.* at 16-17.) Defendants claim that the redactions are authorized by Exemption 6 because they prevent the disclosure of the names of "nonsenior government employees" who "have a privacy interest in preventing their identities from being disclosed to the public." (ECF No. 37 ("Defs. Reply") at 2.) However, the court need not reach the issue of whether the names are properly withheld under Exemption 6 because it finds they are properly withheld under Exemption 5. The D.C. Circuit has held that "[i]f agency records are indeed deliberative, it is appropriate to apply Exemption 5 to the documents themselves, as well as to the names of their authors." *Brinton v. Dep't of State*, 636 F.2d 600, 604, 204 U.S. App. D.C. 328 (D.C. Cir. 1980); *see also Pub. Citizen, Inc. v. U.S. Dep't of Educ.*, 388 F. Supp. 3d 29, 44 (D.D.C. 2019) ("Because the emails are protected under the deliberative process privilege, the Court finds that the identity of the author of those emails . . . is also protected"); *Aaron v. U.S. Dep't of Justice,* No. 09-00831 (HHK), 2011 U.S. Dist. LEXIS 164342, 2011 WL 13253641, *8 (D.D.C. July 15, 2011) ("This Circuit has recognized that if a document is deliberative in nature, the identity of the author is also privileged.") Because the underlying documents are indeed deliberative, and because the redacted names are those of the authors of those deliberative documents, the court finds that the names were properly withheld.

B. *Withholdings by the Department of Education*

Almeda argues that ED improperly withheld information contained in attachments to emails and that it failed to segregate non-exempt information.

1. *Attachments*

Almeda argues that Defendants offer no reason "why attachments undoubtedly associated with these emails are not included in the Bates ranges of withholdings." (Pl. MSJ at 19.) Defendants respond that "all documents with withheld information are included on ED's *Vaughn* index."[4] (Defs. Reply at 3.) Moreover, the Declaration supplied by Defendants indicates that the *Vaughn* index includes all the records that were withheld. (ECF No. 32-4 ("Siegelbaum Decl.") ¶ 15.) Declarations of agencies are "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991) (internal quotation marks omitted). Because Almeda provides no explanation for the assertion that there are documents excluded from the *Vaughn* Index, and further provides no evidence to support such

4. "A *Vaughn* index describes the documents withheld or redacted and the FOIA exemptions invoked, and explains why each exemption applies." *Prison Legal News v. Samuels*, 787 F.3d 1142, 1145 n.1, 415 U.S. App. D.C. 354 (D.C. Cir. 2015) (citing *Vaughn v. Rosen*, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973); *Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 349, 265 U.S. App. D.C. 189 (D.C. Cir. 1987)).

an assertion, the court finds that ED properly included all withheld information on the *Vaughn* Index.[5]

2. *Segregable Information*

Almeda argues that ED "failed to release segregable information" in 10 Bates page ranges. (Pl. MSJ at 17-18.) Defendants point to the Siegelbaum Declaration, which asserts that "no portion of the withheld sections can be reasonably segregated and released." (Siegelbaum Decl. at ¶ 21.) As noted above, "agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman*, 494 F.3d at 1117. Here, Almeda merely asserts that ED failed to release segregable information without providing any evidence in support thereof.[6] Accordingly, the court finds that ED complied with the obligation to disclose reasonably segregable material.

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5. The documents that Almeda does provide—the email and attachment he obtained despite both being withheld—show that at least in that instance, the *Vaughn* Index does properly include the attachment to the email, given that the page range listed in the index (1064-1084) encompasses the pages of the attachment. (Pl. Reply at 2.)

6. Moreover, as discussed above, "[a]ny effort to segregate the factual portions of the drafts, as distinct from their deliberative portions, would run the risk of revealing editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis." *Competitive Ent. Inst.*, 161 F. Supp. 3d at 132 (internal citations omitted).

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IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment will be GRANTED and Almeda's cross-motion for summary judgment will be DENIED. A corresponding Order will issue separately.

Date: February 7, 2020

/s/ Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

APPENDIX C — STATUTORY PROVISIONS

5 U.S.C. 552(b) provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.