

APPENDICES

1a

APPENDIX A

**UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

No. 19-2188

(1:17-cv-00192-TSK-MJA)

AYYAKKANNU MANIVANNAN

Plaintiff – Appellant

v.

DEPARTMENT OF ENERGY, National Energy
Technology Laboratory

Defendant - Appellee

and

GRACE M. BOCHENEK; SUSAN MALIE; ISABEL
COTERO

Defendants

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

2a

Entered at the direction of the panel: Judge
Diaz, Senior Judge Traxler, and Senior Judge
Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

3a

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-2188

AYYAKKANNU MANIVANNAN,
Plaintiff - Appellant,

v.

DEPARTMENT OF ENERGY, National Energy
Technology Laboratory,

Defendant - Appellee,

and

GRACE M. BOCHENEK; SUSAN MALIE; ISABEL
COTERO,

Defendants.

Appeal from the United States District Court for the
Northern District of West Virginia, at Clarksburg.
Thomas S. Kleeh, District Judge. (1:17-cv-00192-
TSK-MJA)

Submitted: December 1, 2020

Decided: January 12, 2021

4a

Before KEENAN and DIAZ, Circuit Judges, and
TRAXLER, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by
unpublished per curiam opinion.

Ayyakkannu Manivannan, Appellant Pro Se. Tara
Noel Tighe, Assistant United States Attorney,
OFFICE OF THE UNITED STATES ATTORNEY,
Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in
this circuit.

PER CURIAM:

Ayyakkannu Manivannan filed a complaint pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, against the Department of Energy's National Energy Technology Laboratory (NETL or "the agency"), alleging that NETL failed to adequately respond to several requests for records pursuant to FOIA. The district court granted summary judgment in favor of NETL. For the reasons that follow, we affirm the district court's judgment in part, vacate in part, and remand.

When reviewing a district court's grant of summary judgment in favor of the Government in a FOIA action, we review de novo whether, after taking the evidence in the light most favorable to the nonmovant, there remains any genuine issue of material fact and whether the Government is entitled to summary judgment as a matter of law. *See Wickwire Gavin, P.C. v. United States Postal Serv.*, 356 F.3d 588, 591 (4th Cir. 2004).

We have reviewed the record and discern no reversible error as to the following determinations made by the district court. First, NETL was entitled to summary judgment with respect to FOIA request Numbers 78, 1069, 1268, 1284, 1347, 1348, and 1759 because Manivannan failed to pay fees that NETL was permitted to assess. *See Coleman v. Drug Enf't Admin.*, 714 F.3d 816, 819 (4th Cir. 2013); *see also* 5 U.S.C. § 552(a)(4)(A)(v); 28 C.F.R. § 16.10(i). Second, NETL was entitled to summary judgment with respect to request Number 890 because Manivannan did not exhaust his administrative remedies prior to

filing suit. Further, Manivannan did not constructively exhaust his administrative remedies because NETL cured the statutory violation based on its failure to timely respond to Manivannan's request by responding before he filed suit. *See Coleman*, 714 F.3d at 820. Third, NETL was entitled to summary judgment on the basis that its searches with respect to request Numbers 833 and 1070 were adequate. The agency met its burden of showing that it "made a good faith effort to conduct a search . . . using methods which can be reasonably expected to produce the information requested." *DiBacco v. Dep't of the Army*, 926 F.3d 827, 832 (D.C. Cir. 2019) (internal quotation marks omitted). Fourth, the agency met its burden to show that it properly redacted or withheld information pursuant to the statutory exemption in 5 U.S.C. § 552(b)(6) relating to personal privacy, and Manivannan failed to overcome the presumption of good faith accorded to the agency's relatively detailed and nonconclusory affidavits. *See Bowers v. United States Dep't of Just.*, 930 F.2d 350, 357 (4th Cir. 1991); *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384 (8th Cir. 1985). Finally, the district court did not abuse its discretion in determining that an *in camera* review was unnecessary to determine whether the agency validly applied the personal privacy exemption. *See Rein v. U.S. Patent and Trademark Off.*, 553 F.3d 353, 377 n.34 (4th Cir. 2009) (stating standard of review).

We conclude, however, that the district court erred in finding that Manivannan did not constructively exhaust his administrative remedies with respect to request Number 946. An agency must

ordinarily notify a requester of its “determination and the reasons therefor” within 20 business days of receiving a FOIA request. 5 U.S.C. § 552(a)(6)(A)(i). “FOIA provides that a requester may be treated as if [h]e exhausted the administrative appeals process where the agency did not provide a timely determination.” *Khine v. United States Dep’t of Homeland Sec.*, 943 F.3d 959, 966 (D.C. Cir. 2019); *see Coleman*, 714 F.3d at 820 (citing 5 U.S.C. § 552(a)(6)(C)(i)). However, the constructive exhaustion provision only applies “so long as the agency has not cured its violation by responding before the requester files suit.” *Coleman*, 714 F.3d at 820; *see also Pollack v. Dep’t of Just.*, 49 F.3d 115, 118-19 (4th Cir. 1995).

NETL issued its initial determination letter for request Number 946 on May 5, 2017. That letter was rendered moot when the request was remanded by the Department of Energy’s Office of Hearings and Appeals on August 7, 2017, for NETL to continue its search for responsive records, which restarted the constructive exhaustion period. *See Coleman*, 714 F.3d at 824 (noting that “[a] request upon remand [from an administrative appeal] is still a request” and “it, too, must be acted upon within twenty working days, pursuant to 5 U.S.C. § 552(a)(6)(A)(i)”). However, after the request was remanded, NETL did not send Manivannan a new determination letter before he filed suit on November 6, 2017.* Since more than 20 working days had elapsed, Manivannan had

* Manivannan specifically pled in his initial complaint that NETL failed to timely respond to request Number 946 and his allegations were effectively against NETL because he sued the agency director in her official capacity. *See Andrews v. Daw*,

constructively exhausted his claim with respect to request Number 946, and he was entitled to seek “judicial enforcement without appealing to the agency head or seeking further explanation from the agency as to why his request had not been timely processed.” *Pollack*, 49 F.3d at 119. While the district court determined that NETL cured its failure to respond by sending a determination letter on April 11, 2018—two weeks before Manivannan filed his amended complaint—the date on which Manivannan filed his initial complaint is the appropriate benchmark for determining if NETL cured its failure to respond to request Number 946. Indeed, we have held that an agency can defeat a requester’s constructive exhaustion only if it responds to the request before the plaintiff “files suit.” *Pollack*, 49 F.3d at 118; *Coleman*, 714 F.3d at 820 (describing important date as the date that “this litigation began”). Allowing agencies to cure their failure to timely respond only after a plaintiff has waited 20 business days and initiated proceedings in federal court would cut against the rationale of the constructive exhaustion rule, since, “[i]n setting a time limit for agencies to respond to initial requests and establishing constructive exhaustion as a means to enforce that limit, Congress expressed a clear intent to ensure that FOIA requests receive prompt attention from the

201 F.3d 521, 525 (4th Cir. 2000) *See Andrews v. Daw*, 201 F.3d 521, 525 (4th Cir. 2000) (noting that “official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent and in essence are suit[s] against the entity”) (internal quotation marks omitted).

applicable agencies.” *Coleman*, 714 F.3d at 824. Accordingly, because request Number 946 was constructively exhausted, the district court should determine on remand whether the agency’s search was adequate and whether any exemptions were applicable.

We also conclude that the district court erred in finding that NETL met its burden to show that it properly redacted or withheld information pursuant to the statutory exemption in 5 U.S.C. § 552(b)(5) relating to legal privileges. We review factual findings as to the applicability of a FOIA exemption for clear error and legal conclusions de novo. *See Wickwire Gavin*, 356 F.3d at 591. We “narrowly construe the FOIA exemptions in favor of disclosure.” *Id.*

Exemption 5 provides that FOIA disclosure rules do not apply to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). This exemption applies to materials that fall under, as relevant here, the attorney-client privilege, the attorney work product doctrine, and the deliberative process privilege. *See Hall & Assocs. v. Env’t Prot. Agency*, 956 F.3d 621, 624 (D.C. Cir. 2020); *Hanson v. U.S. Agency for Int’l Dev.*, 372 F.3d 286, 290–91 (4th Cir. 2004). The exempted records must be inter-agency or intra-agency documents. *See* 5 U.S.C. § 552(b)(5); *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 12 (2001).

We have reviewed the record and conclude that the district court lacked an adequate factual basis to rule on the propriety of NETL's redactions and withholding of documents under this exemption pursuant to request Number 833. Specifically, some of the responsive documents appear to have been sent to employees of Penn State University or attorneys in the district attorney's office that oversaw Manivannan's prosecution in Pennsylvania. As a threshold matter then, the district court should first determine if the records were "interagency or intra-agency" before deciding whether NETL stated a good faith basis for applying the exemption. 5 U.S.C. § 552(b)(5). If a document is neither inter-agency nor intra-agency, then NETL may not withhold it under this exemption, regardless of whether it reflects the deliberative process of the agency, is attorney work product, or is an attorney client communication. See *Klamath*, 532 U.S. at 12. We therefore remand for the district court to apply *Klamath* and determine whether the nature of the relationships between agency employees and any third party recipients of the requested records bar NETL's application of the exemption.

We accordingly affirm the district court's grant of summary judgment in part, vacate in part, and remand for further proceedings consistent with this opinion. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED*

EXHIBITS

11a



EXHIBIT 3 in ECF 69
Department of Energy
Washington, DC 20585

NOV 14 2017

BY ELECTRONIC MAIL AND
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Dr. Ayyakkannu Manivannan Ph.D
505 Blanchita Place Morgantown, WV 26508
ayyakkannu@comcast.net

Re: case Nos. FIA-17-0041
FIA-17-0042
FIA-17-0043
FIA-17-0044

Request Nos. (HQ-2018-00078-F)
(HQ-2017-01759-F)
(HQ-2017-01348-F)
(HQ-2017-01347-F)

Dear Dr. Manivannan:

This letter concerns the above-referenced Freedom of Information Act (FOIA) appeals, which were received by the Office of Hearings and Appeals (OHA) on November 9, 2017. In your appeals, you challenge the National Energy Technology Laboratory's (NETL) processing of your FOIA requests. You state that NETL has not issued determination letters with regard to four FOIA Requests (HQ-2018-00078-F,

HQ-2017-01759-F, HQ0017-01348-F, HQ-201701347-F).

Section 1004.8(a) of the DOE Regulations states that OHA has jurisdiction to consider Freedom of Information Act Appeals in the following circumstances:

When the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request... or when the Freedom of Information Officer has denied a request for waiver of fees.

10 C.F.R. 1004.80.

With regard to these four FOIA Requests, the circumstances for an administrative appeal do not yet exist because, as of the date of your appeals, NETL had not yet denied a request for records in whole or in part, responded that there are no documents responsive to the request, or denied a request for waiver of fees. Accordingly, your appeals, assigned Case Nos. FIA-170041, FIA-17-0042, FIA-17-0043, FIA-I %0044, are hereby dismissed.

(Since the DOE has not issued a final determination for these requests within the statutory time limit, you may be deemed to have exhausted your administrative remedies and may proceed with this matter in federal district court. 5 U.S.C. 552(a)(6)(C)(i). In the alternative, after receiving a final determination from NETL, you may file another

appeal with OHA if you are not satisfied with that determination.

For the above reasons, your appeals, assigned Case Nos. FIA-17-0041, FIA-17-0042, FIA-170043, FIA-17-0044, are hereby dismissed.

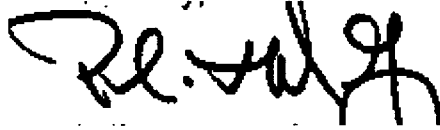
Finally, the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov Telephone: 202-741-5770
Fax: 202-741-5769 Toll-free: 1-877-684-6448

If you have any questions concerning this letter, please contact Katie Quintana, Attorney Advisor, at the Office of Hearings and Appeals, by electronic mail at telephone number (202) 287-6972 or by email at Katie.Quintana@hq.doe.gov.

14a

Sincerely,

A handwritten signature in black ink, appearing to read "Poli A. Marmolejos", written in a cursive style.

Poli A. Marmolejos

Director

Office of Hearings and Appeals

cc (by electronic-mail):

Ann C. Guy

FOIA Officer

National Energy Technology Laboratory

Ann.Guy@NETL.doe.gov

Alexander C. Morris

FOIA Officer

Office of Public Information

Alexander.Morris@hq.doe.gov

15a



EXHIBIT 11 in ECF 17
Department of Energy
Washington, DC 20585

SEP 22 2017

BY ELECTRONIC MAIL AND
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Dr. Ayyakkannu Manivannan Ph.D
505 Blanchita Place Morgantown, WV 26508
ayyakkannu@comcast.net

Re: Case No. FIA-17-0031

Request Nos.

HQ-2017-00833-F/NETL-2017-01017-F

[HQ-2017-00890-F/NETL-2017-01016-F]
[HQ-2017-00946-F/NETL-2017-01081-F]

HQ-2017-01069-F/NETL-2017-01141-F

HQ-2017-01070-F/NETL-2017-01080-F

HQ-2017-01268-F/NETL-2017-01260-F

HQ-2017-01284-F/NETL-2017-01308-F

HQ-2017-01347-F

HQ-2017-01348-F

Dear Dr. Manivannan:

This letter concerns the above-referenced Freedom of Information Act (FOIA) Appeal, which was received by the Office of Hearings and Appeals (OHA) on September 15, 2017. In your Appeal, you challenge

the National Energy Technology Laboratory's (NETL) processing of your FOIA requests. You state that NETL has not issued determination letters with regard to five FOIA Requests (HQ-2017-00833-F/NETL-2017-01017-F, HQ-2017-00890-F/NETL-2017-01016-F, HQ-2017-00946-F/NETL-2017-01081-F, HQ-2017-01070-F/NETL-2017-01080-F, HQ-2017-01347-F, HQ-2017-01348-F) and has not issued revised fee determinations with regard to three FOIA requests (HQ-2017-01069-F/NETL-201701141-F, HQ-2017-01268-F/NETL-2017-01260-F, HQ-2017-01284-F/NETL-2017-01308-F). You also state that NETL responded that there are no responsive records with regard to HQ-2017-00946-F/NETL-2017-01081-F.

Section 1004.8(a) of the DOE Regulations states that OHA has jurisdiction to consider Freedom of Information Act Appeals in the following circumstances:

When the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request.. or when the Freedom of Information Officer has denied a request for waiver of fees.

10 C.F.R. 1004.80.

In the case of FOIA requests HQ-2017-00833-F/NETL-2017-01017-F, HQ-2017-00890-F/NETL-2017-01016-F, HQ-2017-01070-F/NETL-2017-01080-F, HQ-2017-01347-F, HQ2017-01348-F, the

circumstances for an administrative appeal do not yet exist because, as of the date of your Appeal, NETL has not yet denied the requests for records in whole or in part as it has not issued determination letters.

With regard to HQ-2017-00946-F/NETL-2017-01081-F, while NETL issued a determination letter on May 5, 2017, stating there were no responsive records, you have already appealed this determination in FIA-17-0012. In response to the appeal, NETL withdrew its initial determination, stating its intention to issue a revised determination after conducting further inquiry. Accordingly, we dismissed your Appeal. We have spoken with NETL, and at this time, it has not issued a revised determination letter for this request. Thus, as it has not yet denied a request for records in whole or in part, the circumstances for an administrative appeal do not yet exist.

Since the DOE has not issued a final determination for these requests within the statutory time limit, you may be deemed to have exhausted your administrative remedies and may proceed with this matter in federal district court. 5 U.S.C. 552(a)(6)(C)(i). In the alternative, after receiving a final determination from NETL, you may file another appeal with OHA if you are not satisfied with that determination.

As you state in your Appeal, and as NETL confirmed, it has closed FOIA request numbers HQ2017-01069-F/NETL-2017-01141-F, HQ-2017-01268-F/NETL-2017-01260-F, and HQ-2017-01284F/NETL-2017-01308-F. As OHA ordered in FIA-17-0020, a revised fee

determination was to be issued for these requests. Accordingly, on September 21, 2017, NETL informed OHA that it would be reopening these requests and issuing a revised fee determination.

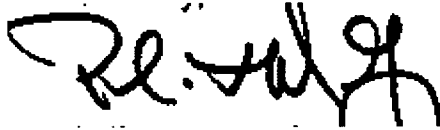
For the above reasons, your appeal, assigned Case No. FIA-17-0031, is hereby dismissed.

Finally, the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov Telephone: 202-741-5770
Fax: 202-741-5769 Toll-free: 1-877-684-6448

If you have any questions concerning this letter, please contact Katie Quintana, Attorney Advisor, at the Office of Hearings and Appeals, by electronic mail at telephone number (202) 287-6972 or by email at Katie.Quintana@hq.doe.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Poli A. Marmolejos". The signature is stylized with a large initial "P" and a long, sweeping underline.

Poli A. Marmolejos
Office of Hearings and Appeals
cc (by electronic-mail):
Ann C. Guy
FOIA Officer
National Energy Technology Laboratory
Ann.Guy@NETL.doe.gov

Alexander C. Morris
FOIA Officer
Office of Public Information
Alexander.Morris@hq.doe.gov

EXHIBIT 11 in ECF 69

Guy, Ann C.

From: Hunzeker, Mark T.
Sent: Tuesday, February 23, 2016 1:57 PM
To: Marisa Williams
Subject: RE: MDI

Got it. Thanks!

Mark

From: Marisa Williams
mailto:mlw@williamsandrhodes.com
Sent: Tuesday, February 23, 2016 1:51 PM
To: Hunzeker, Mark T.
<Mark.Hunzeker@NETL.DOE.GOV>
Subject: Re: MDI

Here are the leave records and the email I could find
Marisa

On 2/23/2016 6:26 AM, Hunzeker, Mark T. wrote:

Hi, Marisa,

I don't know if this will surprise you, or not, but I'm
[working ^{(b)(6)} [redacted] (b)(6)]. I haven't gotten any
supervisor onboard yet to propose anything against
him — this is my own initiative, so it might not go
anywhere. We'll see. To that end.

Can you tell me without doing any research, where in
the investigation might find his ATAAPS records?

[
[redacted]
[(b)(5) (WP) (DP)] [redacted]
]

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I just thought if you had a basic idea it would prevent me from having to go through the whole thing until I found it.

Also, do you have any evidence (emails, etc.) about [you sending ^{any} [REDACTED] [(b)(6)] the transcript and] requesting his review and signature? I REALLY don't think we should let him get away with stonewalling you and thing we should send a message about that. Of course, maybe once we serve him a proposed action he might start remembering things in return for no discipline...

Anyway, I appreciate your thoughts on this. Thanks!

Mark

From: Marisa Williams
mailto:mlw@williamsandrhodes.com

Sent: Friday, February 19, 2016 6:41 PM To:
Hunzeker, Mark<Mark.Hunzeker@NETL.DOE.GOV>

Subject: Re: MDI

Hi Mark,

FYI, in January the new DA filed another case against Manivannan, charging him with five felony (level

EXHIBIT 17 in ECF 69**Guy, Ann C.**

From:	Hunzeker, Mark T.
Sent:	Thursday, October 13, 2016 6:41 AM
To:	'Megan McGoron'
Subject:	RE: Mani

Thanks, Megan. All is well!

interesting. I googled the firm. They have a litigation department and an appellate litigation department focused on IP issues, it seems. They don't have anything advertising criminal defense. They're a pretty big outfit and, I'm sure/ not cheap. I can't imagine what the appellate issues might be for him (aside from sufficiency of evidence) because it appeared to me that the judge ruled in their favor about 98% of the time and when he ruled for the Commonwealth, it wasn't on any issue that would be likely to impact the result of the trial. Setting aside a jury verdict on anything less than pretty substantial grounds ought to be an unusual result for any court (although, I recognize a lot more goes into it than simply the law, sometimes).

Anyway, in the worst case scenario (for me), the verdict is overturned but we don't have to take him back because he voluntarily resigned and he has a lot less money in his bank account!

Thanks for the information and all of your hard work on the case and I'm sorry one of our people (former people) caused such a mess.

Hope all is well for you, too.

Mark

From: Megan McGoron
[mailto:mmcgoron@centreda.org]
Sent: Wednesday, October 12, 2016 4:06 PM
To: Hunzeker, Mark T. Subject: RE: Mani

Hi Mark-

Mani did end up filing an appeal and I filed a cross appeal. He hired a firm out of Philadelphia to represent him on the appeal, I'm guessing it's his employment attorney's firm-Buchannon, Ingersol? I filed my cross appeal based on his sentence. I believe the date he filed the appeal was October 7th.

Let me know if you need anything!

Hope all is well.

No.

In the Supreme Court of the United States

AYYAKKANNU MANIVANNAN,

Petitioner,

v.

DEPARTMENT OF ENERGY,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Fourth Circuit**

SUPPLEMENTAL APPENDICES C, D

DR. AYYAKKANNU MANIVANNAN

Pro Se

505 Blanchita Place,

Morgantown, WV 26508

(304) 685-8185

ayyakkannu@comcast.net

April 11, 2022

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST
VIRGINIA CLARKSBURG

AYYAKKANNU MANIVANNAN,
Plaintiff,

Civ. Action No. 1:17-cv-192
(Judge Kleeh)

DEPARTMENT OF ENERGY
(National Energy Technology
Laboratory) ,

Defendants.

REPORT AND RECOMMENDATION
RECOMMENDING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT BE GRANTED

This matter before the undersigned is pursuant to the *pro se* Plaintiff, Ayyakkannu Manivannan's "Note and Clarification" (ECF No. 60), which has been construed as a Motion to Compel, and Defendant, Department of Energy (DOE), National Energy Technology Laboratory (NETL's) Motion for Summary Judgment (ECF No. 61). Honorable Senior District Court Judge Irene M. Keeley entered an order, referring any motions filed in this case to the undersigned for written orders or report and recommendations. (ECF No. 5).

This case was reassigned to Honorable District Judge Thomas S. Kleeh on December 1, 2018. (ECF No. 78). A motion hearing was held before the undersigned on October 30, 2018. This matter is now ripe for a report and recommendation to the District Judge. For the reasons set forth herein, the undersigned **RECOMMENDS** the Defendant's Motion for Summary Judgment (ECF No. 61) be **GRANTED**, Plaintiff's "Note and Clarification", construed as a Motion to Compel (ECF No. 60), be **DENIED AS MOOT** and Plaintiff's Amended Complaint (ECF No. 50) be **DISMISSED WITH PREJUDICE**.

I. Background and Procedural History

Plaintiff, Dr. Ayyakkannu Manivannan, is a former employee of the Defendant, United States Department of Energy (DOE) at the National Energy Technology Laboratory (NETL) in Morgantown, West Virginia. Plaintiff was placed on administrative leave on August 12, 2015, during an internal investigation into allegations against him and was forbidden from

accessing NETL property or spaces. (ECF No. 12 at 4). This internal investigation revolved around allegations of an improper relationship with an intern, harassment, and unlawful use of computer that ultimately led to a criminal case against Plaintiff in Pennsylvania state court.¹ Upon the onset of administrative leave, Plaintiff's office was secured under lock and key, and controlled by the NETL security personnel. (ECF No. 12 at 4). No one was permitted access to the area without consultation with the NETL Office of Chief Counsel. Id. Plaintiff tendered his resignation on June 16, 2016, which became effective on June 17, 2016. Id. at 3.

On November 6, 2017, Plaintiff filed a civil action in this Court against Defendants, Grace Bochenek, Susan Malie and Isabel Coterio, citing 5 USC § 552(a)(6)(C)(i) and alleging violations of 18 U.S.C. §§ 21, 1701 and 1702. (ECF No. 1). The undersigned issued a Report and Recommendation on February 21, 2018, recommending that the action be dismissed against all three defendants. (ECF No. 30). However, the undersigned further recommended that the Defendants' request to dismiss Plaintiff's FOIA claims be denied, the Department of Energy, National Energy Laboratory be substituted as Defendant and directed the NETL to respond to Plaintiff's FOIA requests. Id.

¹ The undersigned notes that many of Plaintiff's FOIA Requests involve documents relating to the internal investigation of Plaintiff conducted by Defendant NETL as well as NETL's communications with Centre County Prosecuting Attorney's Office and Penn State University, which were in furtherance of Plaintiff's criminal case.

The undersigned's Report and Recommendation referred to nine FOIA requests made by the Plaintiff: HQ-2017-0833-F/NETL-201701017-F, (Request 833); HQ-2017-00890F/NETL-2017-01016-F (Request 890); HQ-2017-01070-F/NETL-2017-01080-F (Request 1070); HQ-2017-00946-F/NETL-2017-01081-F (Request 946); HQ-2017-01347 (Request 1347); and HQ-2017-01348-F, (Request 1348). The undersigned further recommended that the plaintiff be deemed to have exhausted FOIA requests HQ-2017-0169-F/NETL-201701141-F (Request 1069); HQ-2017-01268-F/NETL-2017-01260-F Request 1268); and HQ2017-01284-F/NETL-2017-01308-F (Request 1284), because there was no evidence that a revised fee letter was sent. Id. Honorable District Judge Irene M. Keeley adopted the undersigned's report and recommendation by order (ECF No. 52) on May 21, 2018, and substituted Department of Energy, National Energy Technology Laboratory as Defendant, thereby allowing Plaintiff to pursue his complaints regarding FOIA requests.

Following a status conference, by order on April 13, 2018, the undersigned directed the Plaintiff to file an Amended Complaint, including the FOIA requests for which he had exhausted his administrative remedies on or before April 26, 2018. (ECF No. 48). The Plaintiff filed his Amended Complaint on April 25, 2018 (ECF No. 50) and included every FOIA request he had made to Defendant, Department of Energy (DOE), National Energy Technology Laboratory (NETL). However, the Plaintiff did not reference whether administrative remedies had been exhausted for each of the FOIA

requests contained in his Amended Complaint and included repetitive requests as well as requests for which required fees had not been paid as required. The Defendant, DOE (NETL) filed an Answer to Plaintiff's Amended Complaint on May 10, 2018 (ECF No. 51) prior to the District Court's Order Adopting Report and Recommendation that substituted DOE (NETL) as Defendant and allowed Plaintiff to pursue his complaints regarding FOIA requests.

Thereafter, Plaintiff filed a "Note and Clarification" on August 28, 2018 (ECF No. 60), which has been construed as a Motion to Compel, requesting the Court to compel the Defendant to respond to his FOIA requests. The Defendant filed a Motion for Summary Judgment and an accompanying Memorandum in Support with several attached exhibits on September 6, 2018 (ECF Nos. 61 and 62). The undersigned issued a Roseboro Notice to the *pro se* Plaintiff on September 7, 2018 informing him of his right to respond to the Motion for Summary Judgment (ECF No. 63). Plaintiff filed his Response to the Motion along with several exhibits on September 28, 2018 (ECF No. 69). The Defendant filed a Reply to Plaintiff's Response on October 11, 2018. (ECF No. 70). A motion hearing was held before he undersigned on October 30, 2018, at which the parties appeared in person and presented arguments regarding the pending motions.

II. Contentions of the Parties

A. Plaintiff's Amended Complaint

Plaintiff's Amended Complaint raises concerns regarding the responsive efforts of Defendant DOE

(NETL) to Plaintiff's numerous requests pursuant to the Freedom of Information Act (FOIA). In his Amended Complaint, Plaintiff states that his "major goal is to obtain the documented truth through the opportunity" of his "FOIA request." (ECF No. 50 at 1). Plaintiff states that he "is concerned that the purpose of delay by DOE is to cause his statute of limitations to protest injustice to expire." Id. Plaintiff claims that he had "exhausted administrative remedies long ago and most certainly as of April 26, 2018." Id.

Regarding Plaintiff's FOIA "Request 1070", Plaintiff stated in his Amended Complaint that he objected to the "Agency's use of Exemptions 5 & 6 to withhold requested information." (ECF No. 50 at 2). Specifically, Plaintiff objected to the Agency "claiming pre-decisional and deliberative actions to justify withholding records" and to the Agency's claim "of destroying records." Id. The Plaintiff further stated he objected to the Agency's "withholding of information that has been shared, circulated, and discussed with non-Federal entities" and to the Agency's right "to withhold internal information that has been used in a post-decisional sense." Id. The Plaintiff stated he "objects to Agency's claim of lawyer and client privilege for withholding information" as well as the "Agency withholding post-decisional records that, include but are not limited to a) conclusions of an internal investigation, b) facts of the personal action "Notice of Proposed Removal (NPR)," c) evidence justifying the NPR that otherwise suggests false fabrication, d) documents justifying negative comments on employee personal action SF-50 form, e) documents verifying the

report. to Congressional persons that my personal property was returned.” Id.

Plaintiff further stated that he objected to the Agency’s “claim that withheld/redacted information was pre-decisional” and to the “Agency’s claim that the records requested contain information of a ‘candid,’ and/or ‘deliberative’ nature.” Id. at 3. Plaintiff claims that the Agency is “misusing ‘privilege’ as a basis to hide its ‘unprofessional behavior.’” Id. Plaintiff states he “objects to Agency’s claim of confidentiality” and the claim that “there is a privacy interest in the information withheld.” Id. Plaintiff claims the Agency has “failed to prove that any guiltless person(s) would be harmed from release of the information requested.” Id.

Plaintiff’s Amended Complaint then went on to provide a “Status of the FOIAs” claiming that the Agency’s response to the FOIA requests had been “inadequate” and that “evidentiary records are being hidden or have been destroyed.” Id. Plaintiff then provided a summary of the extensive and voluminous amount of information he has requested pursuant to all of the FOIA requests he has submitted to the Defendant. Due to the voluminous nature of the information the Plaintiff has requested, the contents of these requests will not be summarized herein. (See Pl’s Amended Compl, ECF No. 1, at 3-20). In summary, regarding all of Plaintiff’s FOIA requests, Plaintiff indicated he was concerned and objected to the information being redacted or withheld pursuant to exemptions five and six provided under 5 United States Code § 552(b)(5)-(6) allowing for withholdings

due to attorney-client privilege, attorney work product, and governmental deliberative process privilege. Plaintiff further raised concerns that information requested was being improperly destroyed or hidden from Plaintiff. *See Id.*

B. Defendant's Motion for Summary Judgment

The Defendant states that the "nine FOIA requests" the undersigned referenced in his report and recommendation (ECF No. 30) are the "subject of this lawsuit." (Def's Memo in Supp., ECF No. 62, at 4). The Defendant states that a letter dated "June 26, 2017" sent to Plaintiff by Defendant NETL "advised the plaintiff that in view of the voluminous amount of information 'on the same or closely related subject' as well as the similarity and repetitive nature of the requests for the same information, NETL decided to aggregate requests 833, 890, 946, 1069, 1070, 1268 and 1284." *Id.*

The letter provided to Plaintiff by Defendant "further estimated the cost to search for responsive records would be over \$7,000.00 thus requiring prepayment before a search could begin." *Id.* (citing the Declaration of Ann C. Guy, attached as Government Exhibit 1 (ECF No. 62-1, at 10 ¶ 28) (*Guy Decl.*), Ex. 5 (ECF No. 62-6)). The Plaintiff "appealed that determination on July 5, 2017." *Id.* (citing *Guy Decl.*, Ex. 6 (ECF No. 62-7)). The Defendant states that by a "**Decision and Order** issued by the United States Department of Energy Office of Hearings and Appeals, (OHA), dated August 7, 2017 plaintiff could not be assessed fees for 4 of the 7 requests which included requests 833, 890, 946 and

1070.” Id. (citing *Guy Decl.*, ECF No. 62-1, at 10-11, ¶ 30).

As a result, the Defendant states that “NETL issued a new fee determination on September 22, 2017, pursuant to OHA’s Order denying the fee waiver as to requests 1069, 1268 and 1284.” (Def’s Memo in Supp., ECF No. 62, at 4). This letter required plaintiff to make a prepayment of an estimated “\$5,000.00 in search fees . . . prior to the initiation of the search.” Id. at 5. Due to nonpayment, the Defendant contends that these requests “were closed by NETL without taking any action as a result of plaintiff’s failure to pay the assessed fees. Likewise, no fees were paid for the newer search requests 1347 and 1348, resulting in their closure.” Id. (citing *Guy Decl.*, at 11, ¶ 31, Ex. 8 and 66 (ECF No. 62-9 and 62-67)). Therefore, the Defendant addresses the search and action taken by Defendant DOE (NETL) regarding the four remaining FOIA requests (Request 833, 890, 946, and 1070) “for which OHA ruled that no fees could be assessed” in its Memorandum in Support of Motion for Summary Judgment. (ECF No. 62 at 5-9).

1. Plaintiff’s FOIA Request 833

Regarding Plaintiff’s FOIA Request 833, Defendant contends that “NETL responded in a detailed determination letter on October 6, 2017, releasing 42 pages with 1 redaction supported by Exemption 5.” Id. at 5. Thereafter, Plaintiff appealed that determination letter filed on October 12, 2017, and “OHA issued a **Decision and Order** on November 2, 2017, finding that NETL performed an adequate search for all but 2 items of the 19 item request.” Id. (citing *Guy Decl.*, at

12, ¶ 34, Ex. 12 (ECF No. 62-13)). The Defendant states that the “new determination letter dated November 22, 2017, produced 66 pages along with email communications, the resignation letter and the SF50s, with some information redacted pursuant to Exemption 5.” (Def’s Memo in Supp., ECF No. 62, at 5). Defendant states that Plaintiff then “appealed to OHA on November 29, 2017, which resulted in a **Decision and Order** dated January 11, 2018, wherein the OHA addressed both requests 833 and 890, partially granting plaintiff’s appeals.” *Id.* (citing *Guy Decl.*, at 12, ¶ 35 - 36, Ex. 15 (ECF No. 62-16)).

Defendant states that NETL then “sent a redetermination letter addressing the OHA concerns on January 25, 2018, releasing emails and further information required by the January 11 Order.” *Id.* (citing *Guy Decl.*, Ex. 17 (ECF No. 62-1)). Plaintiff appealed this redetermination letter on January 29, 2018. (Def’s Memo in Supp., ECF No. 62, at 5) (*Guy Decl.*, ECF No. 62-1, at 13, ¶ 38). Defendant states that NETL issued a new redetermination letter on February 7, 2018, “releasing 90 pages of documents with 9 redactions pursuant to Exemption 5.” (Def’s Memo in Supp., ECF No. 62, at 5) (citing *Guy Decl.*, at 13, ¶ 39, Ex. 19 (ECF No. 62-20)).

The Defendant states that Plaintiff again appealed on February 8, 2018, “complaining of improper redactions” and following this appeal the “OHA issued a **Decision and Order** dated February 12, 2018, denying plaintiff’s appeal on the basis that NETL was in full compliance with their Order dated January 11, 2018.” (Def’s Memo in Supp., ECF No. 62, at 5-6). As a result, the Defendant contends that Plaintiff’s FOIA

Request 833 was closed and because “plaintiff’s appeal was denied, his administrative remedies were exhausted, and he was permitted to seek judicial review.”

2. Plaintiff’s FOIA Request 890

The Defendant asserts through the declaration of Ann C. Guy (*Guy Decl.*) that a detailed search was undertaken regarding this request and as a “result of the search, 7 documents were released to the plaintiff and 24 documents were withheld pursuant to Exemption 5 of the FOIA as explained in the determination letter dated May 19, 2017.” (Def’s Memo in Supp., ECF No. 62, at 6) (citing *Guy Decl.*, at 14-15, ¶ 42, Ex. 25 – 26 (ECF No. 6226, 27)). Plaintiff filed an appeal “dated June 6, 2017” and “insisted that NETL failed to release video/audio tape records which were used during the investigation.” (Def’s Memo in Supp., ECF No. 62, at 6). The Defendant states that the “audio/video tapes referred to were destroyed during the normal course of business as is fully explained in *Guy Decl.* para. 64, Ex. 57.” *Id.*

The Defendant states that the “OHA remanded the request to NETL on June 16, 2017, which resulted in the release of the plaintiff’s personnel file.” *Id.* The NETL then “issued a new determination letter on August 7, 2017 including the previously redacted information.” *Id.* (citing *Guy Decl.*, at ¶ 42, Ex. 25 – 26 (ECF No. 62-26, 27)). The Defendant claims that the “Plaintiff was dissatisfied with the new determination letter dated November 3, 2017 and appealed to OHA on November 29, 2017.” *Id.* (citing *Guy Decl.*, at ¶ 33, 34, Ex. 27 – 28 (ECF No. 62-28, 29)). OHA then “issued a **Decision and Order** dated January 11, 2018, which

addressed request 833 as well as request 890.” (Def’s Memo in Supp., ECF No. 62, at 6). In its Decision, the “OHA held that NETL’s search was not adequate and that several redactions pursuant to Exemption 5 were not proper.” Id.

As a result of the OHA’s findings, NETL sent a second redetermination letter to the Plaintiff “on January 25, 2018 releasing the previously redacted communications pursuant to OHA’s **Decision and Order.**” Id. (citing *Guy Decl.* at ¶ 45, Ex. 29 – 30 (ECF No. 62-30, 31)). The Plaintiff appealed the secondredetermination letter to the OHA on January 29, 2018 and the appeal was “dismissed after NETL agreed to withdraw the determination letter and reissue another.” (Def’s Memo in Supp., ECF No. 62, at 6). Following their withdraw of the second redetermination letter, the NETL then issued a third redetermination letter on January 30, 2018, “releasing additional portions of emails that had previously been redacted.” Id. at 6-7 (citing *Guy Decl.*, ¶ 46, Ex. 31 – 33 (ECF No. 62-32, 33, 34)).

Plaintiff appealed again on January 31, 2018, but his appeal “was dismissed by OHA because NETL had withdrawn its last redetermination agreeing to conduct an additional review of the responsive documents.” (Def’s Memo in Supp., ECF No. 62, at 7). The Defendant states that NETL then issued a “fourth determination letter dated February 27, 2018” in which NETL “redacted and/or segregated 157 pages of documents in compliance with OHA’s **Decision and Order** dated January 11, 2018.” Id. (citing *Guy Decl.*, ¶ 47, Ex. 35 – 36 (ECF No. 62-36, 37)). Plaintiff filed yet another appeal on March 1, causing NETL to issue

yet another determination letter “dated March 8, 2018.” *Id.* (citing *Guy Decl.*, Ex. 38 (ECF No. 62-39)). In this determination letter, the Defendant states NETL complied with OHA’s **Decision and Order** of January 11, 2018, and “further redacted and segregated information pursuant to Exemption 5.” (Def’s Memo in Supp., ECF No. 62, at 7). The Defendant argues that because “plaintiff never appealed the March 8, 2018 redetermination letter to OHA”, he failed to exhaust his administrative remedies. *Id.*

3. Plaintiff’s FOIA Request 946

The Defendant asserts that “Plaintiff’s request 946 required searching 14 categories of records pertaining to his personal belongings as well as emails regarding work he had done while employed by NETL.” *Id.* NETL issued an initial response to Plaintiff’s request on May 5, 2017, stating no records existed “because plaintiff’s request was for information rather than records or actual documents.” *Id.* (citing *Guy Decl.*, ¶ 50, Ex. 41 (ECF No. 62-42)). Defendant states that, subsequently, all “searches were put on hold after the requests were aggregated and a fee letter was issued” and, no search was undertaken until “OHA ruled that NETL was not permitted to charge a fee for request 946 on August 7, 2017.” (Def’s Memo in Supp., ECF No. 62, at 7).

The Defendant states that NETL then conducted “an exhaustive search” and that this search is “reflected in *Guy Decl.* para. 51 and 66.” *Id.* The Defendant states that NETL issued a redetermination letter on April 11, 2018, including “approximately 689 pages with no redactions.” *Id.* (citing Def. Ex. 44 (ECF No. 62-45)). The Defendant argues that because the Plaintiff did not appeal this redetermination letter to the OHA, he

has failed to exhaust his administrative remedies with respect to Request 946. (Def's Memo in Supp., ECF No. 62, at 7).

4. Plaintiff's FOIA Request 1070

Defendant states that Plaintiff's FOIA Request 1070 was "repetitive" because "it was one of the requests aggregated." *Id.* at 8. However, after the OHA decision of August 7, 2017, holding fees could not be assessed, "the processing of the request resumed." *Id.* The Defendant states that NETL produced "approximately 227 pages of information. . . on October 24, 2017, subject to redactions under Exemption 5." *Id.* (citing *Guy Decl.*, ¶ 53, Ex. 46 (ECF No. 62-47)). The Plaintiff then appealed NETL's production on October 29 "on the ground that Exemption 5 did not apply to him and again asking for the video/audio tape." (Def's Memo in Supp., ECF No. 62, at 8). The Defendant states that the OHA issued a **Decision and Order** on November 29, 2017 and "granted plaintiff's appeal in part, however, noted that NETL did an adequate search for most of the items listed in plaintiff's request." *Id.*

Defendant states that the OHA "required NETL to do an additional search using more search terms on 2 particular items included in the request." *Id.* (citing *Guy Decl.*, ¶ 54, Ex. 48 (ECF No. 62-49)). Defendant states that NETL, pursuant to OHA's Order, then issued a new redetermination letter to Plaintiff on "January 4, 2018, producing 46 pages with no redactions and 91 pages with some redactions made pursuant to Exemption 5." *Id.* (citing *Guy Decl.*, ¶ 55, Ex. 49 (ECF No. 62-50)). The Defendant states that the Plaintiff then appealed this determination letter to "OHA on January 16, 2018, on the ground that the

search was not complete, causing NETL to re-examine and issue a new determination letter on February 27, 2018, complying with the OHA Order by correctly listing and marking the exemptions used.” *Id.* (citing *Guy Decl.*, ¶ 55, Ex. 51 (ECF No. 62-52)).

The Defendant states that Plaintiff again filed an appeal “on the ground of an inadequate search, resulting in OHA’s **Decision and Order** dated March 29, 2018” which ultimately concluded that the Defendant NETL had conducted an adequate search for the records requested and further had properly redacted information under the stated Exemptions, Exemptions 5 and 6 and thereby denied Plaintiff’s appeal. *Id.* at 8-9 (citing *Guy Decl.*, ¶ 56, Ex. 53 (ECF No. 62-54)). As a result, the Defendant contends that Plaintiff has properly exhausted his remedies with regard to FOIA Request 1070 and may seek judicial review.

III. Defendant’s Arguments

With this background in mind, the Defendant makes several arguments regarding Plaintiff’s FOIA requests. First, Defendant argues that the agency has conducted an adequate search as required under the law for all responsive records encompassed within Plaintiff’s numerous FOIA requests. (Def’s Memo in Supp., ECF No. 62, at 10). Defendant states that the adequacy of its search for responsive records is clearly supported by the submitted affidavits and “non-conclusory declarations of Anne C. Guy, Paralegal Specialist and NETL’s Freedom of Information Act Officer, Mark T. Hunzeker, Attorney-Advisor for the NETL, and Alexander C. Morris, Freedom of

Information Act Officer in the Office of Information Resources for DOE headquarters.” Id. at 11.

The Defendant contends that it not only conducted detailed searches and made all good faith efforts to locate and provide responsive records to Plaintiff’s FOIA Requests, but also further complied with all **Decision and Orders** of the United States Department of Energy Office of Hearings and Appeals (OHA) each time Plaintiff appealed the determination letters issued to him by the Defendant. The Defendant contends that it conducted further responsive searches and released additional documents as directed by the OHA and that this is supported by the OHA’s Decisions finding the Defendants’ searches to be adequate as well as the affidavits and declarations submitted by the Defendant detailing the searches performed and documents released. Id. at 10-15. As such, the Defendant argues that it conducted adequate searches for Plaintiff’s FOIA Requests 833, 1070, and one part of Request 1284 that was directed to the Department of Energy (DOE) as opposed to NETL. Id. at 12-15.

The Defendant further argues that NETL properly applied and asserted exemptions to redact information pursuant to 5 U.S.C. §552(b)(5) – (b)(6). Id. at 15. The Defendant asserts that it applied FOIA Exemption 5 for attorney work product, attorney – client privilege, and the governmental deliberative process privilege. Id. The Defendant similarly argues that NETL properly applied and asserted exemptions to redact information pursuant to FOIA Exemption 6 for sensitive information that relate to individuals’ personal privacy. Id. at 17-18.

Finally, Defendant argues that Plaintiff failed to exhaust administrative remedies regarding Requests 946 and 890 because of Plaintiff's failure to appeal the redetermination letters to the OHA after being issued to the Plaintiff by the Defendant NETL Id. at 18-23. Defendant further argues that "constructive exhaustion does not apply". Id. at 24. Defendant quotes from the undersigned's Report and Recommendation issued on February 21, 2018 (ECF No. 30, at 15) which stated the law regarding when an individual's administrative remedies are deemed to be exhausted for purposes of a FOIA Request. The undersigned noted that, pursuant to Coleman v. Drug Enforcement Administration, 714 F.3d 816, 824 (4th Cir. 2013) and Pollack v. Department of Justice, 49 F.3d 115, 119 (4th Cir. 1995), "a person making a request to an agency for records, 'shall be deemed to have exhausted his administrative remedies' with respect to such request, as long as the agency has not cured its violation by responding before the person making the request files suit." (ECF No. 30, at 15).

The Defendant argues that the Plaintiff's suit began either with the filing of his Amended Complaint on April 25, 2018, or with the entry of the Order Adopting the Report and Recommendation that substituted NETL as Defendant on May 21, 2018. (Def's Memo in Supp., ECF No. 62, at 24). The Defendant argues that NETL had responded and "the administrative process was well underway before this suit was filed." Id. Therefore, the Defendant argues that constructive exhaustion does not apply, and Plaintiff has failed to exhaust his administrative remedies.

IV. Plaintiff's Response

Plaintiff filed his Response in Opposition to Defendant's Motion for Summary Judgment on September 28, 2018. (ECF No. 69). Plaintiff argues that he has exhausted his administrative remedies with the agency Defendant because the "Agency failed to produce requested records within the required 20 days." (Pl's Resp., ECF No. 69, at 1).

Plaintiff further disputes the Defendant's contention that audio and video tapes requested by the Plaintiff were destroyed in the normal course of business. Plaintiff claims this is not the normal course of business and must be explained. Id. at 3.

Plaintiff contends that redacted information provided to him was not proper under FOIA Exemption 5 as asserted by the Defendant. Id. Plaintiff further argues that Defendant's reasons for why information was redacted or withheld under Exemption 5 has not been adequate or proper. Id. at 3-10. Plaintiff also argues that the Defendant's use of Exemption 6 to redact and withhold information responsive to his FOIA Requests is similarly insufficient and the government has not met its burden to justify the withholding. Id. at 11, 13-14. Plaintiff states that he has not received any response from DOE, NETL to FOIA Requests 1347, 1348, 1759, or 78 Id. at 23. The Plaintiff requests the Court to deny Defendant DOE, NETL's Motion for Summary Judgment and to grant the Plaintiff summary judgment and order the DOE to respond and produce all redacted and withheld records requested under all of Plaintiff's FOIA Requests. Id. Plaintiff further requests the Court conduct an *in*

camera review of the redacted or withheld documents to determine if such withholdings by the Defendant were proper.

V. Defendant's Reply

Defendant filed a Reply on October 11, 2018. (ECF No. 70). The Defendant states that Plaintiff's failure to pay fees stopped and closed any response to FOIA Requests 1069, 1268, 1284, 1347, 1348, 78, and 1759. (Def's Reply, ECF No. 70, at 1). Defendant states that "Plaintiff's request for a fee waiver was denied" on August 7, 2017 and Defendant NETL "issued a revised fee determination on September 22, 2017 requiring \$5,000.00 in search fees be paid prior to initiation of the search." Id. at 1-2 (citing *Guy Decl.* at ¶ 30 -31, Ex. 7 – 8 and 66, (ECF No. 62-8, 9, 67)). Defendant states that because Plaintiff "failed to respond or pay any of the assessed fees, no further search was undertaken by NETL." Id.

In their Reply, Defendant further reiterates the arguments from their Memorandum in Support of Motion for Summary Judgment, stating Plaintiff failed to exhaust administrative remedies as to Requests 890 and 946 for failure to appeal Defendant NETL's redetermination letters. (Def's Reply, ECF No. 70, at 2-5). Defendant further states that an adequate search was performed, and exemptions were properly asserted regarding Requests 833 and 1070 as set forth by the Declaration of Ann C. Guy. Id. at 5-7. Defendant further argues that Plaintiff's Opposition contains complaints that are not cognizable under FOIA. Id. at 7-10.

VI. Legal Standard

Summary judgment is appropriate where the “depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials” show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed R. Civ. P. 56(a), (c)(1)(A). When ruling on a motion for summary judgment, the Court reviews all the evidence “in the light most favorable” to the nonmoving party. Providence Square Assocs., L.L.C. v. G.D.F., Inc., 211 F.3d 846, 850 (4th Cir. 2000). The Court must avoid weighing the evidence or determining the truth and limit its inquiry solely to a determination of whether genuine issues of triable fact exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

On a motion for summary judgment, “the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act’s inspection requirements.” Goland v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C.Cir. 1978); Students Against Genocide v. Department of State, 257 F.3d 828, 833 (D.C.Cir. 2001) (quoting Goland). “A defendant agency has the burden of establishing the adequacy of its search and that any identifiable document has either been produced or is subject to withholding under an exemption.” Havemann v. Colvin, 629 Fed.Appx. 537, 539 (4th Cir. 2015).

The agency may meet its burden through the production of affidavits describing the manner in

which it undertook the requested information search. See id. In order to invoke an exception, however, the agency's affidavits "must be relatively detailed and nonconclusory." Id. (citing Simmons v. United States Dept. of Justice, 796 F.2d 709, 711–12 (4th Cir. 1986)). The court may presume "the credibility of such affidavits, so long as it has no reason to question the good faith of the agency." Id. (citing Bowers v. United States Dept. of Justice, 930 F.2d 350, 357 (4th Cir. 1991)). To overcome the presumption, "a requestor must demonstrate a material issue by producing evidence, through affidavits or other appropriate means, contradicting the adequacy of the search or suggesting bad faith." Id. (citing Miller v. United States Dept. of State, 779 F.2d 1378, 1384 (8th Cir. 1985)).

Under the Freedom of Information Act ("FOIA"), federal agencies "shall make [agency] records promptly available to any person," so long as the person's request "(i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed" 5 U.S.C. § 552(a)(3)(A). Courts have long held that "FOIA reflects a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." Id. (quoting Dept. of Defense v. FLRA, 510 U.S. 487, 494 (1994)). Notably, the FOIA does not require an agency to create or retain any document; rather, it only "obligates them to provide access to those which it in fact has created and retained." Turner v. U.S., 736 F.3d 274, 283 (4th

Cir. 2013) (quoting Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980)).

There are, however, certain enumerated exemptions from the FOIA's mandate to disclose. See 5 U.S.C. § 552(b)(1)-(9); New Hampshire Right to Life v. Dep't of Health and Human Svcs., 13 S. Ct. 383 (2015). The Court must decide as a matter of law whether a document falls within one of the exemptions. Wickwire Gavin, P.C. v. U.S. Postal Service, 356 F.3d 588, 591 (4th Cir. 2004). In addition, courts must construe the FOIA's exemptions narrowly and place the burden on the agency to show that its exemptions are proper. Id. (citing 5 U.S.C. § 552(a)(4)(B); J.P. Stevens Co. v. Perry, 710 F.2d 136, 139 (4th Cir. 1983)).

VII. Analysis

A. The undersigned finds Plaintiff's failure to pay assessed fees closed Plaintiff's FOIA Requests 1069, 1268, 1284, 1347, 1348, 78 and 1759.

FOIA "commands that a federal agency 'promptly' make records available upon a request which 'reasonably describes such records and . . . is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.'" Pollack v. Department of Justice, 49 F.3d 115, 118 (4th Cir. 1995) (quoting 5 U.S.C. § 552(a)(6)(A) & (B)). Further, FOIA "requires the requester to follow each agency's rules for requesting, reviewing and paying for documents. See 5 U.S.C. § 552(a)(3)(B). Each agency is authorized "to charge a 'reasonable' amount for the direct costs of document search, duplication, and

review.” Pollack, 49 F.3d, at 119 (citing 5 U.S.C. § 552(a)(4)(A)).

Furthermore, these “fees may be estimated by the agency and demanded in advance, but only if the agency determines that the fees will exceed \$250 or if the requester has previously failed to pay fees in a timely fashion.” Id. (citing 5 U.S.C. § 552(a)(4)(A)(v)). Finally, “the agency *may refuse to continue processing the pending request* and refuse to accept any new request from that requester, until the requester makes advance payment of any fees owed plus interest.” Id. at 120 (quoting 28 C.F.R. § 16.10(g)(2)).

Here, “Plaintiff’s request for a fee waiver was denied” on August 7, 2017 and Defendant NETL “issued a revised fee determination on September 22, 2017 requiring \$5,000.00 in search fees be paid prior to initiation of the search.” (Def’s Reply, ECF No. 70, at 1-2) (citing *Guy Decl.* at ¶ 30 – 31, Ex. 7 – 8 and 66, (ECF No. 62-8, 9, 67)). There has been no evidence submitted that would indicate Plaintiff ever paid the required search fees and therefore, the undersigned finds that Plaintiff’s failure to pay the assessed fees allowed for the Defendant, NETL, to properly refuse to continue processing Plaintiff’s FOIA Requests 1069, 1268, 1284, 1347, 1348, 78 and 1759.

B. The undersigned finds Plaintiff has failed to exhaust his administrative remedies with respect to Requests 890 and 946 and constructive exhaustion is not applicable.

While Defendant NETL and the OHA denied Plaintiff’s request for a fee waiver with respect to several of his FOIA Requests, it was determined by a

“Decision and Order issued by the United States Department of Energy Office of Hearings and Appeals, (OHA), dated August 7, 2017 plaintiff could not be assessed fees for 4 of the 7 requests which included requests 833, 890, 946 and 1070.” (*Guy Decl.*, ECF No. 62-1, at 10-11, ¶ 30).

An agency’s “failure to respond to the initial request within the initial 10-day period (plus any 10-day extension) may constitute ‘constructive exhaustion.’” Pollack v. Department of Justice, 49 F.3d 115, 118 (4th Cir. 1995) (quoting 5 U.S.C. § 552(a)(6)(C); Oglesby v. United States Dept. of Army, 920 F.2d 57, at 62 (D.C. Cir. 1990)). However, pursuant to Coleman v. Drug Enforcement Administration, 714 F.3d 816, 824 (4th Cir. 2013) and Pollack v. Department of Justice, 49 F.3d 115, 119 (4th Cir. 1995), “a person making a request to an agency for records, ‘shall be deemed to have exhausted his administrative remedies’ with respect to such request, *as long as the agency has not cured its violation by responding before the person making the request files suit.*” (emphasis added).

Here, the Plaintiff argues that his administrative remedies have been exhausted because NETL failed to respond to his FOIA requests within twenty days. Defendant argues that the Plaintiff’s suit began either with the filing of his Amended Complaint on April 25, 2018, or with the entry of the Order Adopting the Report and Recommendation that substituted NETL as Defendant on May 21, 2018. (Def’s Memo in Supp., ECF No. 62, at 24).

Regarding Plaintiff’s FOIA Request 890, NETL issued a determination letter on May 19, 2017. *See Guy*

Decl., ECF No. 62-1, ¶ 41 and Ex. 23, ECF No. 62-24. After an appeal by the Plaintiff, additional documents were released by NETL on March 8, 2018. There is no evidence to suggest Plaintiff ever appealed this decision letter to OHA. The undersigned finds that Plaintiff's suit began with the filing of Plaintiff's Amended Complaint on April 25, 2018. Because the Defendant "cured its violation by responding before the person making the request" filed suit by issuing a determination letter on March 8, 2018 that was not appealed by the Plaintiff, the undersigned finds Plaintiff has failed to exhaust his administrative remedies regarding FOIA Request 890 and constructive exhaustion does not apply.

Similarly, regarding Plaintiff's FOIA Request 946, following appeals by the Plaintiff, NETL conducted an expanded search and sent out a redetermination letter to Plaintiff on April 11, 2018, that included "approximately 689 pages with no redactions." There is no evidence to suggest Plaintiff ever appealed this decision letter to OHA. *See Guy Decl.*, ECF No. 62-1, ¶ 50 – 51, Ex. 41-44, ECF No. 62-42, 43, 44, 45. Because the Defendant "cured its violation by responding before the person making the request" filed suit by issuing a determination letter on April 11, 2018, that was not appealed by the Plaintiff, the undersigned finds Plaintiff has failed to exhaust his administrative remedies regarding FOIA Request 946 and constructive exhaustion does not apply.

C. The undersigned finds Defendant, Department of Energy (National Energy Technology Laboratory) performed an

**adequate search with respect to Requests 833,
1070, and one part of Request 1284**

As noted herein, on a motion for summary judgment, “the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act’s inspection requirements.” Goland v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C. Cir. 1978); Students Against Genocide v. Department of State, 257 F.3d 828, 833 (D.C. Cir. 2001) (quoting Goland). “A defendant agency has the burden of establishing the adequacy of its search and that any identifiable document has either been produced or is subject to withholding under an exemption.” Havemann v. Colvin, 629 Fed.Appx. 537, 539 (4th Cir. 2015).

The agency may meet its burden through the production of affidavits describing the manner in which it undertook the requested information search. *See id.* In order to invoke an exception, however, the agency’s affidavits “must be relatively detailed and nonconclusory.” *Id.* (citing Simmons v. United States Dept. of Justice, 796 F.2d 709, 711–12 (4th Cir. 1986)). The court may presume “the credibility of such affidavits, so long as it has no reason to question the good faith of the agency.” *Id.* (citing Bowers v. United States Dep’t of Justice, 930 F.2d 350, 357 (4th Cir. 1991)). To overcome the presumption, “a requestor must demonstrate a material issue by producing evidence, through affidavits or other appropriate means, contradicting the adequacy of the search or suggesting bad faith.” *Id.* (citing Miller v. United

States Dept. of State, 779 F.2d 1378, 1384 (8th Cir. 1985)).

Here, the Defendant has attached the Declaration of Ann C. Guy (*Guy Decl.*). Ann C. Guy is a Paralegal Specialist for the United States Department of Energy's (DOE's) National Energy Technology Laboratory (NETL). Ann Guy manages all FOIA requests sent to the laboratory and has held this position since December of 1991. *Guy Decl.* at ¶ 1. Guy's responsibilities have included searching for information responsive to FOIA requests, reviewing information to determine whether it is potentially exempt from release, and providing information to those who have requested it pursuant to the FOIA, 5 U.S.C. § 552. *Guy Decl.* at ¶ 2. The Declaration of Ann C. Guy clearly explains in detail the DOE, NETL system of records and how that system is searched in response to a FOIA request and personally conducted and reviewed searches for documents responsive to the Plaintiff's requests. *See generally Id.* The declaration also explains in detail how the records were searched in response to the FOIA requests as well as the considerations made for redactions and assertions of exemptions under FOIA.

Upon a review of the Guy Declaration, the undersigned finds that Ann C. Guy is a "responsible agency official." In addition, the undersigned finds the declaration is sufficient to establish that the methods used by the Defendant to conduct FOIA searches can reasonably be expected to produce the information Plaintiff requested in this case and that the agency has acted in good faith in conducting its search. The agency

has released a voluminous number of documents and information in response to Plaintiff's FOIA Requests and has fully complied with all Decisions and Orders issued by the OHA. Therefore, although Plaintiff is not satisfied with Defendant DOE, NETL's responses to his FOIA requests, the undersigned finds the Defendant's numerous searches and release of documents to Plaintiff was reasonable and adequate.

Furthermore, to the extent Plaintiff claims Defendant is hiding or destroying evidence improperly, the undersigned notes that the FOIA does not require an agency to create or retain any document; rather, it only "obligates them to provide access to those which it in fact has created and retained." Turner v. U.S., 736 F.3d 274, 283 (4th Cir. 2013) (quoting Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980)). The undersigned further finds that Plaintiff has failed to introduce evidence through affidavits or other appropriate means, contradicting the adequacy of the search or suggesting bad faith and therefore, the Defendant is entitled to summary judgment.

D. The undersigned finds as a matter of law that Defendant has properly applied and asserted Exemptions 5 and 6 pursuant to 5 United States Code, §552(b)(5) – (b)(6).

- 1. The undersigned has conducted a detailed review of the Declaration of Ann C. Guy and Defendant's revised Vaughn Index and finds it is sufficient to support a finding that Exemption 5 – Attorney-client**

privilege and deliberative process privilege as well as Exemption 6 – Personal Privacy, have been properly asserted and applied by the Defendant.

(a) Exemption 5:

Exemption 5 provides that FOIA disclosure rules do not apply to “inter-agency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Hanson v. United States Agency for Int’l Dev., 372 F.3d 286, 290 (4th Cir. 2004) (quoting 5 U.S.C. § 552(b)(5)). Courts have interpreted Exemption 5 to exclude from disclosure documents encompassing the attorney-client privilege, attorney work product doctrine, and the deliberative process privilege. Hanson, 372 F.3d at 290-91 (citing N.L.R.B. v. Sears, Roebuck, & Co., 421 U.S. 132, 149-50 (1975); *See Tax Analysts v. IRS* (294 F.3d 71, 76 (D.C. Cir. 2002) (Noting FOIA Exemption 5 covers the attorney work product doctrine, the attorney-client privilege, and the governmental deliberative process privilege.))

The “attorney-client privilege is ‘the oldest of the privileges for confidential information known to the common law.’” Hanson, 372 F.3d at 291 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). The Court further stated in Hanson that the “Supreme Court has long recognized that the attorney client privilege merits special protection ‘to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in observance of law and administration of justice.’” *Id.* If the attorney-client privilege applies, “all

communications between attorney and client” are afforded “absolute and complete protection from disclosure.” Hanson, 372 F.3d at 291 (quoting In re Allen, 106 F.3d 582, 600 (4th Cir. 1997)).

Further, for a document to qualify under the deliberative process privilege, a document must satisfy two conditions: “its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” Dept. of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8 (2001). Only those documents normally privileged in the civil discovery context are within the scope of Exemption 5. NLRB v. Sears, 421 U.S. at 148-49. In other words, documents that are not “obtainable by a private litigant in an action against the agency under normal discovery rules (e.g., attorney-client, work product, executive privilege) are protected from disclosure under Exemption 5.” Grand Cent. P’ship, Inc., v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999) (internal quotations omitted). “Work product protects mental processes of the attorney, while deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Klamath Water Users, 532 U.S. at 8-9 (internal citations and quotations omitted).

“The purpose of the deliberative process privilege is to allow agencies to freely explore alternative avenues of action and to engage in internal debates without fear of public scrutiny.” State of Missouri ex rel. Shorr v.

United States Army Corps of Engineers, 147 F.3d 708, 710 (8th Cir. 1998). “The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decision by protecting open and frank discussion among those who make them within the Government.” Klamath Water Users, 532 U.S. at 8-9 (internal citations and quotations omitted).

“Exemption 5 to the FOIA permits nondisclosure if the document in question is an inter- or intra-agency memorandum which is both predecisional and deliberative.” Ex rel Shorr, 147 F.3d at 710. A predecisional document is one prepared in order to assist an agency decisionmaker in arriving at this decision and which contains recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Id. A document is deliberative if the disclosure of the materials would expose an agency’s decision-making process in such a way as to discourage candid discussion within the agency and, thereby, undermine the agency’s ability to perform its function. Id.

Here, Defendant DOE, NETL has sought to withhold information under Exemption 5 for information exchanged between NETL attorney Mark Hunzeker and several individuals/groups, including: an independent investigator contracted by NETL to conduct the internal investigation into Plaintiff’s conduct while employed with NETL, Penn State

University officials, Plaintiff's supervisor while employed, documents related to the "Management Directed Investigation (MDI)", and emails between NETL Counsel, NETL employees and HQ Human Capital Office. See Vaughn Index, ECF No. 70-1. Many of these documents related to Plaintiff's internal investigation and contained witness statements and communications in preparation of Plaintiff's criminal trial or revealed DOE, NETL's internal decision-making process regarding actions to be taken with Plaintiff's employment because of the ongoing investigation. Id.

Regardless, here, the OHA has upheld and found proper the Defendant's assertion of Exemption 5. See Ex. 53, at 5, ECF No. 62-54. Further, the undersigned finds that Plaintiff has not made any specific argument for the release of any records withheld under Exemption 5, asserting only generally that this exemption claimed by Defendant is unwarranted. Therefore, the undersigned finds that Defendant DOE, NETL has properly asserted and withheld information under Exemption 5.

(b) Exemption 6:

Exemption 6 allows for an agency to withhold and prevent the disclosure of information which would constitute a clearly unwarranted invasion of personal privacy. Havemann v. Colvin, 629 Fed.Appx. 537 (4th Cir. 2015). To determine if such an invasion would occur, the Court must "balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." Havemann, 629

Fed.Appx. at 539 (quoting Yonemoto v. Dep't of Veterans Affairs, 686 F.3d 681, 693 (9th Cir. 2012)).

Here, similar to the analysis above for Exemption 5, the undersigned notes that the OHA approved of Defendant's assertion and redaction of information pursuant to Exemption 6 to prevent the release of information discussing a NETL employee's disciplinary action and "personal background regarding the family of the NETL attorney." (Def's Reply, ECF No. 70, at 6) (*Guy Decl.*; Ex. 53, at 6 (ECF No. 62-54)). The OHA found that the "privacy interests of both the NETL employee and the NETL attorney outweigh any public interest in the disclosure of the redacted information." Ex. 53, at 6 (ECF No. 62-54). The undersigned agrees. Further, similar to Plaintiff's objections to the use of Exemption 5, Plaintiff has not made any specific argument for the release of any records withheld under Exemption 6, asserting only generally that this exemption claimed by Defendant is unwarranted. Therefore, the undersigned finds that Defendant DOE, NETL has properly asserted and withheld information under Exemption 6.

(c) Adequacy of Vaughn Index:

A Vaughn index "is a list which describes each document withheld by an agency with sufficiently detailed information to enable a district court to rule whether it falls within an exemption provided by FOIA." Ethyl Corp v. EPA, 25 F.3d 1241, at 1244, n. 1 (4th Cir. 1994). Although there is "no set formula for a Vaughn index . . . the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or

portion of a document withheld is putatively exempt from disclosure.” Hinton v. Dept. of Justice, 844 F.2d 126, 129 (3d Cir. 1988). The Fourth Circuit has found a Vaughn Index insufficient where it did not contain the document’s author, recipient or date. Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 366 (4th Cir. 2009).

Here, the undersigned finds that the Defendant DOE, NETL’s Vaughn index has provided the court with a detailed analysis of each redaction and document withheld. See Vaughn Index, ECF No. 70-1. Specifically, the index describes the document type, date of the document, author of the document, recipients, the number of pages, the exemption asserted, the basis for the redactions, and an explanation for the redactions. Id. Therefore, the Court finds there is sufficient information to make a reasoned and informed decision as to the DOE, NETL’s compliance with the FOIA.

2. The undersigned finds that an *in camera* review is not necessary.

Plaintiff requests the Court to conduct an *in camera* review of the redacted or otherwise withheld documents. However, an *in camera* review of the documents is not required and is discretionary. See 5 U.S.C. § 522(a)(4)(B); Simon v. United States Dept. of Justice, 796 F.2d 709, 710-711 (4th Cir. 1986). “*In camera* review is appropriate where the justifications for withholding are conclusory or not described in sufficient detail to demonstrate that the claimed exemption applies, or where there is evidence of agency bad faith such as where evidence in the record

contradicts agency affidavits.” Falwell v. Executive Office of the President, 158 F.Supp.2d 734, 738 (W.D.Va. 2001) (citing Carter v. United States Dept. of Commerce, 830 F.2d 388, 392-393 (D.C. Cir. 1987)). As set forth in this Report and Recommendation, the Defendant has adequately explained its reasons for asserting the exemptions and redacting or withholding information responsive to Plaintiff’s FOIA requests. Moreover, the Defendant has filed an appropriate Vaughn Index. Because the Defendant has sufficiently demonstrated that the claimed exemptions apply, and because there has been no showing of bad faith, an *in camera* review of the documents is not necessary.

VIII. Conclusion

Therefore, for the reasons stated herein, the undersigned **RECOMMENDS** the Defendant’s Motion for Summary Judgment (ECF No. 61) be **GRANTED**, Plaintiff’s “Note and Clarification”, construed as a Motion to Compel (ECF No. 60), be **DENIED AS MOOT** and Plaintiff’s Amended Complaint (ECF No. 50) be **DISMISSED WITH PREJUDICE**.

Any party within fourteen (14) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable Thomas Kleeh, United States District Judge. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court

based upon such report and recommendation. 28 U.S.C. §636(b)(1). United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).

The Clerk of the Court is **DIRECTED** to forward a copy of this Report and Recommendation to counsel of record and any party appearing *pro se* in compliance with the rules for electronic case filing in the Northern District of West Virginia. Additionally, as this report and recommendation concludes the referral from the District Court, the Clerk is further **DIRECTED** to terminate the magistrate judge's association with this case.

Respectfully submitted this 8th day of February 2019

MICHAEL JOHN ALOI
UNITED STATES MAGISTRATE JUDGE

APPENDIX D
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST
VIRGINIA CLARKSBURG

AYYAKKANNU MANIVANNAN,
Plaintiff,

Civ. Action No. 1:17-cv-192
(Kleeh)

DEPARTMENT OF ENERGY
(National Energy Technology
Laboratory) ,

Defendant.

MEMORANDUM OPINION AND ORDER
ADOPTING REPORT AND
RECOMMENDATION IN PART [ECF NO. 79],
GRANTING MOTION FOR SUMMARY
JUDGMENT [ECF NO. 61], AND DENYING AS
MOOT PLAINTIFF' S NOTE AND
CLARIFICATION [ECF NO. 60]

Pending before the Court is a Report and Recommendation ("R&R") entered by United States Magistrate Judge Michael J. Aloia. Judge Aloia recommends that the Court grant Defendant's Motion for Summary Judgment; deny as moot Plaintiff's "Note and Clarification," construed as a Motion to Compel; and dismiss the Amended Complaint with prejudice. For the reasons discussed below, the Court adopts the R&R in part.

I. BACKGROUND

Plaintiff is a former employee of the Department of Energy's National Energy Technology Laboratory ("NETL") in Morgantown, West Virginia. ECF No. 12 at ¶ 1. On April 8, 2017, Plaintiff's supervisor proposed his removal from NETL and federal service due to improper conduct involving an intern whom Plaintiff had been assigned to mentor. Id. ¶ 3. At the time of the notice, Plaintiff was facing criminal charges in Pennsylvania regarding harassment and unlawful use of computers. Id. On April 19, 2016, Plaintiff was convicted by a jury for these crimes. Id. Plaintiff was placed on administrative leave from August 12, 2015, during an internal investigation. Id. ¶ 4. He was forbidden from accessing NETL property, and his former office at NETL was secured under lock and key. Id. He resigned, effective June 17, 2016. Id. Plaintiff's claims in this case stem from his attempts to retrieve his personal belongings after being placed on administrative leave, along with his attempts to gather information about the investigations conducted at NETL and in Centre County, Pennsylvania.

A. Original Complaint [ECF No. 1]

On November 6, 2017, Plaintiff filed a Complaint (the “Original Complaint”) against Grace Bochenek (“Bochenek”), Susan Malie (“Malie”), and Isabel Coteri (“Coteri”) (together, the “Original Defendants”), all of whom were employees of NETL. ECF No. 1 at 1. First, Plaintiff claimed that in violation of 18 U.S.C. § 21 (Stolen or Counterfeit nature of property for certain crimes defined) and since the summer of 2016, NETL had refused to return his personal belongings, despite repeated requests. *Id.* ¶ 1. He also cited a parallel case in Morgantown Magistrate Court. *Id.* Second, he claimed that Malie “blocked” his certified registered court summons by opening it when it was addressed to Bochenek, in violation of 18 U.S.C. § 1702 (Obstruction of correspondence). *Id.* ¶ 2. The summons allegedly opened by Malie related to the Monongalia County Magistrate Court case.

Third, Plaintiff argued that Coteri inappropriately signed the certified registered Court Summons addressed to Bochenek, in violation of 18 U.S.C. § 1701 (Obstruction of mails generally). *Id.* ¶ 3. Fourth, Plaintiff wrote that he sent several FOIA requests to NETL, and NETL failed to provide a determination letter for FOIA HQ-2017-00946-F/NETL-2017-01081-F (“Request 946”). *Id.* ¶ 4. Request 946, he said, specifically requested all paperwork and records related to the alleged official delivery of Plaintiff’s personal belongings to him by NETL. *Id.* Request 946 is the only FOIA request specifically listed in Plaintiff’s Original Complaint.

Fifth, Plaintiff argued that this Court had jurisdiction because the case involved obstruction of mails, obstruction of correspondence, federal employees, Plaintiff's personal belongings being left at a federal site, and denial of responses to FOIAs. *Id.* at ¶ 5. Plaintiff wrote that the Department of Energy's Office of Hearing and Appeals ("OHA") indicated to him that he was deemed to exhaust his administrative remedies for Request 946 and may proceed with the matter in federal district court pursuant to 5 U.S.C. § 552(a)(6)(C)(i). *Id.*

B. Motion to Dismiss [ECF No. 11]

On January 8, 2018, the Original Defendants moved to dismiss Plaintiff's Original Complaint for lack of subject matter jurisdiction and failure to state a claim. ECF No. 11. Bochenek argued that she "never personally directed any action taken by NETL concerning the Plaintiff's belongings at issue, and in fact, has never had any contact with the Plaintiff through her employment at NETL's Pittsburgh, PA office." ECF No. 12 at 2.

The Original Defendants argued that Cotero signed for the summons, Malie signed an internal correspondence accountability log, and Bochenek never received a copy of the summons or signed a receipt for one. *Id.* at 6. They argued that the claims against them should be dismissed for failing to meet the standards under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *Id.* at 7, 8. Plaintiff had cited criminal statutes in the Original Complaint, for which no civil relief was available, and to the extent he cited 5 U.S.C. § 552(a) regarding FOIA requests, the

Original Defendants argued that the Original Complaint did not request the provision of documents pursuant to that statute. *Id.* at 9, 10.

On January 22, 2018, Plaintiff filed a response to the Motion to Dismiss. ECF No. 17. Plaintiff emphasized that several requests were made to NETL about his belongings, and “[n]o proper response was received.” *Id.* at 11. He argued that NETL failed to respond to Plaintiff’s Request 946. *Id.* at 12. He provided his version of the history of Request 946: (1) FOIA applied in May 2018¹; (2) NETL responded with “No Records”; (3) Plaintiff appealed to OHA; (4) NETL withdrew its “No Records” response and stated that a new determination letter would be issued. *Id.* at 13. Plaintiff stated that it had not been issued. *Id.* OHA informed him that because NETL had not issued a final determination as to Request 946, Plaintiff might be deemed to have exhausted his administrative remedies for that Request and proceed in federal court. *Id.*

C. Judge Aloï’s First R&R [ECF No. 30]

On February 21, 2018, Judge Aloï entered an R&R on the pending motion to dismiss. ECF No. 30. Judge Aloï recommended that the action be dismissed against Coteró, Bochenek, and Malie. *Id.* at 16. He concluded that the Court lacked subject matter jurisdiction over the criminal allegations by Plaintiff. *Id.* at 11. He further found that the Court lacked jurisdiction over the claims potentially made under

¹ This was likely a typographical error because the Response was filed on January 22, 2018.

the Federal Tort Claims Act (“FTCA”). Id. at 13. To the extent the complaint could be read as a request for injunctive relief, neither the FTCA nor the Administrative Procedure Act (“APA”) would be an adequate remedy. Id.

Construing the complaint liberally, however, Judge Aloï found that Plaintiff may proceed in federal court under 5 U.S.C. § 552(a)(6)(C)(i). Id. at 15–16. He recommended that the request to dismiss Plaintiff’s FOIA claims be denied and that NETL be substituted as a defendant, noting that “[t]he claim under FOIA . . . must proceed against NETL.” Id. at 16. He deemed the following FOIA requests exhausted because there was no evidence that a revised fee letter was sent:

- HQ-2017-01069-F/NETL-2017-01141-F (Request 1069);
- HQ-2017-01268-F/NETL-2017-01260-F (Request 1268); and
- HQ-2017-01284-F/NETL-2017-01308-F (Request 1284).

Id. at 15. He also found that NETL had not issued final determinations within the statutory time limit for the following six FOIA requests: 833, 890, 1070, 946, 1347, and 1348. Id. Therefore, he deemed those Requests exhausted as well. Id. Judge Aloï directed NETL to respond to the nine FOIA requests listed above. Id. at 16–17. Judge Keeley adopted the R&R on May 21, 2018, and substituted NETL as the defendant. ECF No. 52.

On April 6, 2018, Judge Aloï directed NETL to provide certain documents to the Court for in camera

review. ECF No. 44. On April 10, 2018, NETL filed a Motion for Relief from Requirements of that order, arguing, among other things, that Plaintiff had been adding new claims without amending his complaint. ECF No. 46. Judge Aloï then ordered NETL to provide Plaintiff a response to Request 946 by April 26, 2018. ECF No. 48 at 3. He also found that NETL cured its violation as to Request 1070 before this cause of action was initiated on November 6, 2017. *Id.* at 4–5. Judge Aloï directed Plaintiff to file an Amended Complaint, including the FOIA requests for which he had exhausted his administrative remedies, on or before April 26, 2018. *Id.* at 5.

D. Amended Complaint [ECF No. 50]

Plaintiff filed an Amended Complaint on April 25, 2018. ECF No. 50. He did not reference whether administrative remedies had been exhausted for each of the FOIA requests in the Amended Complaint. Plaintiff states in his Amended Complaint that its purpose is “to obtain the documented truth through the opportunity FOIA request.” *Id.* at 1. He argues that “[a]ccording to FOIA regulation 5 U.S.C. § 552(a)(6)(A), the Agency must issue a determination letter within 20 days of receiving a FOIA request,” and in this case, “[t]he determination letter response for many FOIA requests took months.” *Id.* Plaintiff generally objects to NETL’s alleged destroying and withholding of records and its claims of attorney-client privilege and confidentiality.

Plaintiff discusses the following Requests in his Amended Complaint: 1070, 946, 833, 890, 1347, 1759, 78, 1348, 1069, 1268, and 1284. Specific arguments

made by Plaintiff as to each Request are included in the Discussion section below. Plaintiff reiterates requests for documentation and, generally, argues that NETL is not in compliance with the Court Order. He asks the Court to do the following: “order the Agency to release all the records/documents that have been withheld, redacted, and allegedly destroyed. A proper judicial review is requested to determine the matter de novo and may examine the contents of the Agency records in camera that are withheld/redacted from the complainant.” Id. at 20. NETL filed an Answer to the Amended Complaint on May 10, 2018. ECF No. 51. Plaintiff then filed a “Note and Clarification,” which Judge Alois has construed as a Motion to Compel, asking the Court to compel NETL to respond to his FOIA requests. ECF No. 60.

E. Motion for Summary Judgement [ECF No. 61]

NETL filed a Motion for Summary Judgment, which is now ripe for consideration. ECF No. 61. NETL attached to its Motion an affidavit from Ann C. Guy, a Paralegal Specialist for NETL who manages all FOIA requests sent to the laboratory. ECF No. 62-1. In support of the Motion, NETL argues that the FOIA action began on April 25, 2018, with the filing of the Amended Complaint, because the Original Complaint was against three individual employees for obstruction of correspondence and merely contained a reference to FOIA requests. ECF No. 62 at 3. NETL discusses the four FOIA requests for which OHA determined Plaintiff could not be assessed fees: 833, 890, 946, and 1070. Requests 833 and 1070, NETL argues, were properly exhausted, and Plaintiff was permitted to

seek judicial review. Id. at 6, 9. Requests 890 and 946, on the other hand, were not properly exhausted. Id. at 7.

In its Motion, NETL explains the standard for summary judgment pursuant to FOIA. Id. at 9. It then argues that NETL conducted an adequate search for responsive records. Id. at 10. It also argues that the exemptions applied by NETL in providing responsive records were properly applied. Id. at 15. In conclusion, NETL wrote the following:

The plaintiff, as a result of nine FOIA requests which demanded the search and production of thousands of documents, received each document to which he was entitled, and which NETL was obligated to provide. Searches were not conducted for five of the requests because the plaintiff failed to provide the fee required. The plaintiff failed to exhaust his administrative remedies with regard to another two requests. The remaining two requests moved carefully and diligently through the system set up to address FOIA matters within NETL, as did the requests that were not exhausted. Each decision by OHA analyzed NETL's response to each request, often requiring additional searches or less redaction, until the Office of Hearing Appeals was satisfied that NETL had complied with its obligation under FOIA. Hence, as the Declarations and Exhibits demonstrate, there is no genuine issue of material fact and NETL is entitled to judgment as a matter of law.

Id. at 24–25. Plaintiff filed a Response to the Motion, primarily arguing that exemptions were improperly applied and an in camera review of the documents by the Court is warranted. ECF No. 69. He also argues that NETL never performed an adequate search and that constructive exhaustion applies to all requested FOIAs. He believes NETL is destroying or hiding evidentiary records.

F. Judge Aloï's Second R&R [ECF No. 79]

On February 8, 2019, Judge Aloï issued an R&R on the Motion for Summary Judgment. ECF No. 79. He recommended that the Court dismiss Requests 1069, 1268, 1284, 1347, 1348, 78, and 1759 because they were closed for failure to pay fees. Id. at 18. He recommended that the Court find that Plaintiff failed to exhaust his administrative remedies for Requests 890 and 946 and that constructive exhaustion is not available. Id. at 19. He recommended that the Court find that NETL performed an adequate search for Requests 833, 1070, and 1284. Id. at 20. He also recommended that the Court find that NETL properly applied Exemptions 5 and 6. Id. at 22. Plaintiff filed Objections to the R&R on March 18, 2019. ECF No. 86.

II. STANDARD OF REVIEW

When reviewing a magistrate judge's R&R, the Court must review de novo only the portions to which an objection has been timely made. 28 U.S.C. § 636(b)(1)(C). Otherwise, "the Court may adopt, without explanation, any of the magistrate judge's recommendations to which the [parties do] not object." *Dellarcirprete v. Gutierrez*, 479 F. Supp. 2d 600, 603–

04 (N.D.W. Va. 2007) (citing *Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983)). Courts will uphold portions of a recommendation to which no objection has been made unless they are clearly erroneous. See *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

Here, Plaintiff objected to Judge Aloï's findings that exemptions were proper, along with his "contradictory" analysis between this R&R and the first R&R. Plaintiff's objections reiterate many of his points raised earlier: that he exhausted his remedies for multiple Requests, that NETL did not make timely disclosures, and that exemptions were improperly applied. Due to the broad scope of Plaintiff's objections, the Court will review the R&R de novo. Plaintiff's Amended Complaint will be liberally construed because he is proceeding pro se. See *Estelle v. Gamble*, 429 U.S. 97 (1976).

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party must "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* Summary judgment is proper "[w]here the record

taken as a whole could not lead a rational trier of fact to find for the non-moving party, there [being] no ‘genuine issue for trial.’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing First Nat’l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288 (1968)).

Cases brought under FOIA “are generally resolved on summary judgment once the documents at issue have been properly identified.” Wickwire Gavin, P.C v. U.S. Postal Serv., 356 F.3d 588, 591 (4th Cir. 2004). “In a suit brought to compel production, an agency is entitled to summary judgment if no material facts are in dispute and if it demonstrates ‘that each document that falls within the class requested either has been produced . . . or is wholly exempt from the Act’s inspection requirements.’” Students Against Genocide v. Dep’t of State, 257 F.3d 828, 833 (D.C. Cir. 2011) (citing Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978)). “[T]he district court has the discretion to limit discovery in FOIA cases and to enter summary judgment on the basis of agency affidavits in a proper case.” Simmons v. DOJ, 796 F.2d 709, 711–12 (4th Cir. 1978). These affidavits are required to be “‘relatively detailed’ and nonconclusory and must be submitted in good faith.” Goland, 607 F.2d at 352.

III. GOVERNING LAW

Under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, subject to certain exemptions, “federal agencies generally must make their internal records available to the public upon request[.]” Coleman v. Drug Enf’t Admin., 714 F.3d 816, 818 (4th Cir. 2013). FOIA disclosure “shines a light on government

operations ‘to check against corruption and to hold the governors accountable to the governed.’” Id. (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

The FOIA expressly requires an agency receiving an information request to do the following:

- (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and . . . immediately notify the person making such request of . . . such determination and the reasons therefor . . . [and] in the case of an adverse determination the right of such person to appeal to the head of the agency . . . ; and
- (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.

5 U.S.C. § 552(a)(6)(A)(i)–(ii).

To determine whether an agency has met its obligation under the FOIA, “[i]n the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA.” *Ginarte v. Mueller*, 496 F. Supp. 2d 68, 69 (D.C. Cir. 2007) (citing *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982)). Agency

declarations are “accorded a presumption of good faith.” Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (citing Safecard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

An agency has conducted an adequate search when it shows “that is has conducted a search reasonably calculated to uncover all relevant documents.” Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The adequacy of an agency’s search for records is “generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003). It is “dependent upon the circumstances of the case.” Truitt v. Dep’t of State, 897 F.2d 540, 542 (D.C. Cir. 1990). The FOIA “does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.” Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980).

If responsive documents are withheld, the agency must demonstrate that they fall within one of the nine disclosure exemptions set forth in the FOIA. See 5 U.S.C. § 552(b). A government agency’s burden of demonstrating the applicability of the exemption may be met by affidavits, as long as those affidavits are, again, “‘relatively detailed’ and nonconclusory and . . . submitted in good faith.” Simmons, 796 F.2d at 711-12. “The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.” Bowers v. DOJ, 930 F.2d 350,

357 (4th Cir. 1991) (citing Spannaus v. DOJ, 813 F.2d 1285, 1289 (1987)).

To overcome the presumption of an affidavit's credibility, "a requestor must demonstrate a material issue by producing evidence, through affidavits or other appropriate means, contradicting the adequacy of the search or suggesting bad faith." Havemann v. Colvin, 629 F. App'x 537, 539 (4th Cir. 2015) (citing Miller v. U.S. Dep't of State, 779 F.2d 1378, 1384 (8th Cir. 1985)). Courts have held that if an agency provides a reasonably detailed explanation of the applicability of a claimed exemption, and there is no contradictory evidence of bad faith, the in camera inspection of contested documents is unnecessary. Silets v. DOJ, 945 F.2d 227, 229 (7th Cir. 1991) (en banc) (writing that "[b]ecause the Government's affidavits adequately explain the redacted material, the information logically fits within the claimed exemptions, and there exists no contrary evidence or evidence of bad faith, the District Court did not abuse its discretion in denying in camera review"), cert. denied, 112 S. Ct. 2991 (1992).

As stated above, the FOIA has nine exemptions. See 5 U.S.C. § 552(b)(1)-(9). Most relevant here are Exemptions 5 and 6. Exemption 5 provides that FOIA disclosure rules do not apply to "inter-agency or intraagency memorandums or letters that would not be available by law to a party other than an agency in litigation with an 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[.]" 5 U.S.C. § 552(b)(5). "Courts have interpreted Exemption 5 to exclude from

disclosure documents produced under the attorney work product doctrine and the deliberative process privilege.” Hanson v. U.S. Agency for Int’l Dev., 372 F.3d 286, 290–91 (4th Cir. 2004). Exemption 6 applies to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Id. § 552(b)(6).

A. Exhaustion

In FOIA cases, “a plaintiff must exhaust administrative remedies prior to seeking judicial review.” Schwarz v. FBI, 31 F. Supp. 2d 540, 542 (N.D.W. Va. 1998), aff’d, 166 F.3d 334 (4th Cir. 1998). The Fourth Circuit has provided the following guidance as to when constructive exhaustion is available to a requester:

[A] requester “shall be deemed to have exhausted his administrative remedies” and may commence litigation immediately if “the agency fails to comply with the applicable time limit provisions” of the FOIA statute, . . . **so long as the agency has not cured its violation by responding before the requester files suit** This constructive exhaustion provision allows a requester to break out of the administrative process and proceed directly to federal court in the face of an unresponsive agency.

Coleman v. Drug Enf’t Admin., 714 F.3d 816, 820 (4th Cir. 2013) (emphasis added).

B. Fees

Agencies are authorized to charge a “reasonable” amount “for document search and duplication” in a case that is not for commercial, educational, scientific, or news media use. See 5 U.S.C. § 552(a)(4)(A)(i)–(ii). Advanced fees may not be required “unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.” Id. § 552(a)(4)(A)(v).

When an agency has determined that a total fee “will exceed \$250, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request.” 28 C.F.R. § 16.10(i)(2). It may do the same if a requester has failed to make a timely payment in the past. Id. § 16.10(i)(3). When an advance payment is required, “the request shall not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the . . . fee determination, the request will be closed.” Id. § 16.10(i)(4). If the agency fails to comply with FOIA’s time limits in responding to a request, it may not charge search fees. Id. § 16.10(d)(2). Requesters may seek a fee waiver under 28 C.F.R. § 16.10(k).

IV. DISCUSSION

The Court finds that Plaintiff has failed to overcome the presumptive validity of NETL’s affidavit as it relates to each FOIA Request in issue. NETL was not named as a defendant in this action until Plaintiff filed

his Amended Complaint. For purposes of determining when Plaintiff filed suit and whether NETL cured various violations before suit, the filing of the Amended Complaint will serve as the date Plaintiff “filed suit” against NETL.²

NETL’s Declaration from Ann C. Guy is sufficient to establish that the methods used by NETL to conduct FOIA searches can be reasonably expected to produce Plaintiff’s requested information. Guy’s responsibilities include searching for information in response to FOIA requests, reviewing the information to determine whether it is exempt from release, and providing information to those who have requested it pursuant to FOIA. See Guy Decl., ECF No. 62-1, at ¶ 2. She has held her position since December 1991. *Id.* ¶ 1. Guy explains in detail NETL’s system of records, how the system is searched, and how she personally conducted searches for Plaintiff’s requests. She also explains considerations made for redactions and assertions of exemptions under FOIA. The Court will now examine in turn, based on Guy’s declaration and any evidence presented by Plaintiff, each FOIA Request.

A. NETL’s searches for Requests 833 and 1070 were adequate.

Request 833

On April 5, 2017, Plaintiff filed Request 833. *Id.* ¶ 15 (Ex. 1). Request 833 involved “19 categories of records including NETL’s internal MDI and the related

² The Court is giving Plaintiff the benefit of this earlier date, as opposed to the date on which NETL was served.

communications between NETL's Counsel and the Penn State and Centre County Assistant District Attorney." *Id.* Plaintiff argues that the information received for Request 833 was deficient. ECF No. 50 at 8. He argues that he exhausted his administrative remedies long ago. *Id.* Much of the information, he says, has been withheld or destroyed. *Id.*

Guy states that she "conducted a search of Agency records to determine if responsive records exist." *See* Guy Decl., ECF No. 621, at ¶ 24. She worked with NETL's attorney to locate files. *Id.* She "determined that the MDI and numerous emails were responsive to the request; however, all the information [she] discovered during this search was withheld under Exemption 5 and because of potential litigation." *Id.* She also determined that certain information Plaintiff requested did not exist. *Id.* ¶ 25. Still, even though under no obligation, she "informed Plaintiff that the decision to investigate was made by senior management officials after a telephone call from the Penn State Affirmative Action Office reported a complaint had been made by his former student intern." *Id.*

NETL sent a response to Plaintiff on May 22, 2017, denying his request pursuant to exemptions 5 and 6 of the FOIA, 5 U.S.C. § (b)(5) and 5 U.S.C. § (b)(6). *Id.* (Ex. 2). On June 6, 2017, Plaintiff appealed NETL's response. *Id.* ¶ 26. On June 15, 2017, OHA received the appeal. *Id.* (Ex. 3). NETL agreed to reopen the request, and OHA dismissed the appeal. *Id.* (Ex. 4).

Request 833 was one of seven Requests consolidated into a single request.³ *Id.* ¶ 27. The consolidated Requests were not assigned a new identification number. *Id.* When the consolidation took place, Plaintiff was sent a letter notifying him of the consolidation. *Id.* (Ex. 5). NETL also notified Plaintiff that he did not qualify for a fee waiver, and NETL assessed fees for continued processing of the seven consolidated requests. *Id.*

In the same letter, NETL informed Plaintiff that the estimated fee for processing his Requests would be over \$7,000. *Id.* ¶ 28. NETL asked Plaintiff for partial payment in advance. *Id.* On July 5, 2017, Plaintiff appealed the denial of the fee waiver. *Id.* (Ex. 6). In the consolidated requests, Plaintiff made multiple requests for a video tape created and used by the independent investigator hired by NETL. *Id.* ¶ 29. Guy learned that the investigator created the video tape on her own. *Id.* Creating the video tape was never a requirement under NETL's contract with the

³ The seven consolidated requests were Requests 833, 890, 946, 1069, 1070, 1268, and 1284. NETL, after consulting with DOE HQ's Office of Public Information, determined that these requests should be consolidated based on the similarity and repetitiveness among them, "mostly dealing [with] the Plaintiff's hearing in Centre County, communications between NETL's legal office and Centre County, emails of his supervisors during the time of the investigation, a video/audio tape, and the MDI." Guy Decl., ECF No. 62-1, at ¶ 27. Plaintiff also withdrew Request 1284 and resubmitted it to DOE HQ because it was more appropriately addressed by HQ personnel. *Id.* ¶ 28. Therefore, on July 5, 2017, the seven consolidated requests were reduced to six consolidated requests. *Id.*

investigator. Id. Further, the video tape was never in NETL's possession. Id. The investigator destroyed it when she no longer needed it.⁴ Id.

On August 7, 2017, OHA issued a Decision and Award, finding that Plaintiff could not be assessed fees on four of the seven consolidated requests, including Request 833, because NETL did not respond within the 20-day period required by FOIA. Id. ¶ 30. NETL continued the search for Request 833. Id. ¶ 32. On October 6, 2017, NETL sent a new determination letter to Plaintiff for Request 833. Id. ¶ 33 (Ex. 10). On October 12, 2017, Plaintiff appealed, claiming that NETL did not release all of the requested documents, including the audio/video tape of the investigation. Id. ¶ 34 (Ex. 11). On November 2, 2017, OHA issued a decision on this appeal, finding that NETL reasonably interpreted and adequately searched for all but two items of the 19-item request. Id. It instructed NETL to conduct an additional search for those two items. Id. (Ex. 12). NETL conducted an additional search and sent a new determination letter on November 22, 2017. Id. (Ex. 13).

On November 29, 2017, Plaintiff appealed, asking for the same documents and the video tape and claiming that NETL was withholding information. Id. ¶ 35 (Ex. 14). On January 11, 2018, OHA issued an order addressing Request 833 along with Request 890. Id. ¶ 36 (Ex. 15). OHA stated that NETL conducted an adequate search for 833 but was to reexamine several

⁴ In OHA's decision dated January 11, 2018, OHA explained this to Plaintiff. Guy Decl., ECF No. 62-1, at ¶ 29.

redactions under Exemption 5 and issue a new determination.⁵ Id. On January 25, 2018, NETL released emails and information requested in OHA's order from January 11, 2018. Id. ¶ 38 (Ex. 17). On January 29, 2018, Plaintiff appealed, stating that NETL was not in compliance with OHA's order. Id. (Ex. 18).

Guy then divided up Requests 833 and 890 and responded to each separately. Id. ¶ 39. On February 7, 2018, she issued a new determination letter for Request 833 to comply with the January 11, 2018, order, including 99 pages of documents with nine redactions pursuant to Exemption 5. Id. (Ex. 19). On February 8, 2018, Plaintiff appealed, arguing that redactions were improper. Id. (Ex. 20). On February 12, 2018, OHA issued an order denying Plaintiff's appeal and finding that NETL was in full compliance with the order dated January 11, 2018, therefore closing Request 833. Id. (Ex. 21). As such, Plaintiff's appeal was exhausted, and he was permitted to seek judicial review.

Because Plaintiff's appeal was exhausted as to Request 833, the questions before the Court are whether the search was adequate and whether any exemptions were proper. Guy reconsidered several

⁵ Guy cites clerical confusion after this because she, Plaintiff, and OHA all, at one point, mismatched the requests numbers and the appeal numbers. She says that Plaintiff appealed the two requests before receiving a determination letter, which added to the confusion. OHA issued a letter stating that the appeals were moot because NETL had yet to issue a new determination letter. See Guy Decl., ECF No. 62-1, at ¶ 36 (Ex. 16).

exemptions after OHA determined that legal advice was not included. See id. ¶ 38 (Ex. 17). She took into careful consideration OHA's decisions and incorporated its guidance in each determination letter sent. NETL released many documents in response to Request 833, and OHA – after denying a few earlier searches – found that NETL fully complied with all of its Decisions and Orders. See id. ¶ 39 (Ex. 21).

Guy states that Plaintiff's concerns stem from the following information continuing to be redacted/withheld: (1) "an accusatory investigation report devoid of evidence to support it"; (2) "an unfounded personal action of Notice of Proposed Removal (NPR)"; (3) "unsupported accusations in employee's SF-50 form"; and (4) two amendments to SF-50 form." Id. ¶ 67. Guy states that Hunzeker personally delivered this information to Plaintiff's counsel and received a signed confirmation of receipt. Id.

The search NETL undertook for Request 833 was adequate. In OHA's Decision and Order issued November 2, 2017, it found that NETL performed an adequate search relating to Request 833 for all but two items (items 12 and 16). OHA describes the search process undertaken by NETL as to Search 833:

To process the request, NETL identified the individuals who were most likely to locate responsive records and contacted those individuals, provided them a copy of the FOIA request, and asked them to conduct a search of their records for anything that may be responsive to the request. Those individuals

searched their physical and electronic records, including Outlook emails, using the search term “Manivannan.” Additionally, the FOIA Officer at NETL conducted an electronic and hard copy file search using “Manivannan” and “Mani.” The FOIA Officer also searched the Sharepoint database, which allows access to all NETL personnel email, using the search terms “Manivannan,” “Mani,” “Centre County,” and the names of two individuals relevant to the Appellant’s request. Subsequently, the FOIA Officer reviewed the results of the above searches to determine which information was responsive to the Appellant’s requests. After concluding its review, NETL determined that it had searched all locations where responsive records may reside.

(Ex. 12) (internal citations omitted). After this Decision and Order, NETL performed a new search (for items 12 and 16) and issued another redetermination letter, which led to another appeal and another Decision and Order on January 11, 2018. In this Decision and Order, OHA described the search as follows:

Beginning with item 12, NETL explained that it searched its email database using the search terms “Manivannan,” “investigation,” “Management Directed Investigation (MDI),” “Centre County,” and the name of the former NETL Chief Counsel. NETL also explained that it examined its investigative file and contacted multiple individuals and offices throughout NETL who may have had additional documentation. Within the

investigative file, NETL located the requested phone call lists and provided them to the Appellant in a previous determination letter. NETL clarified that these phone call lists were comprehensive and would not be located anywhere else. NETL stated that there is "nowhere remaining to search."

With regard to the requested video/audio recordings, NETL explained that any recordings were made by a non-DOE investigator for transcription purposes only. NETL contacted this investigator when the FOIA request was submitted, and the investigator explained that she deleted any recordings once she had completed her investigative report. Therefore, any such recording no longer exists and cannot be provided in response to the FOIA request.

Turning to item number 16, in conducting its additional search, NETL explained that it searched its email database using the term "Manivannan." Then within the emails that surfaced, it searched the terms "removal," "discipline," and "Management Directed Investigation." NETL also searched for the name of the NETL Attorney, and the name of a human resources specialist. Although it could find no document identifying the person who drafted the Notice of Proposed Removal, NETL provided the Appellant with 41 pages of relevant, responsive records.

(Ex. 15). OHA found that the searches for the two previously inadequate items — 12 and 16 — were adequate. Based on the description of the search conducted, this Court agrees. NETL “has conducted a search reasonably calculated to uncover all relevant documents.” See Weisberg, 705 F.2d at 1351. In conclusion, the Court finds that the search for Request 833 was adequate. Exemptions will be discussed below.

Request 1070

On May 11, 2017, Plaintiff filed Request 1070. Guy Decl., ECF No. 62-1, at ¶ 52 (Ex. 45). It included “11 categories of records related to the MDI and a video tape prepared by the contract investigator.” *Id.* ¶ 19. It also included “information on the names of all NETL personnel who initiated and were involved with his investigation and information on the investigator hired by NETL to do the investigation.” *Id.* ¶ 52. Plaintiff argues that the information he has received for Request 1070 is deficient, that he exhausted his administrative remedies long ago, and that NETL made “numerous questionable redactions.” ECF No. 50 at 11.

Request 1070 was one of the seven consolidated requests. *Id.* ¶ 27. On August 7, 2017, OHA issued a Decision and Award finding that Plaintiff could not be assessed fees on four of the seven consolidated requests, including Request 1070, because NETL did not respond within 20 days. Guy Decl., ECF No. 62-1, at ¶ 30.

NETL continued the search for Request 1070. *Id.* ¶ 32. On October 24, 2017, NETL sent Plaintiff a determination letter including approximately 227 pages of information. *Id.* ¶ 53. Guy could not find responsive documents to some of the items in his request. *Id.* Certain portions were redacted under Exemption 5. *Id.* On October 29, 2017, Plaintiff appealed, arguing that Exemption 5 did not apply to him. *Id.* ¶ 54. He asked again for the video/audio tape. *Id.* On November 29, 2017, OHA granted the appeal in part, writing that NETL did an adequate search for most items listed, but OHA ordered NETL to do an additional search using more search terms for two items in the request. *Id.* (Ex. 48).

On January 4, 2018, NETL sent Plaintiff a new determination letter based on this request. *Id.* ¶ 55 (Ex. 49). On January 16, 2018, Plaintiff appealed, stating that the search was incomplete. *Id.* (Ex. 50). NETL withdrew its determination and issued a new determination on February 27, 2018, “correctly listing and marking the exemptions used.” *Id.* (Ex. 51). Plaintiff again appealed, arguing that the search was inadequate. *Id.* ¶ 56 (Ex. 52). On March 29, 2018, OHA issued a final order denying Plaintiff’s appeal and closing Request 1070. *Id.* (Ex. 53). Plaintiff, therefore, exhausted his administrative remedies and could seek judicial review of Request 1070.

Because Plaintiff exhausted his administrative remedies for Request 1070, the questions before the Court are whether the search was adequate and whether any exemptions were proper. The search NETL undertook for Request 1070 was adequate. In

OHA's Decision and Order dated November 29, 2017, it found that NETL performed an adequate search relating to Request 1070 for all but two items. OHA describes the search process undertaken by NETL as to Request 1070:

NETL identified the individuals who were most likely to locate responsive records, contacted those individuals, and requested that they conduct a search of their records. Those individuals searched their physical and electronic records, including Outlook emails, using relevant search terms such as "Manivannan," "investigation," "Management Directed Inquiry," and "final SF-50." Additionally, the FOIA officer at NETL conducted electronic and hard copy file searches using the Appellant's name and the names of other individuals relevant to the particular request. The FOIA Officer also searched the eDiscovery (or Sharepoint) database, which allows access to all NETL personnel email. Subsequently, the FOIA Officer reviewed the results of the above searches to identify information responsive to the Appellant's requests. After concluding its review, NETL determined that it had searched all locations where responsive records may reside.

(Ex. 48) (internal citations omitted). After this Decision and Order, NETL performed a new search (for items 1 and 2) and issued a new determination letter. Plaintiff again appealed, which led to another Decision and

Order on March 29, 2018. In this Decision and Order, OHA described the search as follows for item 1:

NETL explained that it conducted a broader search and there was “no document that list[ed] the names of NETL personnel who initiated and were involved in the internal investigation.” NETL explained that the released documents, however, show an outline of the investigation and discuss the Management Directed Inquiry (MDI). NETL additionally provided our office with information regarding the additional search it conducted. NETL explained that on remand, it broadened the search of its electronic database to include the terms “MDI,” “investigation,” and “Manivannan.” This search revealed 46 pages of documents that were released to Appellant in their entirety.

(Ex. 53). OHA described the search as follows for item 2:

NETL explained that the Appellant has already received “a copy of the purchase requisition for the hiring of” the investigator, without redaction, in a previous release of documents, and NETL disclosed to the Appellant previously that no “written instructions” to the investigator exist.

Nonetheless, in order to ensure a thorough search, NETL searched its electronic database for the terms “Manivannan” and the first and last name of the investigator. NETL stated that it noticed that its files

utilized two different spellings of the investigator's first name. As such, NETL utilized both spellings in its search. NETL additionally searched the Equal Employment Opportunity (EEO) Office. NETL clarified that "there is nowhere else to look." This search produced 89 pages of documents.

Id. OHA found that the searches for the two previously-inadequate items — 1 and 2 — were adequate. Based on the description of the search conducted, this Court agrees. NETL "has conducted a search reasonably calculated to uncover all relevant documents." See Weisberg, 705 F.2d at 1351. In conclusion, Court finds that the search for Request 1070 was adequate. Exemptions will be discussed below.

B. NETL cured its violations for Requests 890 and 946 before Plaintiff filed suit.

Request 890

On April 12, 2017, Plaintiff filed Request 890. Guy Decl., ECF No. 62-1, at ¶ 40. Request 890 related to "eight categories of documents, the bulk of which pertained to email between NETL counsel and a Centre County Pennsylvania Assistant District Attorney." Id. (Ex. 22). Plaintiff argues that the information he received for Request 890 was deficient, that he exhausted his administrative remedies long ago, and that it would be futile to appeal at this point. ECF No. 50 at 10.

Guy worked with NETL's attorney to search for documents in response to Request 890. Guy Decl., ECF No. 62-1, at ¶ 41. They used search terms such as

“Penn State,” “Centre County,” “McGoran,” “Miller,” and “Hundt.” *Id.* She also searched for testimony involving “David Alman,” whom Plaintiff specifically named in his Request. *Id.* On May 19, 2017, NETL sent its initial determination letter to Plaintiff, with redacted records based on attorney work product and attorney-client privilege, under Exemption 5 of FOIA. *Id.* (Ex. 23).

On June 6, 2017, Plaintiff appealed the initial determination. *Id.* ¶ 42 (Ex. 24). He argued that NETL failed to release the video/audio tape records used during the investigation and requested additional information from his personnel file. *Id.* NETL agreed to issue a new determination letter including personnel file information, so OHA remanded the request on June 16, 2017. *Id.* (Ex. 25). On June 20, 2017, NETL sent Plaintiff his personnel file. *Id.* On August 7, 2017, NETL sent Plaintiff a new determination letter that included the previously redacted information. *Id.* (Ex. 26).

Request 890 was one of the consolidated requests. *Id.* ¶ 27. On August 7, 2017, OHA issued a Decision and Award finding that Plaintiff could not be assessed fees on four of the seven consolidated requests, including Request 890, because NETL did not respond to it within the 20-day response time required by FOIA. *Id.* ¶ 30. NETL then continued the search for Request 890. *Id.* ¶ 32.

On November 3, 2017, NETL issued a determination letter. *Id.* ¶ 43 (Ex. 27). On November 29, 2017, Plaintiff appealed, arguing that Exemption 5 did not apply and stating that all of NETL’s communications should be provided to him without redaction. *Id.* ¶ 44

(Ex. 28). He also asked for the video tape again. Id. On January 11, 2018, OHA remanded the decision to NETL, writing that the search was adequate but several redactions under Exemption 5 were improper. Id. ¶ 45 (Ex. 29). On January 25, 2018, NETL issued a second redetermination letter, releasing the previously redacted communications. Id. (Ex. 30).

On January 29, 2018, Plaintiff appealed. Id. ¶ 46 (Ex. 31). OHA dismissed the appeal after NETL agreed to withdraw its determination letter and issue another one. Id. (Ex. 32). On January 30, 2018, NETL issued another redetermination letter, releasing additional portions of previously redacted emails. Id. (Ex. 33). On January 31, 2018, Plaintiff appealed. Id. ¶ 47. He argued that all redacted information should be released and NETL was intentionally hiding information. Id. (Ex. 34). OHA dismissed the appeal because Plaintiff appealed before receiving the redetermination letter. Id. (Ex. 35). On February 27, 2018, NETL issued another redetermination letter. Id. (Ex. 36).

On March 1, 2018, Plaintiff appealed again. Id. ¶ 48 (Ex. 37). NETL withdrew the letter to issue a new one so it could correct several redactions and appropriately mark the exemptions, so OHA dismissed the appeal. Id. (Ex. 39). On March 8, 2018, NETL sent Plaintiff two corrected letters, sending the final determination on March 8, 2018, and releasing 157 pages of information. Id. (Ex. 38). Plaintiff never appealed the determination letter from March 8, 2018, and, therefore, failed to exhaust his administrative remedies. See id. NETL sent Plaintiff its most recent determination letter for Request 890 over a month before Plaintiff filed his

Amended Complaint. Because NETL “cured its violation before the person making the request” filed suit against NETL, constructive exhaustion does not apply. See Coleman, 714 F.3d at 820.

Request 946

On April 24, 2017, Plaintiff filed Request 946. Guy Decl., ECF No. 62-1, at ¶ 49 (Ex. 40). It included “14 categories of records pertaining to his personal belongings that he alleged were still on NETL property and emails regarding work he had done while employed by NETL and . . . records on NETL’s counsel arranging a visit for Dr. Manivannan and his supervisor to pick up his personal belongings.” Id.

On May 5, 2017, NETL sent Plaintiff its initial response to request 946 — “no records” — because Plaintiff’s request was for information, not actual records or documents. Id. ¶ 50 (Ex. 41). On May 22, 2017, Plaintiff appealed. Id. (Ex. 42). NETL agreed to withdraw its determination and issue a new one after conducting an additional search, so OHA dismissed the appeal as moot. Id. (Ex. 43). Then, Request 946 became one of the consolidated requests. Id. ¶ 27.

On August 7, 2017, OHA issued a Decision and Award, finding that Plaintiff could not be assessed fees on four of the seven consolidated requests, including Request 946, because NETL did not respond within 20 days. Id. ¶ 30. NETL continued the search for documents related to Request 946. Id. ¶ 32. NETL’s search relating to Request 946 included “contacting all NETL personnel named in Plaintiff’s requests, the security office, the property office, NETL’s counsel and searching electronically through all emails using eDiscovery.” Id. ¶ 51. On April 11, 2018, NETL sent a

redetermination letter to Plaintiff including approximately 689 pages with no redactions. *Id.* (Ex. 44). Plaintiff did not appeal to OHA, which closed Request 946. *Id.*

Plaintiff now argues that NETL provided a partial response, and it “was not made available until last week” (last week being the week before he filed his Amended Complaint). ECF No. 50 at 5. He argues that he exhausted his administrative remedies long ago. He cites concerns with the sufficiency of NETL’s responses. *Id.* Because Plaintiff has not appealed the most recent determination letter from NETL, he has failed to exhaust his administrative remedies. NETL “cured its violations by responding before the person making the request” filed suit against it, so constructive exhaustion does not apply. *See Coleman*, 714 F.3d at 820.

C. Requests 1069, 1268, 1284, 1347, 1348, 1759, and 78 were properly closed because Plaintiff failed to pay fees.

Request 1069

NETL received Request 1069 on May 12, 2017. *See* Guy Decl., ECF No. 62-1, at ¶ 18. It included “20 categories of documents related to emails of prior supervisor’s and management of Plaintiff pertaining to prior complaints Plaintiff had made during his employment.” *Id.*

Request 1069 was one of the consolidated requests. *Id.* ¶ 27. On August 7, 2017, OHA issued a Decision and Order finding that NETL must issue a revised search fee for three of the seven consolidated requests, including 1069. *Id.* ¶ 30 (Ex. 7). On September 22,

2017, NETL sent a new fee determination letter for Request 1069. *Id.* ¶ 31 (Ex. 8). NETL requested advanced payment of fees (based on an estimated \$5,000 in cost) within 30 days and advised that future requests would not be processed without payment of fees. *Id.* Plaintiff never tendered payment of fees for Request 1069. *Id.* As such, this Request was closed without NETL taking any action. *Id.* Guy avers that she “contacted Plaintiff several times when subsequent requests were received that his requests were on hold and any future requests would not be processed without the payment of fees” *Id.*

Plaintiff has not submitted any evidence to contradict Guy’s declaration as to the status of Request 1069. He argues that NETL announced a fee, Plaintiff requested a fee revision, NETL indicated that Plaintiff missed the deadline, and NETL closed the FOIA Request. ECF No. 50 at 19. Plaintiff argues, therefore, that he has the right to seek judicial review. *Id.* The Court finds that this argument fails to overcome the presumption of validity of Guy’s declaration. Plaintiff is not entitled to judicial review of Request 1069 because he has failed to pay the required fees.

Request 1268

NETL received Request 1268 on June 16, 2017. See Guy Decl., ECF No. 62-1, at ¶ 20. It included “six categories of records pertaining to the SF-50 documents prepared when he resigned his employment and about the MDI.” *Id.* Request 1268 was one of the consolidated requests. *Id.* ¶ 27. On August 7, 2017, OHA issued a Decision and Order finding that NETL

must issue a revised search fee for three of the seven consolidated requests, including 1268. Id. ¶ 30 (Ex. 7).

NETL sent Plaintiff a new fee determination letter on September 22, 2017, pursuant to OHA's order, estimating a cost of \$5,000 and "requesting advanced payment of processing fees within 30 days and advising that any further requests would not be processed without payment of fees." Id. ¶ 31 (Ex. 8). Plaintiff never paid the advanced fees for this request. Id. As such, Request 1268 was closed by NETL without taking any action. Id. Guy "contacted Plaintiff several times when subsequent requests were received" to notify him that his requests were on hold until he made his payments. Id.

Plaintiff argues that NETL announced a fee, Plaintiff requested a fee revision, NETL indicated that Plaintiff missed the deadline, and NETL closed the FOIA Request. ECF No. 50 at 20. Plaintiff argues, therefore, that he has the right to seek judicial review. Id. The Court finds that this argument fails to overcome the presumption of validity of Guy's declaration. Plaintiff is not entitled to judicial review of Request 1268 because he has failed to pay the required fees.

Request 1284

NETL received Request 1284 on June 19, 2017. Id. ¶ 21. It included "information pertaining to DOE HQ activities in this case." Id. Request 1284 was one of seven requests consolidated into a single request. Id. ¶ 27. As discussed above, Plaintiff removed Request 1284 from the consolidated group because it was more appropriately submitted to DOE HQ. Id. ¶ 28. On August 7, 2017, OHA issued a Decision and Order finding that NETL must issue a revised search fee for

three of the seven consolidated requests, including 1284. Id. ¶ 30 (Ex. 7).

On September 22, 2017, NETL sent a new fee determination letter for Request 7284. Id. 91 31 (Ex. 8). NETL requested advanced payment of fees within 30 days (based an estimated \$5,000 in cost) and advised that future requests would not be processed without payment of fees. Id. Plaintiff never tendered payment of fees for Request 1284. Id. As such, this Request was closed without NETL taking any action. Id. Guy avers that she “contacted Plaintiff several times when subsequent requests were received that his requests were on hold and any future requests would not be processed without the payment of fees” Id.

Plaintiff argues that he exhausted his administrative remedies long ago and has the right to seek “proper judicial review” of this Request. ECF No. 50 at 20. Plaintiff has not overcome the presumption of validity of Guy’s declaration. Plaintiff is not entitled to judicial review of Request 1070 because he has failed to pay the required fees.

Request 1347

NETL received Request 1347 on July 5, 2017. See Guy Decl., ECF No. 62-1, at ¶ 22. It included “16 categories of records pertaining to his criminal hearing in Centre County, Pennsylvania and again requested the video tape prepared by the contract investigator.” Id. Guy states that Plaintiff never paid his fees, resulting in the closure of Request 1347. Id. ¶ 70. Presumably, Guy is referring to Plaintiff’s failure to pay his fees for Requests 1069, 1268, and 1284. See id. ¶ 31 (Ex. 8). If Plaintiff had failed to pay his fee for those Requests, NETL was free to refuse to process

Request 1347 until that payment was made.⁶ Guy writes that despite Plaintiff's contentions, he never asked for any fee revision. Id. ¶ 71.

Plaintiff argues that he exhausted his administrative remedies long ago. ECF No. 50 at 16. He argues that NETL "is not in compliance with the Court Order for [this] FOIA request[]." Id. Plaintiff also argues that NETL "never issued a determination letter for [this] FOIA request[]." Id. He believes NETL misled the Court when NETL said that Plaintiff's appeal of the FOIA response was denied on October 22, 2017. Id. Plaintiff has failed to overcome the presumption of the validity of Guy's declaration. Plaintiff is not entitled to judicial review of Request 1347 because he has failed to pay fees.

Request 1348

NETL received Request 1348 on July 6, 2017. See Guy Decl., ECF No. 62-1, at ¶ 23. It included "eight categories of records pertaining to the NETL director, her assigned duty station, and procedures for sending certified mail to the Director." Id. Guy states that Plaintiff never paid his fees, resulting in the closure of Request 1348. Id. ¶ 70. Presumably, Guy is referring to Plaintiff's failure to pay his fees for Requests 1069,

⁶ See 28 C.F.R. § 16.10(i)(3) ("Where a requester has previously failed to pay a properly charged FOIA fee to any component or agency within 30 calendar days of the billing date, a component may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the component may require that the requester make an advance payment of the full amount of any anticipated fee before the component begins to process a new request or continues to process a pending request or any pending appeal.").

1268, and 1284. See *id.* ¶ 31 (Ex. 8). If Plaintiff had failed to pay his fee for those Requests, NETL was free to refuse to process Request 1348 until that payment was made.⁷ Guy writes that despite Plaintiff's contentions, he never asked for any fee revision. *Id.* ¶ 71.

Plaintiff argues that he exhausted his administrative remedies long ago. ECF No. 50 at 16. He also argues that NETL "is not in compliance with the Court Order for [this] FOIA request[]." *Id.* Plaintiff argues that NETL "never issued a determination letter for [this] FOIA request[]." *Id.* He believes NETL misled the Court when NETL stated that Plaintiff's appeal of the FOIA response was denied on October 22, 2017. *Id.* Plaintiff has failed to overcome the presumption of the validity of Guy's declaration. Plaintiff is not entitled to judicial review of Request 1348 because he has failed to pay fees.

Requests 1759 and 78

Guy states that NETL did not issue determination letters for these Requests because Plaintiff failed to pay fees. *See* Guy Decl., ECF No. 62-1, at ¶ 72. Guy avers that she "sent several emails explaining that no determination letter would be sent without a payment of fees." *Id.* (Ex. 66). She also says that the requests "were not requests for documents that existed." *Id.* (Ex. 65).

Plaintiff argues that he exhausted his administrative remedies long ago for these Requests. ECF No. 50 at 16. He also argues that NETL "is not in compliance

⁷ See *supra* n. 6

with the Court Order for these FOIA requests.” Id. Plaintiff argues that NETL “never issued a determination letter for these FOIA requests.” Id. NETL, he says, misled the Court when NETL stated that Plaintiff’s appeal of the FOIA response was denied on October 22, 2017. Id. Plaintiff has failed to overcome the presumption of the validity of Guy’s declaration. Plaintiff is not entitled to judicial review of Requests 1759 and 78 because he has failed to pay fees.

D. NETL properly applied Exemptions 5 and 6.

The only exemptions applied by NETL are Exemptions 5 and 6. Further, as discussed above, the only FOIA Requests for which exemptions are relevant to the Court’s analysis are 833 and 1070., In Guy’s Declaration, she explains her application of Exemption 5, Deliberate Process Privilege:

The information withheld under Exemption 5 of the deliberative process privilege consists of email chain discussions and internal deliberations on potential agency action regarding discipline and personnel actions that resulted from the Management Directed Inquiry (MDI). The release of such information release would have a chilling effect on the ability of NETL staff to have open and frank discussions and to make decisions on how to proceed and the appropriate and necessary agency actions resulting from the findings of the investigation.

The information redacted and withheld pursuant to Exemption 5 under the

deliberative process privilege has been reviewed to ensure that all reasonably segregable information have been released to Plaintiff. Information contained in the withheld portions of documents was determined to be inextricably intertwined with the privileged information and could not be reasonably segregated to be released under the FOIA from the deliberative material.

See Guy Decl., ECF No. 62-1, at ¶¶ 9, 10. She states the following about Exemption 5, Attorney Client Privilege:

The withheld information consists of legal advice sought by supervisors, managers, and other personnel regarding compliance with the investigation process and attendance at the hearing of the plaintiff. The disclosure of the attorney-client communications would deprive NETL staff of the benefit of confidential advice from NETL attorneys in legal matters and agency decision-making and would have a chilling effect on the ability of staff to have open and frank discussions with the attorneys.

The information redacted and withheld pursuant to Exemption 5 under the attorney-client privilege has been reviewed to ensure that all reasonably segregable information in the documents has been released from the documents to Plaintiff.

Id. ¶¶ 11, 12. Last, she explains her application of Exemption 6, Personal Privacy:

The information withheld pursuant to this Exemption consists of private individuals' names. Access to this withheld information would violate the privacy interest of the subject of the information and the private harm would outweigh any public gain from disclosure.

The information redacted and withheld pursuant to Exemption 6 has been reviewed to ensure that all reasonably segregable information in the documents has been released from the documents to Plaintiff.

Id. ¶¶ 13, 14. These statements are nonconclusory and relatively detailed explanations of the claimed exemptions. Plaintiff has not produced any contradictory evidence of bad faith. Therefore, the Court finds that the exemptions are proper, and an in camera inspection of the contested documents is unnecessary.

Additional Information from Ann Guy

Guy writes that “[m]ost of the documents responsive Plaintiff’s FOIA request (if not all), including the entire redacted investigation file, were provided to . . . Plaintiff’s counsel as part of discovery in a personnel action initiated by the Agency.” Id. ¶ 57. Further, Guy states that “affidavits by two of Plaintiff’s co-workers were provided to Plaintiff documenting the [personal] property that was returned to him.” Id. ¶ 58. Plaintiff was also provided photographs and security logs. Id.

Guy searched emails of all employees in her attempts to respond to Plaintiff's requests. Id. ¶ 59.

Guy writes that she generally reaches out to requesters in order "to get a better understanding of the scope of the documents being requested." Id. ¶ 60. She "tried several times to contact the Plaintiff for clarification or narrowing of his requests, but he did not respond to any of [her] efforts to discuss his requests with him." Id. (Ex. 55). The only exemptions applied to any documents were exemptions 5 and 6. Id. ¶ 61. OHA offered guidance to NETL through this process by asking questions for clarification and offering guidance, for example, as to search terms. Id. ¶ 62 (Ex. 56).

Guy further avers that documented evidence of communications between DOE's counsel and Centre County officials, which was originally redacted under attorney-client privilege, was later released to Plaintiff. Id. ¶ 63. As to Plaintiff's repeated requests for the video tape, the video tape was created and used by the investigator. Id. ¶ 64. When NETL reached out to request the video tape, NETL was told that the tape was destroyed after transcription of the investigation and that this was a normal business practice. Id. The investigator submitted an affidavit stating as much. (Ex. 57).

Guy avers that Plaintiff asked NETL to "confirm or deny" information and also sent NETL interrogatories. Id. ¶ 65. As Guy explains, this is not how FOIA operates, as FOIA is a tool for individuals to retrieve existing government documents. Id. Nonetheless, Guy conducted searches for documents that were

potentially responsive and “released documents that he had not specifically requested but might help him answer some of his questions.” *Id.* Guy also writes that Requests 1347, 1348, 1069, 1268, and 1284, while not addressed due to failure to pay fees, were “almost entirely repetitive” of other Requests. *Id.* ¶ 70.

V. CONCLUSION

Most of the FOIA Requests at issue were properly closed based on Plaintiff’s failure to pay fees (1069, 1268, 1284, 1347, 1348, 1759, and 78). NETL cured its violations for two others before Plaintiff filed suit against it (890 and 946), so Plaintiff failed to exhaust his administrative remedies. Finally, as to the remaining Requests (833 and 1070), NETL performed an adequate search, and any exemptions applied were proper. NETL has in good faith produced a nonconclusory and relatively detailed affidavit indicating the same. Plaintiff has failed to demonstrate a material issue by producing evidence contradicting the adequacy of the search or suggesting bad faith. NETL is entitled to judgment as a matter of law.

For the reasons discussed above, the R&R is **ADOPTED IN PART** [ECF No. 79], to the extent consistent with this Memorandum Opinion and Order; Defendant’s Motion for Summary Judgment is **GRANTED** [ECF No. 61]; Plaintiff’s Note and Clarification, construed as a Motion to Compel, is **DENIED AS MOOT** [ECF No. 60]; and this action is **DISMISSED WITH PREJUDICE** and **STRICKEN** from the Court’s active docket.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Memorandum Opinion and Order to counsel of record and the pro se Plaintiff via certified mail, return receipt requested.

DATED: September 30, 2019

THOMAS S. KLEEH
UNITED STATES DISTRICT JUDGE