UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLOR OF CHANGE and CENTER FOR CONSTITUTIONAL RIGHTS, Plaintiffs, -v- UNITED STATES DEPARTMENT OF HOMELAND SECURITY, and FEDERAL BUREAU OF INVESTIGATION, Defendants.	16 Civ. 8215 (WHP)

DEFENDANT DEPARTMENT OF HOMELAND SECURITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2663/2721
Fax: (212) 637-2686
jennifer.jude@usdoj.gov
tomoko.onozawa@usdoj.gov

JENNIFER JUDE
TOMOKO ONOZAWA
Assistant United States Attorneys, *Of Counsel*

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Defendant United States Department of Homeland Security ("DHS"), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its cross motion for partial summary judgment and in opposition to plaintiffs Color of Change and Center for Constitutional Rights' (jointly "Plaintiffs") motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

This action concerns a Freedom of Information Act ("FOIA") request in which Plaintiffs sought information about certain Movement for Black Lives ("MBL") protests from DHS and the Federal Bureau of Investigation. The only issue raised in these cross motions for partial summary judgment is whether the Office of Intelligence and Analysis ("I&A"), a component of DHS that analyzes trends in terrorism, including domestic terrorism, for use by the U.S. Intelligence Community, properly withheld information from nine documents. Those documents are (i) eight draft versions of an intelligence assessment (the "proposed intelligence assessment" or the "drafts"), which I&A withheld in full under Exemption 5, and in part under Exemptions 3 and 6, and (ii) a cover email dated March 3, 2017 (the "March 3 email" or the "email") circulating one of the drafts among I&A personnel, which I&A withheld in part under Exemptions 5 and 6.

In their motion for summary judgment, Plaintiffs argue that DHS has not sufficiently justified the basis for these claimed exemptions nor its position that there is no non-exempt information that is reasonably segregable such that it can be produced. *See* Mem. of Law in Support of Plaintiffs' Motion for Summary Judgment Granting Access to Defendant Department of Homeland Security "Race Paper" (Dkt. No. 55) ("Pls.' Br."), at 13-21. Plaintiffs further argue that that Court should order DHS to release the full email, the final draft version of the proposed

intelligence assessment, and any segregable non-exempt portions of the other draft versions. *See id.* at 21.

The Court should grant summary judgment in DHS's favor and uphold its exemptions, each of which is supported by the accompanying Declaration of Arthur R. Sepeta, dated April 18, 2018 (the "Sepeta Declaration" or "Sepeta Decl."). In that declaration, Mr. Sepeta, the Chief of the Privacy and Intelligence Oversight Branch of I&A, satisfies the agency's obligations to provide detailed descriptions of the withheld information under *Vaughn v. Rosen*, 484 F.2d 820. 826-28 (D.C. Cir. 1973). As he explains, the draft intelligence assessments, all but one of which was entitled "Growing Frequency of Race-Related Domestic Terrorist Violence," assess trends in recent violent, terroristic acts that were driven by race-related extremist ideologies. Sepeta Decl. ¶ 22. Each of the drafts is incomplete and contains comments, edits, and other notations that were part of I&A's intelligence assessment review process. *Id.* ¶ 31. The draft assessments were prepared primarily by an I&A intern and an I&A analyst. *Id.* No final version of the assessment was ever produced because I&A chose not to finalize it and cancelled the project before it had gone through I&A's full review process. *Id.* ¶ 32.

The Court should uphold DHS's decision to withhold each of the drafts in full and a portion of the email giving feedback on one of the drafts under Exemption 5 because these records are covered by the deliberative process privilege, a civil discovery privilege that protects the integrity of executive branch decisionmaking. *See infra* at Argument Part B. These records easily satisfy that privilege's two criteria as they are both "predecisional" and "deliberative." They are predecisional because they were prepared to assist the agency in deciding whether to publish a final intelligence assessment on certain developing trends in violence and domestic terrorism. They are deliberative because, as drafts that include preliminary assessments of junior

I&A employees and their comments and edits, they are part of the process by which the government arrives at policies and they reflect the views of the authors rather than the final position of the agency. I&A properly determined that no portion of the drafts is segregable because the successive revisions themselves show I&A's deliberations; the portions of the drafts that contain descriptions of particular incidents of domestic terrorism are inextricably intertwined with I&A's evaluations of those incidents and thus are also protected. Sepeta Decl. ¶¶ 34, 37.

This Court should also uphold I&A's decision to withhold portions of the challenged records that concern intelligence sources and methods under Exemption 3, because two exemption statutes vest I&A, as an element of the U.S. Intelligence Community, with broad authority to protect its sources of intelligence information from unauthorized disclosure. *Id.* ¶¶ 40-42. The material redacted under Exemption 3 contains, among other things, intelligence information that was acquired, developed, and utilized by I&A as a member of the Intelligence Community, *id.* ¶¶ 43-46, and as such, falls within the scope of the exemption statutes invoked by I&A. *See infra* at Argument Part C.

Additionally, this Court should also uphold I&A's determination to withhold the names, phone numbers, and email addresses of I&A personnel identified in the March 3 email, and the initials of I&A personnel who reviewed, revised, and edited the draft intelligence assessments under Exemption 6. Sepeta Decl. ¶ 49-50. Not only do the March 3 email and the draft intelligence assessments qualify as "similar files" for purposes of Exemption 6, but the I&A personnel identified in those records have a substantial privacy interest in nondisclosure. *Id.* ¶ 50. Disclosing the identities and related identifying information of I&A personnel would not shed light on I&A operations and activities and therefore would not serve any legitimate public interest. *Id*. *See infra* at Argument Part D.

Finally, no *in camera* review is necessary here where the agency has provided a detailed *Vaughn* declaration describing the at-issue records and the basis for each exemption. *See infra* at Argument Part E. Accordingly, this Court should grant summary judgment in DHS's favor.

BACKGROUND[1]

A. Plaintiffs' FOIA Request

On July 5, 2016, Plaintiffs submitted a FOIA request to DHS that sought various categories of records related to recent protests in certain U.S. cities concerning MBL. Sepeta Decl. ¶ 10 & Ex. A. Although Plaintiffs characterize their FOIA request as "seeking records related to federal government surveillance and monitoring of protest activities related to MBL," Pls.' Br. at 8, the FOIA request sought a broader range of records. It included, for example, requests for all "[c]ommunications . . . between the FBI and DHS and state and local enforcement entities in the [relevant] jurisdictions . . . relating to the Relevant Protests" and for all "[c]ommunications, and records, such as memos, policies, protocols, manuals, talking points, or threat assessments, relating to the Relevant Protests." Sepeta Decl. Ex. A at 5-6.

DHS acknowledged Plaintiffs' FOIA request and it was referred to I&A (as well as other components of DHS not relevant here) to process and respond directly to Plaintiffs. *Id.* ¶¶ 11-12; Exhibit B. After I&A conducted a search it informed Plaintiffs that it was "unable to locate or identify any responsive records" and Plaintiffs filed an administrative appeal. *Id.* ¶¶ 13-14; Exhibit C. On October 20, 2016, while that administrative appeal was pending, Plaintiffs filed this action. *Id.* ¶¶ 15-16.

[1] Because Plaintiffs challenge only I&A's withholdings of information in the draft intelligence assessments and March 3 email, only the background relevant to I&A and these documents is presented here.

B. I&A's Production of Responsive Documents and the Withheld Information

During the course of this litigation I&A conducted additional searches of its records and made six rounds of production in accordance with the agreement of the parties and guidance of the Court. *Id.* ¶ 17. I&A withheld in full, however, eight draft versions of a proposed intelligence assessment under FOIA Exemption 5, and withheld discrete portions of those eight drafts pursuant to Exemptions 3 and 6. *Id.* ¶ 20. I&A also withheld in part the March 3 email under Exemptions 5 and 6. *Id.*

C. DHS's Draft *Vaughn* Index

On January 9, 2018, at the same time that I&A made its final production to Plaintiffs, it also provided them with a copy of a preliminary draft *Vaughn* index that provided a description of the intelligence assessment drafts, the cover email, and several other withheld records. *Id.* ¶ 21. The draft index was produced by the agency in response to Plaintiffs' request for additional information about certain records from I&A productions for purposes of settlement discussions. *Id.* The agency provided the draft index in an attempt to narrow the parties' dispute in this case and the index, which displayed a "DRAFT" watermark across each page, *see* Declaration of Omar Farah dated Mar. 19, 2018 (Dkt. No. 56), Ex. 8, was not intended to provide I&A's complete description of the documents or its justification for withholding. Sepeta Decl. ¶ 21. Nor does I&A rely upon that draft and preliminary *Vaughn* index to support its withholdings in this summary judgment motion. Rather, the agency relies solely on the Sepeta Declaration, which provides the full and complete description of the documents and the bases for their withholding.

D. The At-Issue Records

The Sepeta Declaration provides detailed information about the records whose exemptions Plaintiffs challenge—the eight drafts of the proposed intelligence assessment and the

March 3 email. As the declaration explains, as part of I&A's statutory mission of analyzing trends in terrorism affecting the United States, including domestic terrorism, it creates intelligence products that are used to inform the positions of policymakers and law enforcement operators. Sepeta Decl. ¶¶ 22, 30. The drafts are successive iterations of a proposed, but never finalized, intelligence assessment that surveyed terroristic acts related to race-related extremist ideologies and discussed indicators of terrorism and preparations for terroristic violence. *Id.* ¶¶ 22, 23. The first draft version is entitled "(U//FOUO) Race-Related Domestic Terrorism Incidents Likely to Continue in 2017," but the name was changed in the editing process to "(U//FOUO) Growing Frequency of Race-Related Domestic Terrorist Violence," which remained the title for the other seven drafts.[2] *Id.* ¶ 22. As emails produced to Plaintiffs show, I&A personnel who circulated and discussed the drafts termed it "Race Paper" as a shorthand. *Id.* ¶¶ 22, 25. The proposed intelligence assessment considers how violent ideological actors coopt peaceful political activity and mass gatherings and does not speak to any surveillance operations at all, let alone surveillance of constitutionally-protected or other political demonstrations. *Id.* ¶ 23.

The drafts are preliminary versions of what was intended to become a final intelligence product, but one that I&A chose not to adopt or publish; instead, a decision was made to cancel the project before the proposed intelligence assessment could be finalized. *Id.* ¶¶ 27, 32, 36. Each of the drafts was incomplete, most are undated, and all include comments, edits, and other notations that were part of I&A's robust intra-agency review process. *Id.* ¶ 31. The majority of the drafts were prepared by an I&A intern and an I&A analyst, and the drafts reveal the back-and-forth edits, questions, and thorough comments of those authors and their team lead, also an

[2] "U//FOUO" stands for "Unclassified // For Official Use Only." Sepeta Decl. ¶ 22.

analyst. *Id.* Within the division, the proposed intelligence assessment only went through part of I&A's editorial review process and was not close to finalization when it was cancelled. *Id.* ¶ 32. Ultimately, no final product was created, approved, or released because, upon review and consideration by mid-level supervisors in response to substantive methodological concerns raised by a tradecraft standards reviewer, I&A chose not to complete, publish, or otherwise adopt the proposed intelligence assessment. *Id.*

The March 3 email is entitled "RE: (U//LES) Race Paper for First Level Review."[3] *Id.* ¶ 25. This email was sent by an I&A senior analyst to the I&A intern and I&A analyst who jointly authored the proposed intelligence assessment. *Id.* This email, which attached one of the drafts of the proposed intelligence assessment, includes the senior analyst's feedback in reviewing the draft product for the first time. *Id.* The feedback section of the email was withheld pursuant to Exemption 5 and the names, phone numbers, and email addresses of the sender and recipients were withheld pursuant to Exemption 6. *Id.* ¶ 49. Contrary to Plaintiffs' assertion in their brief, Pls.' Br. at 7, no professional titles were redacted as the email contains none. Sepeta Decl. ¶ 49.

ARGUMENT

THE COURT SHOULD GRANT SUMMARY JUDGMENT TO DHS BECAUSE THE AGENCY HAS DEMONSTRATED THAT THE WITHHELD INFORMATION IS EXEMPT FROM DISCLOSURE UNDER FOIA

A. Summary Judgment Standard

FOIA was enacted to "ensure an informed citizenry, . . . needed to check against corruption and hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). At the same time, FOIA exempts nine categories of

[3] "U//LES" stands for "Unclassified // Law Enforcement Sensitive." Sepeta Decl. ¶ 22.

information from disclosure, while providing that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection." *Id.* § 552(b). FOIA thus "calls for broad disclosure of [g]overnment records, while maintaining a balance between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Associated Press v. U.S. Dep't of Justice*, 549 F.3d 62, 64 (2d Cir. 2008) (citations and internal quotation marks omitted); *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003).

Summary judgment pursuant to Federal Rule of Civil Procedure 56 is the procedural vehicle by which most FOIA actions are resolved. *See, e.g.*, *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Id.* (footnote omitted); *see also Halpern v. Federal Bureau of Investigation*, 181 F.3d 279, 291 (2d Cir. 1999) (same). Although this Court reviews *de novo* the agency's determination that requested information falls within a FOIA exemption, *see* 5 U.S.C. § 552(a)(4)(B); *Halpern*, 181 F.3d at 287, the declarations submitted by the agency in support of its determination are "accorded a presumption of good faith," *Carney*, 19 F.3d at 812 (citation and internal quotation marks omitted). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 315 (S.D.N.Y. 2012) (quoting *Wilner v. National Security Agency*, 592 F.3d 60, 73 (2d Cir. 2009)).

B. The Draft Intelligence Assessments and Email Discussion of One of the Drafts Are Exempt From Disclosure Under FOIA Exemption 5

I&A has properly invoked FOIA's Exemption 5 with respect to each of the draft intelligence assessments as well as the portion of the March 3 email that provides feedback on one of the drafts. Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). That language "incorporate[s] . . . all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991); *accord Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules . . . are protected from disclosure under Exemption 5." *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002) (citation omitted).

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84. Protecting such processes is important to good government because "those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) (quotation marks omitted, ellipsis in original); *accord Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (noting that "officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news . . . .").

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent.*, 166 F.3d at 482

(citations omitted). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Grumman*, 421 U.S. at 184. While a document is predecisional if it "precedes, in temporal sequence, the 'decision' to which it relates," *Grand Cent.*, 166 F.3d at 482, the government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record, *Sears*, 421 U.S. at 151 n.18; *accord Tigue*, 312 F.3d at 80. So long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Tigue*, 312 F.3d at 80. This category of material includes "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Grand Cent.*, 166 F.3d at 482 (internal quotation marks omitted).

"A document is 'deliberative' when it is actually related to the process by which policies are formulated." *Id.* (quotation marks and alteration omitted). In determining whether a document is deliberative, courts inquire whether it "formed an important, if not essential, link in [the agency's] consultative process," whether it reflects the opinions of the author rather than the policy of the agency, and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]." *Id.* at 483; *accord Hopkins*, 929 F.2d at 84. Predecisional deliberative documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Tigue*, 312 F.3d at 80 (quotation marks omitted).

The drafts of the proposed intelligence assessment and the March 3 email are protected by the deliberative process privilege because they are predecisional and deliberative. Draft documents represent an iterative stage of the government's process of creating a final document, in this case a finalized intelligence assessment. It is for this reason that "[d]raft documents, by

their very nature, are typically predecisional and deliberative." *NAACP Legal Defense & Educ. Fund, Inc. v. U.S. Dep't of Housing*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *11 (S.D.N.Y. Nov. 30, 2007); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 843, 866 (D.C. Cir. 1980) (recognizing that draft documents fall within scope of deliberative process privilege); *Grand Cent.*, 166 F.3d at 482; *Moreland Properties, LLC v. City of Thornton*, 07-cv-00716, 2007 WL 2523385, at *3 (D. Colo. Aug. 31, 2007); *Van Aire Skyport Corp. v. FAA*, 733 F. Supp. 316, 321 (D. Colo. 1990); *see also, e.g.*, *ACLU v. U.S. Dep't of Justice* ("*ACLU I*"), 844 F.3d 126, 133 (2d Cir. 2016) (various types of drafts protected); *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 183-84 (3d Cir. 2007) (draft incident report); *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993) (draft letters); *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987) (draft of agency historical manuscript protected as deliberative); *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048-49 (D.C. Cir. 1982) (same). Further, suggested revisions, comments, or opinions expressed about a draft are no less predecisional and deliberative than the actual text of the draft. *Robert v. Dep't of Health & Human Servs.*, No. 01-CV-4778 (DLI), 2005 WL 1861755, at *4 (E.D.N.Y. Aug. 1, 2005), *aff'd*, 217 F. App'x 50 (2d Cir. 2007).

Plaintiffs argue that draft documents are not *per se* exempt under the deliberative process privilege. Pls.' Br. at 17-18. I&A does not claim that all drafts are automatically entitled to protection, regardless of the nature of the document. But courts have almost uniformly held that drafts of documents that reflect internal, ongoing deliberations as to an issue of policy qualify for protection under the privilege. *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 518 (S.D.N.Y. 2010) (because drafts "'reflect only the tentative view of their authors[,] views that might be altered or rejected upon further deliberation either by their authors or by superiors,'" such

documents "'by their nature are typically predecisional and deliberative'" (quoting *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983)); *MacNamara v. City of New York*, 249 F.R.D. 70, 78 (S.D.N.Y. 2008) (drafts are "typically" covered by deliberative process privilege); *Nat'l Council of La Raza v. Dep't of Justice*, 339 F. Supp. 2d 572, 583 (S.D.N.Y. 2004) ("Drafts and comments on documents are quintessentially predecisional and deliberative."); *Hornbostel v. U.S. Dep't of Interior*, 305 F. Supp. 2d 21, 31 (D.D.C. 2003) (holding that draft documents that "contain the opinions and suggested changes of federal officials" were privileged), *aff'd*, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); *Hamilton Sec. Group, Inc. v. Dep't of Hous. & Urban Dev.*, 106 F. Supp. 2d 23, 31 (D.D.C. 2000) ("[A] draft document is the type of subjective document that reflects the personal opinion of the writer rather than the policy of the agency."); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782 (D.D.C. 1993) ("[T]he disclosure of such draft documents would undercut the openness of decision-making embodied by Exemption 5.").

The declaration submitted by I&A provides exactly the type of linkage between the drafts and email at issue and the formation of policy that has been found sufficient to support a withholding on deliberative process grounds. The drafts at issue here are clearly predecisional. The documents temporally precede any decision as to whether to adopt and issue a final intelligence assessment, as well as the form any such intelligence assessment should take. Sepeta Decl. ¶ 33; *see Grumman*, 421 U.S. at 184.

The drafts of the proposed intelligence assessment are deliberative because they reflect the give-and-take that is part of the process by which government decisions and policies are formed. *See Coastal States Gas Corp.*, 617 F.2d at 866; *Electronic Frontier Foundation v. U.S. Dep't of Justice*, 890 F. Supp. 2d 35, 53 (D.D.C. 2012). Developing intelligence products,

particularly in the field of terrorism, is a core I&A mission, and I&A's intelligence products contain I&A's key judgments and assessments that are intended to inform the positions of policymakers and law enforcement operators. Sepeta Decl. ¶ 30. In the instant case, I&A was considering whether to issue an assessment to assist various actors in the Intelligence Community in arriving at decisions about law enforcement responses to violence and domestic terrorism, important policy-oriented judgments, as well as what form such an analysis should take. *Id*. ¶¶ 30, 33. To make that determination, I&A subjects draft intelligence assessments to an oversight office review, and then several levels of production review before finalizing them. *Id.* ¶ 32.

The drafts and the portion of the March 3 email that have been withheld pursuant to Exemption 5 constitute an essential part of that consultative process. The drafts, for example, include comments, line edits, and other notations that are part of I&A's robust review process and that demonstrate the exchange of ideas and suggestions related to I&A's preliminary intelligence assessments. *Id.* ¶¶ 31, 33. Further, the drafts reflect the opinions of their primary authors—an intern and an analyst, both of whom lacked final decision-making authority for the agency, *id.* ¶ 31—not any policy or final position of I&A. *See Grand Cent.*, 166 F.3d at 483; *Tigue*, 312 F.3d at 80. Indeed, the drafts constitute recommendations from a subordinate prepared for review by a superior, a type of communication that is "characteristic of the deliberate process." *Nat'l Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 752 (S.D.N.Y. 2011). The drafts are also deliberative because their release would "reflect inaccurately upon or prematurely disclose the views of [the agency]," as they made it only partway through I&A's review process before being cancelled,

Sepeta Decl. ¶ 32, and thus do not reflect the final, approved views of the agency. *Grand Cent.*, 166 F.3d at 483; *accord Hopkins*, 929 F.2d at 84.

The portion of the March 3 email redacted pursuant to Exemption 5, which provides feedback on one of the intelligence assessment drafts, is simply an outgrowth of the drafts themselves. The redacted passage consists of five sentences in which an analyst discusses the draft attached to the email and highlights some of the feedback separately provided in edits and comments in that draft. Sepeta Decl. ¶ 38. These sentences are predecisional for the same reasons that the drafts themselves are—they are part of the process of drafting a proposed intelligence assessment that was designed to guide policymakers. *See Robert*, 2005 WL 1861755, at *4. Similarly, the redacted sentences are deliberative because, like the drafts, they contain comments and recommendations about the intelligence assessment product and are part of the exchange of ideas that characterizes government decisionmaking. Sepeta Decl. ¶ 38

Withholding the drafts and the redacted portion of the email is necessary to protect the integrity of I&A's deliberative process. *See Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984); *see also Hopkins*, 929 F.2d at 84 (privilege "protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions"). Public disclosure of drafts of preliminary intelligence analyses and recommendations could reasonably be expected to inhibit I&A's decisionmaking process, as agency officials and their advisors would be less inclined to provide their frank written recommendations. *See Marzen v. Dep't of Health & Human Servs.*, 825 F.2d 1148, 1155 (7th Cir. 1987). As the Sepeta Declaration sets forth, there is reason to expect that compelled disclosure of this material would chill the candid and frank communications necessary for effective governmental decisionmaking at I&A. *See* Sepeta Decl. ¶ 35.

Plaintiffs suggest that if no subsequent version of the draft paper was ever prepared, then the last draft is "functionally the final iteration of I&A's report," and should be disclosed. Pls.' Br. at 18. This is not the case. The fact that I&A never produced a final intelligence assessment does not transform a draft into a final statement of the agency's position. Indeed, both the Second Circuit and the D.C. Circuit have rejected this very argument. In *ACLU I*, for example, the Second Circuit held that a draft of an op-ed article that suggested ways to publicly explain the government's legal reasoning in support of drone strikes was protected by the deliberative process privilege, notwithstanding that no final version of the op-ed was ever published. 844 F.3d at 133. The Second Circuit held that such a document "is a draft and for that reason predecisional," and "need not be disclosed." *Id.*

The D.C. Circuit explained why such an argument was unavailing:

> [T]he FOIA requester points out that there was no final [document]. That is true, but we do not see the relevance of the point. There may be no final agency document because a draft died on the vine. But the draft is still a draft and thus still pre-decisional and deliberative. A Presidential speechwriter may prepare a draft speech that the President never gives. A Justice Department aide may give the Attorney General a draft regulation that the Attorney General never issues. Those kinds of documents are no less drafts than the drafts that actually evolve into final Executive Branch actions. Moreover, the writer does not know at the time of writing whether the draft will evolve into a final document. But the writer needs to know at the time of writing that the privilege will apply and that the draft will remain confidential, in order for the writer to feel free to provide candid analysis. A privilege contingent on later events—such as whether the draft ultimately evolved into a final agency position—would be an uncertain privilege, and as the Supreme Court has said, an uncertain privilege is "little better than no privilege at all."

National Sec. Archive v. CIA, 752 F.3d 460, 463 (D.C. Cir. 2014) (internal citations omitted).

Plaintiff cites to Judge Hellerstein's opinion in *ACLU v. Dep't of Defense*, 15 Civ. 9317 (AKH), 2017 WL 4326524, at *16 (S.D.N.Y. Sept. 27, 2017), as support for the argument that if no final version of a document exists, the final version of the draft should be disclosed under

FOIA. Pls.' Br. at 18. As an initial matter, Judge Hellerstein's ruling does not sweep so broadly. His decision was issued in the specific context of draft agency histories. More importantly, however, this decision is fundamentally flawed. Judge Hellerstein explicitly decided not to follow either the Second Circuit's holding in *ACLU I* or *National Security Archive*, on the ground that he found their reasoning unpersuasive. 2017 WL 4326524 at *15 (stating that the Second Circuit's decision in *ACLU I* "contained no substantive analysis of the deliberative process privilege"). Yet Judge Hellerstein was bound by the Second Circuit's decision in that matter, as is this Court. This Court should therefore adhere to binding precedent, and reject Plaintiffs' argument.[4]

The argument that the public is entitled to a draft of a non-final document is particularly unpersuasive in the present context. As explained in the Sepeta Declaration, there was no subsequent version of the proposed intelligence assessment prepared because I&A made a deliberate decision not to move forward with this project, largely because of substantive methodological concerns that had been raised. Sepeta Decl. ¶¶ 27, 32, 34. Disclosing this document therefore would cause precisely the harms that the deliberative process was designed to prevent, including misleading and confusing the public regarding the agency's position. *Tigue*, 312 F.3d at 76.

Plaintiffs also invoke caselaw discussing the express adoption doctrine. Pls.' Br. at 18. Yet that doctrine is inapplicable here. Documents that fall within the deliberative process privilege may lose their protection under Exemption 5 if they have been expressly "adopted,

[4] Because the government disagrees with Judge Hellerstein's ruling on this issue and believes it is in conflict with binding Second Circuit precedent, reconsideration was sought on this ground, among others in *ACLU I*. A final decision on that motion has not yet been entered on the docket. Thus, because no final judgment has been entered, the government has not yet had an opportunity to assess whether it will appeal from that decision.

formally or informally, as the agency position on an issue or [are] used by the agency in its dealings with the public." *Brennan Center for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 195 (2d Cir. 2012) (internal quotation marks omitted) (alteration in original). That is not the case here, however. As stated above, the evaluations and analyses in the drafts were not adopted by I&A, published within the agency, or disseminated beyond it. Sepeta Decl. ¶ 32. To the contrary, far from adopting the drafts, the agency made a decision not to finalize the proposed intelligence assessment due to substantive concerns raised regarding its methodology, data selection, and assessment quality. *Id.* ¶¶ 32, 34. As Plaintiffs can point to no evidence that the drafts have been adopted by the agency, the express adoption doctrine is not implicated. *See La Raza*, 411 F.3d at 359 ("[T]here must be evidence that an agency has *actually* adopted or incorporated by reference the document at issue; mere speculation will not suffice.") (emphasis in original).

Finally, I&A has properly determined that the drafts must be withheld in full because there is no reasonably segregable non-exempt portions in them. Sepeta Decl. ¶¶ 33-34, 37. The successive versions of the draft intelligence product include incremental revisions that show an evolution of thinking that is itself deliberative. *Id.* Although the drafts contain sections that describe specific incidents of domestic terrorism, the selection of which incidents to include and the inclusion of certain factual information and issues in the descriptions of those incidents reflects I&A's analysis and evaluation and is itself deliberative and thus exempt. *Id.* ¶¶ 34, 37. There is no purely factual material in the drafts that is "severable from its context" such that it can be segregated and released. *Grand Cent.*, 166 F.3d at 482 (quoting *EPA v. Mink*, 410 U.S. 73, 87-88 (1973)); *see Tigue*, 312 F.3d at 82 (upholding withholding of factual material where it "is too intertwined with evaluative and policy discussions to require disclosure").

C. The Intelligence Sources and Methods Described in the Draft Intelligence Assessments are Exempt From Disclosure Under FOIA Exemption 3

I&A has also properly invoked Exemption 3, under which matters "specifically exempted from disclosure" by certain statutes are exempt from disclosure under FOIA. 5 U.S.C. § 552(b)(3). Under an Exemption 3 analysis, the Court need only determine whether the claimed statute is an exemption statute under FOIA, and whether the withheld material falls within its scope. *CIA v. Sims*, 471 U.S. 159, 167 (1985); *Wilner*, 592 F.3d at 72. As the Second Circuit has explained, "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at 72; *see also ACLU v. Department of Justice* ("*ACLU II*"), 681 F.3d 61, 72-73 (2d Cir. 2012); *Krikorian*, 984 F.2d at 465.

I&A properly invoked two exemption statutes to protect portions of the draft intelligence assessments that concern intelligence sources and methods: (1) Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i); and (2) Section 201(d)(11) of the Homeland Security Act of 2002, as amended 6 U.S.C. § 121(d)(11). *See* Sepeta Decl. ¶¶ 40-43.

Section 102(A)(i)(1) of the National Security Act of 1947 mandates that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). As Plaintiffs concede, *see* Pls.' Br. at 19, it is well-settled that Section 3024(i)(1) qualifies as an Exemption 3 statute, and vests the intelligence community with "very broad authority to protect all sources of intelligence information from disclosure.'" *ACLU II*, 681 F.3d at 73 (quoting *Sims*, 471 U.S. at 168-69). The definition of "intelligence sources and methods" therefore includes all sources of intelligence that the agency relies upon to

perform its statutory duty, regardless of whether the source was confidential or nonpublic. *Sims*, 471 U.S. at 169-70; *see also ACLU I*, 681 F.3d at 73-74 (emphasizing the breadth of intelligence methods that intelligence agencies are required to protect from unauthorized disclosure).

Section 201(d)(11) of the Homeland Security Act of 2002, as amended, contains a statutory provision that applies specifically to I&A. This provision directs the Secretary of Homeland Security, acting through the Under Secretary for Intelligence and Analysis, to ensure that:

> (A) any material received pursuant to [the Homeland Security Act] is protected from unauthorized disclosure and handled and used only for the performance of official duties; and
>
> (B) any intelligence information under [the Homeland Security Act] is shared, retained, and disseminated consistent with the authority of the Director of National Intelligence to protect intelligence sources and methods under the National Security Act of 1947 and related procedures and, as appropriate, similar authorities of the Attorney General concerning sensitive law enforcement information.

6 U.S.C. § 121(d)(11). Like Section 102(A)(i)(1) of the National Security Act, 50 U.S.C. § 3024(i)(1), each subparagraph of Section 121(d)(11) "on its face exempt[s] matters from disclosure" and thus it qualifies as an Exemption 3 withholding statute. *Nat'l Assoc. of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (quotation marks and emphasis omitted). Thus, both 50 U.S.C. § 3024(i) and 6 U.S.C. § 121(d)(11) provide for categorical protection of information regarding intelligence sources and methods in the draft intelligence assessments.

Under Exemption 3, in conjunction with these statutes, the Government need not show that there would be any harm to national security from disclosure, only that the withheld information falls within the purview of the exemption statute. *Wilner*, 592 F.3d at 72-73; *ACLU II*, 681 F.3d at 72-73. As explained in the Sepeta Declaration, I&A withheld information within the drafts to protect the underlying sources of intelligence I&A relied upon to form its analytical

assessments and to draft the intelligence product at issue. Sepeta Decl. ¶¶ 43-45. I&A also withheld information that would reveal the intelligence community's methods—namely, its methods for identifying and countering violent extremists, including how these inform analytical insights, and its methods for assessing the risks posed by violent extremists. *Id.* The protected information also includes information that would reveal common indicators displayed by those engaging in or preparing to engage in acts of domestic terrorism, which, if revealed, may be evaded by violent extremist actors of various ideologies. *Id.*

As the Sepeta Declaration further explains, the redacted material in the draft intelligence assessments is intelligence information that I&A acquired, developed, and utilized consistent with its authorities under the Homeland Security Act, as contemplated by 6 U.S.C. § 121(d)(11), and as a member of the intelligence community, as contemplated by 50 U.S.C. § 3024(i). Sepeta Decl. ¶¶ 43-45. The information withheld under Exemption 3 logically and plausibly relates to intelligence sources and methods and thus falls within the scope of 50 U.S.C. § 3024(i)(1) and 6 U.S.C. § 121(d)(11).

Further, although no showing of harm is required under Exemption 3, the release of the withheld information could lead to the identification of the sources upon which I&A relies for intelligence. Sepeta Decl. ¶ 45. As the Sepeta Declaration explains in detail, to fulfill its national or homeland security missions, I&A collects information overtly and through publicly available sources. *Id.* (citing Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), as amended by E.O. 13,470, 73 Fed. Reg. 45,328 (July 30, 2008), § 1.7(i) ("The heads of . . . the Office of Intelligence and Analysis . . . shall: (1) Collect (overtly or through publicly available sources), analyze, produce, and disseminate information, intelligence, and counterintelligence to support national and departmental missions")). In doing so, I&A relies on information from a

wide range of sources, including non-human sources, and must evaluate the credibility of those sources. *Id.* Moreover, even where I&A may rely upon open source documents of a publicly-available nature, disclosure of these intelligence sources could reasonably be expected to reveal I&A's tradecraft, as well as I&A's assessments of the relative value and credibility of those sources. *Id.*

Accordingly, especially given the deferential standard applicable to agency determinations in the national security context, I&A properly withheld information regarding intelligence sources and methods under Exemption 3, 50 U.S.C. § 3024(i)(1), and 6 U.S.C. § 121(d)(11). *See, e.g., ACLU II*, 681 F.3d at 75 ("[a]ccording substantial weight" to agency's declarations, holding that records "relate[d] to an intelligence method within the meaning of the NSA, and, accordingly, may be withheld"); *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993) ("[g]iving due deference to the agency's determination," holding that redacted information was exempt from disclosure under National Security Act, 50 U.S.C. § 403(d)(3) (predecessor to 50 U.S.C. § 3024(i)(1)), and Exemption 3); *Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990) (noting that, in determining whether withheld information relates to intelligence sources and methods for purposes of Section 403(d)(3) and Exemption 3, "we accord substantial weight and due consideration to the CIA's affidavits").

D. The Identities of I&A Personnel Who Edited the Draft Intelligence Assessments are Exempt From Disclosure Under FOIA Exemption 6

I&A has properly invoked Exemption 6 to redact the names, phone numbers, and email addresses of I&A employees identified in the March 3 email, and the initials of the I&A personnel who reviewed and provided comments on the draft intelligence assessments. *See* Sepeta Decl. ¶¶ 49-50. Under FOIA Exemption 6, an agency may withhold "personnel and medical files and similar files" when disclosing such information "would constitute a clearly

unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 serves to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005) ((quoting *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982)). In assessing an agency's withholding of personal identifying information under Exemption 6, this Court must undertake a two-part inquiry to: (1) determine "whether the records at issue are likely to contain the type of personal information that would be in a medical or personnel file"; and (2) to "balance the public's need for the information against the individual's privacy interest to determine whether the disclosure of the names would constitute a 'clearly unwarranted invasion of personal privacy.'" *Id.* (citations omitted).

For the first prong of the analysis, the Second Circuit has observed that the "phrase 'similar files' sweeps broadly and has been interpreted by the Supreme Court to mean 'detailed Government records on an individual which can be identified as applying to that individual.'" *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 174 (2d Cir. 2014) (quoting *Washington Post*, 456 U.S. at 602)). Accordingly, e-mails, "proposed talking points, draft opening statements, and draft rollout schedules" have been deemed "similar files" for purposes of meeting the first prong of the Exemption 6 analysis. *Seife v. U.S. Dep't of State*, __ F. Supp. 3d __, 2018 WL 1517196, at *20-21 (S.D.N.Y. Mar. 26, 2018). Likewise, the March 3 email and the draft intelligence assessments are "similar files" that qualify for protection under Exemption 6.

I&A has also established that the second prong of the Exemption 6 analysis has been met. "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its

statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999) (alterations in original) (quoting *U.S. Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 497 (1994)). As explained in the Sepeta Declaration, this identifying information, combined with other information that is or may become publicly available, could compromise the privacy and safety of these intelligence officials. Sepeta Decl. ¶ 50. With respect to the withheld initials in the draft intelligence assessments, I&A believes that documents and records that may exist in the public domain or that may become available through future proper or improper disclosures of agency records—*e.g.*, e-mail signatures, correspondence, employment records, or substantive intelligence—may include personnel names or initials that could be compared against the personnel initials in the withheld draft intelligence assessments. *Id.* Disclosure of this information would therefore constitute an unwarranted violation of personal privacy unconnected to FOIA's legitimate purposes. *Id.*

Moreover, the public interest does not outweigh the individual privacy interests of the I&A personnel whose personal identifying information has been withheld. The only recognized public interest under FOIA is the public's "understanding of the operations or activities of the government." *Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 193 (2d Cir. 2012) (quoting *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 755 (1989)). Releasing the identifying information of I&A personnel who reviewed, revised, and edited the draft intelligence assessments would not shed light on how I&A performs its mission. Sepeta Decl. ¶ 50. Indeed, "federal courts have observed that disclosure of individual employee names tells nothing about 'what the government is up to.'" *Long*, 692 F.3d at 193 (collecting cases). *See, e.g., Wood*, 432 F.3d at 88-89 (upholding FBI's Exemption 6 withholding of names of low-

level FBI employees who participated in administrative investigation because public interest did not sufficiently outweigh potential for harassment).

E. Plaintiffs Are Not Entitled to *In Camera* Review of the Draft Intelligence Assessments

Plaintiffs request that the Court conduct an *in camera* review of the disputed records to determine whether they should be withheld under the claimed exemptions. Pls.' Br. at 12-13. However, *in camera* review is "the exception, not the rule," and "the propriety of such review is a matter entrusted to the district court's discretion." *Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. N.L.R.B.*, 845 F.2d 1177, 1180 (2d Cir. 1988). "*In camera* review is appropriate where the government seeks to exempt entire documents but provides only vague or sweeping claims as to why those documents should be withheld. Only if the government's affidavits make it effectively impossible for the court to conduct de novo review of the applicability of FOIA exemptions is *in camera* review necessary." *Associated Press*, 549 F.3d at 67 (internal citations omitted).

"Summary judgment is warranted on the basis of [*Vaughn*] affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wilner*, 592 F.3d at 73 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (internal quotation marks and citations omitted).

The Sepeta Declaration is sufficiently detailed to allow this Court to determine that the drafts of the proposed intelligence assessments and portions of the March 3 email are exempt from disclosure under Exemptions 3, 5, and 6 of FOIA. The agency's reasons for withholding are not "vague" nor are its claims to withhold "sweeping." *Associated Press*, 549 F.3d at 62.

Nor is there any evidence of agency bad faith. Accordingly, an *in camera* review of the withheld documents is unnecessary and Plaintiffs' request for one should be denied. *See, e.g.*, *New York Times Co. v. National Security Agency*, 205 F. Supp. 3d 374, 385 (S.D.N.Y. 2016) (declining *in camera* review where no evidence contradicted agency declaration, declaration was "quite detailed," and there was "no evidence from which one could infer bad faith" on the agency's part); *Garcia v. U.S. Dep't of Justice, Office of Info. & Privacy*, 181 F. Supp. 2d 356, 371 (S.D.N.Y. 2002) (same).

CONCLUSION

For the foregoing reasons, defendant DHS respectfully requests that the Court grant partial summary judgment in its favor, as set out above, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

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GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
Attorney for Defendant DHS

By: */s/ Tomoko Onozawa*
JENNIFER JUDE
TOMOKO ONOZAWA
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2663/2721
Fax: (212) 637-2686
jennifer.jude@usdoj.gov
tomoko.onozawa@usdoj.gov