UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, CENTER FOR CONSTITUTIONAL RIGHTS, and AMICA CENTER FOR IMMIGRATION RIGHTS, Plaintiffs, – *versus* – UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	No. 25 Civ. 5292 (JSR)

DEFENDANT'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant the United States Department of Health and Human Services ("HHS" or the "Agency") respectfully submits this memorandum of law in further support of its motion for summary judgment and in opposition to plaintiffs' cross-motion for summary judgment in this action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

In its opening papers, HHS adequately justified its application of Exemption 5 to certain withholdings that plaintiffs challenge. In opposition, plaintiffs argue that the deliberative process privilege does not apply to any decision memoranda (even drafts) that represent final versions or to any factual information in a spreadsheet created by HHS attorneys to analyze contractual provisions as part of a deliberative process relating to HHS contracting decisions. Plaintiffs claim that HHS waived attorney-client privilege over that spreadsheet and other email communications by sharing them with Dan Barry, an attorney with an ARPA-H email address. They challenge HHS's representation that it reasonably segregated non-exempt material, as well as the adequacy of HHS's search for final versions of draft decision memoranda.

Each of plaintiffs' challenges fails. Contrary to their assertion, under controlling precedent, drafts that die on the vine are subject to the deliberative process privilege unless they communicate a policy on which the agency has settled. In any event, since plaintiffs filed their cross-motion, HHS has produced final versions of all but one of the draft decision memoranda at issue, as described in the supplemental Vaughn index filed in connection with this brief ("Suppl. Vaughn"). Plaintiffs are also incorrect that the July 14, 2025 decision memorandum is not subject to the deliberative process privilege on account of a final decision having been taken. While the decision itself represents agency policy and therefore is not subject to the deliberative process privilege, the underlying memorandum continues to represent a predecisional recommendation, which the

decisionmaker never expressly adopted, such that the deliberative process privilege continues to apply. And in any event, certain figures contained in the final memoranda are properly withheld under Exemption 4 or 5 as they are confidential commercial information. Plaintiffs' argument that HHS waived attorney-client privilege by including Dan Barry from APRA-H on certain communications is legally and factually specious: at the time, Mr. Barry was detailed to the Office of General Counsel ("OGC"), and the records at issue were shared with him in his capacity as an OGC attorney advising on procurement issues. Even if that were not so, his inclusion would not materially increase the likelihood of disclosure to outside parties and therefore would not constitute a waiver of privilege. Plaintiffs' challenge to the adequacy of HHS's search is similarly based on the faulty legal premise that a search can be judged by its results, and in any event, HHS's search, as described in the Agency's supplemental declaration, was in fact reasonable. Finally, plaintiffs' segregability argument is speculative and similarly defeated by the Agency's declarations.

For all these reasons and those set forth in HHS's opening papers, the Court should grant HHS's motion for summary judgment and deny plaintiffs' cross-motion.

ARGUMENT

I. Plaintiffs' Challenges to "Key Memoranda" Fail

Plaintiffs' challenges relating to HHS decision memoranda are unpersuasive. First, they argue that the deliberative process privilege is categorically inapplicable to any memorandum that is either final or "simply the *last* version[.]" ECF 21 ("Pl. Br.") at 14. Second, they doubt that "not a word is segregable" in the draft decision memoranda. *Id.* at 14. Third, they challenge the adequacy of HHS's search, but only to the extent that the search failed to yield final versions of the decision memoranda. *Id.* at 15.

a. March 3, 2025 Memo

Since plaintiffs filed their cross-motion, HHS has produced final (signed) versions of each draft except the March 3, 2025 draft memorandum (the "March 3 Memo"). Plaintiffs suggest that that memo should be treated as agency policy because, they claim, it is the most recent version. Never mind that plaintiffs' assertion is purely speculative in that there is no record evidence establishing that the March 3 Memo is the most recent version of itself. Plaintiffs' argument fails for a more fundamental reason: controlling precedent contradicts their argument. Courts have long held that the deliberative process privilege generally protects "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. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999). And the Supreme Court has expressly rejected the rationale that plaintiffs would have this Court follow: "A document is not final solely because nothing else follows it. Sometimes a proposal dies on the vine." *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 268 (2021). It continued: "What matters . . . is not whether a document is last in line, but whether it communicates a policy on which the agency has settled." *Id.*

Neither case that plaintiffs cite supports their proposed departure from Second Circuit and Supreme Court precedent. In *Nat'l Imm. Project of Nat'l Lawyers Guild v. Dep't of Homeland Sec.*, this Court held that the deliberative-process privilege did not apply because the "decisions described in the documents at issue . . . are not the types of decision to which the deliberative-process privilege applies, *i.e.*, decisions about the formulation, rather than the application, of policies." 868 F. Supp. 2d 284, 293 (S.D.N.Y. 2012). It did not imply—much less hold—that the deliberative process privilege is categorically inapplicable to final drafts. And in *Am. Civil Liberties Union v. Dep't of Defense*, the court held that the deliberative process privilege did not

apply to a draft report involving a "detailed account of the CIA's detention and interrogation program," principally because the Government "failed to show that the document formed an essential link in a specified consultative process, or that the document was prepared to assist the agency in the formulation of some specific decision, or that it in any way bears on the formulation or exercise of policy-oriented judgment." No. 15 Civ. 9317 (AKH), 2017 WL 4326524, at *14 (S.D.N.Y. Sept. 27, 2017). To be sure, the court went on to observe in dicta that it was unpersuaded by the D.C. Circuit's reasoning in *Nat'l Sec. Archive v. Cent. Intelligence Agency*, 752 F.3d 460 (D.C. Cir. 2014), and instead agreed with Judge Roger's dissent, reasoning that "where no final version of a draft document exists, shielding the draft from disclosure does not serve the purpose of the deliberative process privilege because the public cannot scrutinize the draft against its final version." 2017 WL 4326524, at *16. But, of course, that is not what the D.C. Circuit held, and it is inconsistent with Supreme Court and Second Circuit precedent. In any case, the reasoning does not even apply here, where the March 3 Memo contains "OGC's proposed edits and comments," Suppl. Vaughn at 15, and therefore reveals on its face the relevant deliberations.

But even if plaintiffs were correct on the deliberative process privilege, the March 3 Memo would still be protected from disclosure by the attorney-client privilege. Plaintiffs do not advance any argument as to why the attorney-client privilege would not apply. Rather, they seem to rely on the same argument about the March 3 Memo possibly being the most recent version. But that argument bears no relation to the attorney-client privilege, and the cases they cite (and the language they quote from those cases) have no apparent connection to the attorney-client privilege. As the Government explained in its opening brief, the March 3 Memo "contains HHS-OGC attorneys' proposed edits and comments in which counsel explains the legal rationale for their proposed

edits." ECF 18 at 10. Plaintiffs have not even attempted to explain why attorney-client privilege would not apply.[1]

b. Final Decision Memoranda

Plaintiffs challenge the application of the deliberative process privilege to the July 14, 2025 memorandum, and the other final decision memoranda that HHS has recently produced, on the basis that the documents represent final agency decisions and are therefore "not predecisional." Pl. Br. 13. Plaintiffs' argument rests on the flawed premise that a recommendation loses its predecisional character when the decisionmaker acts on the proposal.

Contrary to plaintiffs' argument, the decision memoranda are predecisional because they were prepared by officials who lacked authority to take final agency action, and in order to assist the decisionmaker. October 9, 2026 Supplemental Declaration of Brandon Lancey ("Suppl. Decl.") ¶ 21. *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975) (record is predecisional because it was "prepared in order to assist an agency decisionmaker in arriving at his decision"); *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 85 (2d Cir. 1991) (memoranda "necessarily predecisional" because they were prepared by officials who "themselves lack any authority to take final agency action"). And they are deliberative in that they related directly to the process by which the agency made the relevant decisions. *See Grand Cent.*, 166 F.3d at 482. The fact that a decision was made does not change the fact that the memorandum was written before the decision was made, by someone other than the decisionmaker, in order to assist the decisionmaker.

[1] Arguments not addressed in an opposition brief are waived. *See First Cap. Asset Mgmt., Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 392-93 & n.116 (S.D.N.Y. 2002).

To be sure, a decision memorandum "loses its predecisional and deliberative character" "if the agency has chosen expressly to adopt or incorporate [it] by reference . . . ." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005). But here, there was no express adoption or incorporation of the underlying memorandum. That is evident from the very structure of the memoranda at issue, whereby the proposal constitutes almost the entirety of the memorandum, at the conclusion of which there is a separate "Decision" section. Suppl. Decl. ¶ 21. The "Decision" section itself consists of check-the-box options for the decisionmaker to approve, disapprove, or request additional information related to the proposed action. *Id.* For each of the memoranda at issue, the decisionmaker selected the "Approved" option and affixed their signature. *Id.* ¶ 22. Although the "Decision" section also includes a "Comments" line, none of the decision memoranda at issue contained any comments by the decisionmaker. *Id.* Therefore, when the decisionmaker "Approved" these memoranda, he adopted the proposed action, but he did not "cho[ose] expressly to adopt or incorporate," *Nat'l Council of La Raza*, 411 F.3d at 356, the rationales offered or the figures cited therein. Suppl. Decl. ¶ 23. In an analogous case, this Court concluded that the agency's adoption of the proposed action did not strip an action memo of its predecisional, deliberative character. In *Azmy v. U.S. Dep't of Defense*, the agency asserted that the deliberative process privilege applied to an action memo that—like the memos at issue here—contained underlying recommendations and then, separately, a decision on the action item. 562 F. Supp. 2d 590 (S.D.N.Y. 2008). This Court held that "only the actual decision . . . falls outside the deliberative process privilege." *Id.* at 604. The same principle applies here.[2]

[2] While plaintiffs elsewhere challenge the application of the deliberative process privilege to factual information, they do not do so here with respect to the cost estimates in the memoranda. But even if they had, it would not alter the conclusion that the withholdings are appropriate. Although factual information generally is not covered by the deliberative process privilege, *see*

In addition, the withholding of the cost estimates in the final decision memoranda (Bates 2132-2137) is separately justified under Exemption 5 because those cost estimates represent confidential commercial information. The purpose of Exemption 5's commercial information privilege is to protect the release of potentially damaging commercial information while the opportunity to take unfair advantage of the government agency continues to exist. *See Fed. Open Mkt. Committee v. Merrill*, 443 U.S. 340, 360 (1979). For example, in *Taylor-Woodrow Int'l v. U.S. Dep't of Navy*, No. C88-429R, 1989 WL 1095561 (W.D. Wash. Apr. 5, 1989), where a federal contractor submitted change order proposals to an existing contract and sought, via FOIA, the production of the government's cost estimates, the court held that the confidential commercial information privilege applied. *Id.* at *3. The court explained that the privilege applied because "the process of contracting ha[d] not ended," and the contractor "could take unfair commercial advantage of the Navy." *Id.* Here, too, HHS "continues to negotiate" in the market "for the provision of these services," and release of the redacted figures "would place the Department at a competitive disadvantage." Suppl. Decl. ¶ 24.[3]

HHS has separately withheld from two final decision memoranda (Bates 2133-2137) pricing figures for specific line items that appear in HHS's contract with Acacia. Suppl. Decl. ¶ 26. These are protected from disclosure under Exemption 4, which applies to "trade secrets and

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Env't Prot. Agency v. Mink, 410 U.S. 73, 91 (1973), here, the cost estimates themselves represent the drafter's exercise of judgment in calculating the estimates, *see* Suppl. Decl. ¶ 25, which differ from the final amounts, *see id.*, and are therefore subject to the deliberative process privilege, *see Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974).

[3] HHS has separately redacted a few sentences in the April 3, 2025 memorandum under the attorney-client privilege and attorney work-product doctrine. The redacted portion relays legal advice provided by OGC and conveys "legal advice . . . concerning pending litigation and its potential implications for ORR." *See* Suppl. Vaughn at 19.

commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). To qualify for protection under Exemption 4, the information "(1) must be a . . . commercial or financial in character; (2) it must be obtained from a person; and (3) it must be privileged or confidential." *Bloomberg, L.P. v. Bd. of Governors of the Fed. Res. Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). For the first prong of the test, "[t]o qualify for the exemption, information itself must in some fashion be commercial or financial in nature or use." *Intellectual Prop. Watch v. U.S. Trade Rep.*, 134 F. Supp. 3d 726, 743 (S.D.N.Y. 2015). "Commercial" includes information that has "commercial value." *N.Y. Pub. Interest Research Grp. v. Env't Prot. Agency*, 249 F. Supp. 2d 327, 334 (S.D.N.Y. 2003). Here, the cost estimates related to proposed contracts easily meet the requirement that the information be "commercial" in nature. The second program is also met because these figures were obtained from the contractor, Acacia. Suppl. Decl. ¶ 26. These figures are confidential, as they "have not been made public." *Id.* Moreover, "contractors generally keep this pricing information confidential, . . . the contractor here has actually kept this pricing information private[,] . . . and [t]he government also maintains the confidentiality of this information, and the assurance of privacy is communicated to the contractors." *Id.*; *see also Food Marketing Inst. v. Argus Leader Media*, 588 U.S. 427, 440 (2019) (information is "confidential" within the meaning of Exemption 4 where it is "customarily and actually treated as private by its owner and provided to the government under an assurance of privacy").

c. Segregability

Next, plaintiffs express skepticism over HHS's position that "not a word is segregable" in the draft decision memoranda. *Id.* at 14. Notwithstanding plaintiffs' speculation to the contrary, the agency has adequately supported its assertion that the draft decision memoranda were protected from disclosure in their entirety. FOIA requires only "reasonable" segregation. *Amnesty Int'l USA*

v. Cent. Intelligence Agency, 728 F. Supp. 2d 479, 529 (S.D.N.Y. 2010) (quotation marks omitted); *see Doherty v. Dep't of Justice*, 775 F.2d 49, 53 (2d Cir. 1985). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). And agency declarations are "accorded a presumption of good faith," and they are "sufficient where they are 'not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Ctr. for Constitutional Rights v. Cent. Intelligence Agency*, 765 F.3d 161, 166 (2d Cir. 2014) (quoting *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009)).

HHS's declaration explains that the agency conducted a line-by-line analysis of the responsive records for segregability purposes, and concluded that no further segregation could be made without disclosing exempt information. *See* ECF No. 19 ¶¶ 31-32; Suppl. Decl. ¶ 27. Plaintiff identifies no contrary evidence in the record nor any evidence of agency bad faith and instead merely speculates that some portion of the draft memoranda might be segregable. Yet that speculation is insufficient to overcome the presumption of good faith owed to the Government's declaration. *See Gonzalez v. U.S. Citizenship & Immigration Servs.*, 475 F. Supp. 3d 334, 354 (S.D.N.Y. 2020). Moreover, the record evidence strongly supports the presumption of good faith here. Of the more than 2,100 pages that the Government produced in this action, HHS withheld in full fewer than 10% of the pages, and Plaintiffs challenges the segregation of non-privileged material in just a handful of records totaling fewer than 60 pages. Suppl. Decl. ¶ 27. And given that the draft memoranda are subject to multiple privileges, including attorney-client privilege, and given the presumption afforded the Government's declaration, which Plaintiffs have failed to rebut, the Court should conclude that HHS has satisfied its obligations.

d. Adequacy of the Search

Finally, plaintiffs challenge the adequacy of HHS's search but only to the extent that it failed to yield final versions of the decision memoranda. *Id.* at 15. As mentioned above, since plaintiffs filed their cross-motion, the Agency has produced final versions of the memoranda with the exception of the March 3 Memo. Accordingly, plaintiffs' challenge should be construed to be limited to the HHS's search for a single document, the March 3 Memo.

Plaintiffs' argument rests on two flawed premises, one factual, the other legal. As a factual matter, there is no record evidence suggesting that any final version of the March 3 Memo exists at all. There is therefore no basis to judge HHS's search as inadequate merely because it did not identify a final version of that memo. Moreover, plaintiffs' argument hinges on a legal premise that courts have long rejected. Plaintiffs argue that, "if HHS's searches yielded drafts of documents but not the final versions, then the searches were inadequate . . . ." Pl. Br. 15. But, as the Second Circuit has long recognized, "a search is not inadequate merely because it does not identify all responsive records." *N.Y. Times Co. v. Dep't of Justice*, 756 F.3d 100, 124 (2d Cir. 2014) (citing *Grand Central*, 166 F.3d at 489. Indeed, "[t]he adequacy of a search is not measured by its results, but rather by its method." *Id.* (citing *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Because plaintiffs' objection rests solely upon speculation and a flawed legal premise, the Court should reject it.

But even if plaintiffs' objection were based on a sound legal premise, it would still fail because the Agency's search, certain parameters of which Plaintiffs agreed to, was adequate. That search involved two separate processes. First, because the FOIA request included legal memoranda, the FOIA Office tasked OGC's Children, Families, and Aging Division ("CFAD"), which advises the Office of Refugee Resettlement ("ORR"), with collecting responsive records,

including any responsive decision memoranda. Suppl. Decl. ¶ 5. CFAD's Coordinating Attorney for the Unaccompanied Alien Children program searched his emails and a shared ORR folder for responsive records, through which he found 64 potentially responsive records, including the draft decision memoranda that ACF had sent to their counsel in CFAD for legal review. *Id.* ¶ 6. Second, because OGC does not necessarily see final versions of program-office documents (like the decision memoranda at issue), the FOIA Office separately asked the Office of the Chief Information Officer ("OCIO") to conduct an enterprise-level electronic search for additional documents. *Id.* ¶¶ 8-9. OCIO searched the accounts of twenty-six custodians for any potentially responsive records between January 1, 2024, through January 1, 2026, using search terms reasonably crafted to identify responsive records.[4] *Id.* ¶¶ 10-11. After that search resulted in over 560,000, the parties agreed on a narrower search involving two search phrases—"legal screening" within 25 words of "video," and "legal orientation" within 25 words of "video"—and three custodians. *Id.* ¶¶ 12-14. That narrower search yielded 1,194 potentially responsive pages. *Id.* ¶ 15. Those searches were "reasonably calculated to discover the requested documents," and were therefore adequate. *Grand Cent. P'ship*, 166 F.3d at 489. And plaintiffs' agreement in advance to the search terms and custodians provides further evidence that the search was adequate. *Cause of Action v. Internal Rev. Serv.*, 253 F. Supp. 3d 149, 158 (D.D.C. 2017) ("Because the agency searched the relevant database using agreed-upon search terms, it has shown that all files likely to contain responsive materials were searched, and the Court finds that the search was reasonably expected to produce the information requested." (quotation marks omitted)).

[4] The search terms were: "legal screen," "140D0422C0009," "legal screening" within 25 words of "video," "legal orientation" within 25 words of "video," CLIN 1" & Acacia, and "CLIN 1" & "Kind."

Those initial searches alone were adequate, but, in an effort to respond to plaintiffs' argument in their cross-motion for summary judgment, HHS conducted a targeted, supplemental search for final versions of the draft decision memoranda at issue in the pending motion. Suppl. Decl. ¶¶ 16-17. Through that more supplemental search, the FOIA Office was able obtain final versions of all the memoranda except for the March 3 Memo. *Id.* ¶ 18.

For these reasons, the Court should reject Plaintiffs' challenge to the adequacy of HHS's searches.

II. HHS Properly Withheld the Spreadsheet

Plaintiffs assert that a spreadsheet created by agency attorneys to help analyze a legal services contract "is not attorney-client or attorney-work product privileged because at least one individual outside of the attorney-client relationship was copied on that email: Dan Barry from ARPA-H . . . ." Pl. Br. 18-19. They further argue that, "to the extent the spreadsheet contains data or facts, that information alone is not necessarily deliberative-process privileged." *Id.* at 19.

Both arguments are wrong. To begin, the inclusion of Dan Barry does not waive attorney-client or attorney work-product privilege. Plaintiffs' argument is premised on an assumption that Mr. Barry's domain name defines his role in relation to this spreadsheet. It does not. Although Mr. Barry has an ARPA-H email domain (because his permanent assignment is to advise ARPA-H), he also covers other OGC portfolios. Suppl. Decl. ¶ 28. When he was sent the spreadsheet at issue, Mr. Barry was serving as a Special Advisor to the Acting General Counsel for procurement matters. *Id.* ¶ 29. And he was sent the spreadsheet in that capacity, not in his role as counsel to ARPA-H. *Id.* ¶ 30. Therefore, the premise of plaintiffs' argument is simply incorrect. But even if that were not so, the fact that the spreadsheet was shared with Mr. Barry would not result in a waiver of privilege, given that there is no evidence that the disclosure "substantially increase[d]

the opportunity for potential adversaries to obtain the information." *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 123 (S.D.N.Y. 2014) (quoting *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260 (SS), 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993)).

Plaintiffs' challenge to the assertion of deliberative-process privilege is similarly flawed. While it is true that factual content generally is not covered by the deliberative process privilege, *see, e.g.*, *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974), courts allow agencies to withhold factual material in an otherwise deliberative document where, among other things, the author selects specific facts out of a larger group of facts, and the act of selecting facts for inclusion is deliberative in nature. *See Elec. Priv. Info. Ctr. v. Dep't of Justice*, 320 F. Supp. 3d 110, 119 (D.C.C. 2018) (noting that "the selection or organization of facts can be part of an agency's deliberative process and so exempt from FOIA"); *see also Almeda v. U.S. Dep't of Educ.*, No. 20-5087, 2020 WL 6038697, at *1 (D.C. Cir. Aug. 18, 2020) (per curiam) (finding "drafts and corresponding emails were part of a deliberative process, spanning several months, during which the government summarized the benefits process for Filipino veterans from a large universe of facts"). The D.C. Circuit has held that the very act of distilling testimony, of separating significant facts from insignificant facts, constituted an exercise of judgment by agency personnel. *Montrose*, 491 F.2d at 68. Here, the creation of the spreadsheet required OGC attorneys to select which contractual provisions to include, which statutory (or other legal) provisions were relevant to the contract, and how the contractual provisions fit into the background legal requirements. *See* Suppl. Vaughn at 1. The selection and organization of these facts was part of the deliberative process and therefore is exempt from FOIA under the deliberative-process privilege.

III. HHS Properly Withheld Portions of Email Threads

Plaintiffs challenge withholdings of various email communications involving OGC attorneys as "overly broad." Pl. Br. 15. Those challenges should be rejected.

a. Bates 135-136

With respect to the February 2025 email thread at Bates 135-136, plaintiffs renew their argument related to the inclusion of Dan Barry on the basis that he has an ARPA-H email address. They suggest that the inclusion of "HHS staff from . . . ARPA-H" constitutes a waiver of attorney-client and attorney work-product privilege. As explained above, Mr. Barry was then serving as a Special Advisor to the Acting General Counsel for procurement matters, and he was included in this email thread in that capacity, not in his role as counsel to ARPA-H. Suppl. Decl. ¶ 29. Plaintiffs' argument, as before, is premised on speculation that, it turns out, is factually incorrect. And, as argued above, the argument also fails as a matter of law, given that Mr. Barry's inclusion on this email thread would not "substantially increase the opportunity for potential adversaries to obtain the information," and therefore does not constitute waiver. *Williams*, 300 F.R.D. at 123.

b. Bates 17-22, 81-82, 150, 169-170, 382-383

Plaintiffs next challenge HHS's decision to withhold in full various emails. With respect to Bates 17-22, 150, 169-170, and 382-383, plaintiffs speculate that these communications by counsel likely contain discussions of "statutory requirements that are factual in nature by themselves and likely segregable." Pl. Br. 17. But plaintiffs offer no basis for this assertion, and even if they had, the possible factual nature of some portion of these communications is of no moment where, as here, HHS has withheld these emails as attorney work product and attorney-client communications. As the Supreme Court explained in *Fed. Trade Comm'n v. Grolier Inc.*, the "test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed

upon a showing of relevance." 462 U.S. 19, 26 (1983). Factual work-product enjoys qualified privilege from civil discovery, and therefore such materials are discoverable "only upon a showing that the party seeking discovery has substantial need" of materials which cannot be obtained elsewhere without "undue hardship." Fed. R. Civ. P. 26(b)(3). Such materials therefore are not "routinely" or "normally" discoverable, and for that reason, the Supreme Court has held that factual material is protected under the attorney work-product privilege recognized under the FOIA. *Grolier*, 462 U.S. at 27. As a result, courts have found that no segregation of factual information is required for information falling within the privilege. *See, e.g.*, *A. Michael's Piano, Inc. v. Fed. Trade Comm'n*, 18 F.3d 138, 147 (2d Cir. 1994) ("The work-product privilege draws no distinction between materials that are factual in nature and those that are deliberative.").

Attorney-client privilege similarly applies to confidential communications (in their entirety) between attorney and client, including any supposedly factual content. *Am. Civil Liberty Union v. Nat'l Sec. Agency*, 925 F.3d 576, 590 (2d Cir. 2019) ("This privilege protects confidential *communications* between an attorney and a client."). Plaintiffs do not explain why attorney-client privilege would not apply to "factual" portions of the privileged communications here. The same principle—that the attorney-client privilege applies to the confidential communication between attorney and client—applies to the body of the email communication at Bates 81-82, and plaintiffs again fail to articulate any basis to challenge the application of attorney-client privilege to the entirety of the email.[5]

[5] Plaintiffs also challenge the redaction of the subject line of the email at Bates 81-82. After plaintiffs filed their cross-motion for summary judgment, HHS lifted that redaction and produced the updated version to plaintiffs, which resolves the issue.

Moreover, the supposedly factual nature of the some of the information would not even defeat the assertion of deliberative-process privilege over those portions of the communications because counsel's "selection [and] organization of facts [was] part of [the] agency's deliberative process and so exempt from FOIA." *Elec. Priv. Info. Ctr.*, 320 F. Supp. 3d at 119.

c. Bates 55

Plaintiffs assert that HHS has not justified the withholding in full of an email attachment at Bates 55 because, they claim, the Vaughn index's description is too sparse. In their view, the Vaughn index fails to "provide an author, person or entity seeking advice, time period when authored, or purpose behind" the document. Pl. Br. 16. In the supplemental Vaughn index, HHS has updated its description, which provides a sufficient evidentiary basis to justify the application of attorney-client privilege over this document. The Vaughn index specifies that this document was an attachment to a June 3, 2025 email among OGC attorneys, provided confidentially by an agency client to counsel in order to obtain legal review and advice "concerning agency contractual matters and potential courses of action" related thereto. Suppl. Vaughn at 5. The Vaughn index provides adequate detail that this was part of a communication "(1) between a client and his or her attorney, (2) that [was] intended to be, and in fact w[as], kept confidential (3) for the purpose of obtaining or providing legal advice," *Am. Civil Liberties Union*, 925 F.3d at 589, and is sufficient to enable "the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves," *Dellums v. Powell*, 642 F.2d 1351, 1360 (D.C. Cir. 1980).

IV. *In Camera* Review Is Not Warranted

Finally, as an alternative to ordering production of the challenged withholdings, plaintiffs urge the Court to review the withheld materials *in camera*, supposedly on account of a "conflict"

between "record evidence" and HHS's assertions. Pl. Br. 19-20 (citing *Adelante Ala. Worker Ctr. v. Dep't of Homeland Sec.*, 376 F. Supp. 3d 345, 360 (S.D.N.Y. 2019)). However, plaintiffs fail to show that such review is appropriate here. While "the propriety of such review is a matter entrusted to the district court's discretion," it is "necessary" only where "the government's affidavits make it effectively impossible for the court to conduct de novo review of the applicability of FOIA exemptions." *Loc. 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988). As the D.C. Circuit has stated, "[w]hen the agency meets its burden by means of affidavits, [i]n camera review is neither necessary nor appropriate." *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979). The relevant standard is whether the affidavits show, "with reasonable specificity, why the documents fall within the exemption." *Id.* As argued above and in the Government's opening papers, HHS has adequately explained why the challenged withholdings are appropriate. The Court need not—and should not—require *in camera* inspection of the records.

CONCLUSION

For the reasons articulated above and in the Government's opening papers, the Court should grant the Government's motion for summary judgment and deny plaintiffs' cross-motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 6,111 words.