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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. NATIONAL SECURITY AGENCY, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, Defendants.	Case No.: 14-cv-03010-RS Hon. Richard Seeborg Hearing Date: February 18, 2016, 1:30 p.m. Location: Courtroom 3, 17th Floor

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Computers, and the networks that link them together, are essential for the performance of just about every function of everyday life. But all of them may contain yet to be discovered vulnerabilities that can be exploited once identified. Exploitation of these vulnerabilities can result in the loss or compromise of important information. The effects of this loss or compromise can be particularly acute if the target of that exploitation is an information technology system that maintains or has access to national security or other sensitive data. Because protecting the integrity of these and other systems is so critical, vulnerabilities within these systems need to be identified and addressed. The Vulnerabilities Equities Process ("VEP") is the means by which the Government rigorously weighs the equities at stake to determine how to address previously-unknown vulnerabilities.

Plaintiff submitted a request under the Freedom of Information Act ("FOIA") for records, emails, and communications related to the development or implementation of the Vulnerabilities Equity Process and all records, emails and communications related to or reflecting the principles that guide the agency decision-making process for vulnerability disclosure. The Government responded to the Plaintiff's request, and the single document that remains at issue here is the Commercial and Government Information Technology and Industrial Control Product or System Vulnerabilities Equities Policy and Process ("VEP Document") which describes the interagency Vulnerabilities Equities Process.

The Government has released the VEP Document, and taken only certain redactions to protect information shielded from disclosure under FOIA Exemptions 1, 3, and 5. As detailed in the attached Declaration of Jennifer L. Hudson of the Office of the Director of National Intelligence ("ODNI"), the vast majority of the information redacted from the document is properly classified, or is protected by statute either because it would disclose sources and methods used by the intelligence community, or because it relates directly to the National Security Agency's ("NSA") functions and activities; in recognition of the potential harm arising from the release of such information, FOIA Exemptions 1 and 3 exempt such information from disclosure. The only

additional redactions are two narrow categories of information redacted under Exemption 5 to protect the deliberative process of creating the Vulnerabilities Equities Process, and the integrity of the deliberations of the Vulnerabilities Equities Process participants.

For the reasons set forth below and detailed in the attached declaration, the Court should grant Defendants' motion for summary judgment and enter judgment for the Defendants.

II. BACKGROUND

In letters dated May 6, 2014 and sent by facsimile to the NSA and ODNI on that day, Plaintiff submitted FOIA requests to Defendants seeking "[a]ll records, emails and communications related to the development or implementation of the 'Vulnerabilities Equity Process' and all records, emails and communications related to or reflecting the 'principles' that guide the agency 'decision-making process for vulnerability disclosure' in the process described in the White House blog post" by Michael Daniel, Cybersecurity Coordinator, *Heartbleed: Understanding When We Disclose Cyber Vulnerabilities* (Apr. 28, 2014). *See* EFF Letter to NSA, ODNI, dated May 6, 2014 (Exhibit A, hereto), at 2.[1] Neither Defendant had completed processing Plaintiff's FOIA requests when Plaintiff filed suit.

Plaintiff filed its Complaint on July 1, 2014, *see* Compl., ECF No. 1, and Defendants answered. *See* Answer, ECF No. 12. Subsequently, the parties agreed to a stipulated schedule for processing of records responsive to a mutually agreed narrowing of Plaintiff's FOIA requests. On October 22, 2014, the Court adopted the schedule proposed by the parties and stayed proceedings until production was complete. *See* Order, ECF No. 20. Pursuant to the production schedule, Defendants disclosed segregable portions of certain documents, claiming FOIA exemptions over the remainder of those documents, and also withheld other documents in full under various FOIA exemptions. *See* Declaration of Jennifer L. Hudson ("Hudson Decl.") (Exhibit B, hereto) ¶¶ 16–21.

[1] According to the Complaint, computer vulnerabilities or "zero days" are software flaws or vulnerabilities that allow an attacker with knowledge of the zero-day to exploit it to gain access to computer systems, compromise security, intercept sensitive information, or otherwise exploit the software's weakness. *See* Compl. ¶ 9.

Once production was complete, the parties filed a Joint Case Management Conference Statement in which they informed the Court that the parties had further narrowed the scope of the issues remaining in contention to those documents representing the final interagency Vulnerabilities Equities Process (and any document incorporated by reference therein) as described in the April 2014 White House blog post by Michael Daniel. *See* Joint Case Management Conference Statement, ECF No. 24, at 5. Defendants informed Plaintiff and the Court that one record withheld in full pursuant to FOIA exemptions one, three, and five met these criteria. *See id.* The parties proposed a briefing schedule for cross-motions for summary judgment, *see id.*, and the Court adopted that proposal. *See* Order, ECF No. 25.

Before any briefs were filed, however, Defendants determined that the single document remaining in contention could be reprocessed and released in part. Defendants began that process and the parties conferred on how to proceed. On August 11, 2015, the parties requested that the Court continue the then-current briefing schedule, allow time for the Defendants to produce the document to Plaintiff with a *Vaughn* index, and then time for Plaintiff to determine whether it would challenge any of the redactions. *See* Stipulated Request for Continuance of Summary Judgment Briefing to Permit Reprocessing of Document, ECF No. 27.

On September 3, 2015, Defendants produced a redacted version of the document, claiming exemptions one, three, and five, the bases for which were set forth in the accompanying draft *Vaughn* index disclosed on the same day. *See* Sept. 3, 2015 VEP Document (Exhibit C, hereto); Draft *Vaughn* Index, September 3, 2015 (Exhibit D, hereto). Subsequently, after conferring further, the parties informed the Court that substantive issues remained in contention regarding the redactions taken in the document and that cross-motions for summary judgment were necessary. *See* Status Report and Stipulated Request to Set a Briefing Schedule, ECF No. 30. The Court adopted the parties' briefing schedule. *See* Order, ECF No. 31.

In the course of preparing the instant motion, Defendants determined that one redaction (of two groups participating in the VEP process) could be lifted in Section 6.3 of the VEP Document, and are producing the revised document concurrently with this motion, as Exhibit E hereto.

III. ARGUMENT

Defendants have properly redacted the one remaining document at issue in this case and have withheld only that information that is classified, exempt from disclosure by federal statute, or protected by the deliberative process privilege. Before addressing each of these arguments, however, we turn first to the statutory background and standard of review in this type of FOIA case.

A. FOIA Statutory Background and Standard of Review

The Freedom of Information Act was enacted to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). "Congress recognized," however, "that public disclosure is not always in the public interest," *CIA v. Sims*, 471 U.S. 159, 166-67 (1985), and that "some information may legitimately be kept from the public." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009). FOIA incorporates "nine exemptions . . . which a government agency may invoke to protect certain documents from public disclosure." *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). Despite the "liberal congressional purpose" of FOIA, the Supreme Court has recognized that these statutory exemptions are intended to have "meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "A district court only has *jurisdiction* to compel an agency to disclose *improperly withheld* agency records," *i.e.*, records that do "not fall within an exemption." *Minier*, 88 F.3d at 803. Thus, "[r]equiring an agency to disclose exempt information is not authorized by FOIA." *Id.* (quoting *Spurlock v. FBI*, 69 F.3d 1010, 1016 (9th Cir. 1995)).

Courts typically resolve FOIA actions through summary judgment motions, *see Yonemoto v. Dep't of Veterans' Affairs*, 686 F.3d 681, 688 (9th Cir. 2011), by conducting *de novo* review of whether the government properly withheld records under any of FOIA's nine statutory exemptions, 5 U.S.C. § 552(a)(4)(B). The Government bears the burden of justifying nondisclosure, *Minier*, 88 F.3d at 800, and it may meet that "burden by submitting a detailed affidavit showing that the information 'logically falls within the claimed exemptions.'" *Id.* (quoting *Hunt v. CIA*, 981 F.2d

1116, 1119 (9th Cir. 1992)). "If the affidavits contain reasonably detailed descriptions of the [information] and allege facts sufficient to establish an exemption, the district court need look no further." *Lane v. Dep't of the Interior*, 523 F.3d 1128, 1135–36 (9th Cir. 2008) (citation omitted). And, although the Government "may not rely upon conclusory and generalized allegations of exemptions," it "need not specify its objections in such detail as to compromise the secrecy of the information." *Church of Scientology of Cal. v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1979) (citation omitted). The Court must accord a presumption of good faith to agency declarations submitted in support of these claimed exemptions. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 773 (9th Cir. 2015).

Critically, the courts have also "emphasized" in FOIA cases "the importance of deference to executive branch judgments about national security secrets." *Hamdan*, 797 F.3d at 773; *see also, e.g., Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926–27 (D.C. Cir. 2003) (recognizing that national security is "a uniquely executive purview"). That is so because courts have "limited institutional expertise on intelligence matters, as compared with the executive branch." *Hamdan*, 797 F.3d at 770; *see also Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (Because "courts have little expertise in either international diplomacy or counterintelligence operations, [they] are in no position to dismiss the [agency's] facially reasonable concerns" about the harm that disclosure could cause to national security). Accordingly, as the Ninth Circuit has directed, for exemptions related to national security, "the district court [is] required to accord 'substantial weight' to [the agency's] affidavits" as long as it is not "controverted by contrary evidence in the record or by evidence of [agency] bad faith." *Hunt*, 981 F.2d at 1119; *see also ACLU v. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011) (courts "must accord substantial weight to an agency's affidavit concerning the details of the classified status of [a] disputed record" because the courts "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case") (citations omitted).

For the reasons set forth below, the declaration of Jennifer L. Hudson sufficiently demonstrates that the Government has appropriately taken redactions under FOIA exemptions one,

three, and five regarding the single document remaining at issue in this case.

B. The Defendants Have Properly Redacted Information That Is Exempt from Disclosure Under Exemption 1.

Defendants, through the declaration of Jennifer L. Hudson of the Office of the Director of National Intelligence, have shown why certain information withheld in the VEP Document is classified national security information protected by FOIA Exemption 1, 5 U.S.C. § 552(b)(1).[2] FOIA Exemption 1 protects records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy[,] and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *accord, e.g.*, *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 144 (1981). In other words, under Exemption 1 material that has been properly classified is exempt from disclosure. *Id.* at 144-45. For information to be properly classified pursuant to Exemption 1, it must meet the requirements of Executive Order 13,526, "Classified National Security Information," 75 Fed. Reg. 707 (Dec. 29, 2009):

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Id. § 1.1, 75 Fed. Reg. at 707; *see* Hudson Decl. ¶ 27. The Executive Order lists three

[2] The Director of National Intelligence is the head of the Intelligence Community and serves as the "principal adviser to the President and the National Security Council for intelligence matters related to the national security." Hudson Decl. ¶ 6. Ms. Hudson, in her capacity as Director of ODNI's Information Management Division, *see id.* ¶ 1, is responsible for, among other areas, records management, classification management and declassification, as well as responding to FOIA requests. *See id.* ¶ 2.

classification levels for national security information: top secret, secret, and confidential. *Id.* § 1.2, 75 Fed. Reg. at 707-08. The Government's declarant, Jennifer L. Hudson, is an original classification authority, that is, a person who is authorized to "conduct classification reviews and to make original classification and declassification decisions for intelligence information." Hudson Decl. ¶ 3.

To meet its burden of showing that the withheld information logically falls within Exemption 1, *see Hamdan*, 797 F.3d at 769, 773-74; *Minier*, 88 F.3d at 800; *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980), the Government's declaration should describe the document withheld; identify the exemption claimed; identify the kind of classified information found in that document; and provide a particular explanation of the injury to national security that would follow from the disclosure of the withheld information in the document. *See Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991); *ACLU v. FBI*, 2014 WL 4629110, at *3 (N.D. Cal. Sept. 16, 2014).

The Government's declaration satisfies this burden. Ms. Hudson identifies the document at issue by title as: "Commercial and Government Information Technology and Industrial Control Product or System Vulnerabilities Equities Policy and Process," referenced here as the VEP Document. *See* Hudson Decl. ¶ 22. She explains that the document was "drafted and reviewed by an interagency working group and other stakeholders within the United States Government" and then it was "subsequently passed on to higher authority within the Executive Branch as part of the Federal Government's development of a vulnerabilities equities policy and process." *Id.*[3] Ms. Hudson concluded that "the portions of the document that have been redacted under exemption (b)(1)" are properly withheld as classified information based upon her personal examination of the information and upon her consultation with "subject matter experts within the ODNI" and her consultation with other "relevant intelligence community agencies" that maintain equities in the

[3] The VEP "define[s] a process for Government consideration of dissemination decisions regarding previously unknown vulnerabilities" in government and commercial information systems. Hudson Decl. ¶ 22. This process is important because these vulnerabilities "can significantly affect the operation and safety of cryptographic and information systems used within national security systems and US critical infrastructure." *Id.*

information. *See id.* ¶ 30.

The VEP Document contains certain categories of classified information: (1) "information that would provide insights into U.S. intelligence cyber capabilities to collect on foreign adversaries"; (2) "U.S. Government's policies and processes employed in identifying and reporting cryptographic vulnerabilities or vulnerabilities discovered in relation to a national security system and how and when those vulnerabilities should be adjudicated and disseminated through the Vulnerabilities Equities Process"; (3) the "specific considerations," not previously officially acknowledged, that "the U.S. Government applies when a vulnerability is identified"; and (4) "information that would identify particular agencies that participate in the process, the conditions under which each agency participates, the timelines involved in the process, and the information that is submitted during the review process." *Id.* ¶ 32.[4]

As Ms. Hudson explains in her declaration, this information, if revealed, could be utilized by foreign intelligence services. *See id.* ¶¶ 31, 33. "Information on the government's cyber capabilities and its cryptographic vulnerabilities would," for example, "be of interest to foreign adversaries." *Id.* at ¶ 33. And, once that information was identified, it "would become a target of opportunity for collection by those services." *Id.* This is because a foreign intelligence service would find it useful "to know what actions the government would take in response to an identified vulnerability and the timing of those actions so that it could develop countermeasures to ensure that it derives the greatest possible benefit from exploitation of that vulnerability." *Id.* Indeed, a foreign intelligence service that had "knowledge of all the government agencies (both large and small) that participate in the VEP, and the conditions under which they participate," would then have a "roadmap for identifying potential targets of opportunity for recruitment and exploitation." *Id.* If that foreign intelligence service was "unable to penetrate one agency," then it "might look to penetrate a particular component of another, smaller entity with the hope of obtaining more information about the VEP." *Id.* By "[t]argeting U.S. Government VEP participants," these

[4] Ms. Hudson noted that these categories of information fall within section 1.4(c) and 1.4(g) of Executive Order 13526 and are thus appropriately considered for classification. *See* Hudson Decl. ¶¶ 29–30.

foreign adversaries could "gain unique insights into the vulnerabilities discovered by U.S. Government elements—vulnerabilities which they could in turn exploit to gain access to sensitive US Government networks—and would also allow such adversaries to gain greater understanding of U.S. cyber operations and capabilities." *Id.* These adversaries would then use that information to "further develop and improve their own capabilities to the detriment of U.S. national security." *Id.*

From the foregoing, Ms. Hudson concludes that the information withheld pursuant to Exemption 1 remains "currently and properly classified at the SECRET level." *Id.* ¶ 30. This conclusion is well supported by the contents of her declaration, and her judgment that disclosure of that information would cause serious damage to the national security, *id.* ¶ 33, is entitled to "substantial weight," *Hunt*, 981 F.2d at 1119, and this Court's deference. *Hamdan*, 797 F.3d at 773; *see also Halperin*, 629 F.2d at 148 ("[T]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency."); *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) ("'[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [effects] might occur as a result of public disclosure of a particular classified record.'") (quoting S. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974)).

C. Defendants Have Properly Withheld Information Under FOIA Exemption 3.

The Government also has properly invoked Exemption 3, which applies to records that are "specifically exempted from disclosure" by other federal statutes "if that statute – establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In promulgating FOIA, Congress included Exemption 3 to recognize the existence of collateral statutes that limit the disclosure of information held by the government, and to incorporate such statutes within FOIA's exemptions. *See Balrige v. Shapiro*, 455 U.S. 345, 352–53 (1982); *Hamdan*, 797 F.3d at 775 ("Exemption 3 protects records exempt from disclosure pursuant to a separate statute."). A "two-part inquiry determines whether Exemption 3 applies to a given case." *Minier*, 88 F.3d at 800–01 (citing *Sims*, 471 U.S. at 167). "First, a court must determine

whether there is a statute within the scope of Exemption 3. Then, it must determine whether the requested information falls within the scope of the statute." *Id.* at 801.

Here, the Government has properly withheld information pursuant to two statutes. *See* Hudson Decl. ¶¶ 36, 40. First, the Government has withheld information that "falls squarely within the scope of Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1)." Hudson Decl. ¶ 36. This statute mandates that the DNI "shall protect intelligence sources and methods from unauthorized disclosure." *Id.* (citing 50 U.S.C. § 3024(i)(1)). As Ms. Hudson notes, the "protection afforded" to those sources and methods "is absolute" and does not depend on whether they are classified. *Id.* This statute indisputably qualifies as an Exemption 3 statute. *See ACLU v. Dep't of Defense*, 628 F.3d at 619; *Larson v. Dep't of State*, 565 F.3d 857, 868 (D.C. Cir. 2009); *N.Y. Times Co. v. Dep't of Justice*, 872 F. Supp. 2d 309, 316-17 (S.D.N.Y. 2012); *N.Y. Times Co. v. Dep't of Defense*, 499 F. Supp. 2d 501, 512 (S.D.N.Y. 2007).[5]

Certain information withheld from disclosure in the VEP Document falls within the scope of section 3024(i)(1). After "review[ing] the contents of the VEP Document" and after "consult[ing] with subject matter experts within the ODNI and with representatives of the relevant agencies," *id.* ¶ 38, Ms. Hudson concluded that certain information in the document implicates sources and methods "employed to identify and address vulnerabilities within U.S. government information systems and to protect research and development and critical infrastructure information necessary to ensure the proper function of those information systems." *Id.* ¶ 39. Thus, she concluded that such sources and methods must be "protect[ed] from unauthorized disclosure" under section 3024 and Exemption 3. *Id.*

Second, the Government has properly withheld certain other information under Section 6 of the National Security Agency Act of 1959, *codified at* 50 U.S.C. § 3605. This statute provides that "[n]othing in this [Act] or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof . . . ." 50 U.S.C. § 3605. The "plain language of a statute stating that no law

[5] 50 U.S.C. § 403-1(i)(1), which is cited in the cases in the text, has been transferred to 50 U.S.C. § 3024.

shall require disclosure of certain records indisputably satisfies the criteria of Exemption 3." *Hamdan*, 797 F.3d at 776. So, too, here, where section 6 states unequivocally that, notwithstanding any other law, including FOIA, NSA cannot be compelled to disclose any information with respect to its activities.[6]

Certain information withheld from disclosure in the VEP Document falls within the scope of Section 6, *see* 50 U.S.C. § 3605. Ms. Hudson explains that this information "pertains to NSA's role in adjudicating certain types of vulnerabilities and certain of NSA's responsibilities as the Executive Secretariat for the VEP process." Hudson Decl. ¶ 40. As such, she continues, this information "relates directly to NSA functions and activities" and thus "falls within the scope of the protection offered by Section 6 of the NSA Act." *Id.* And, given that the "protection afforded by section 6 is, by its very terms, absolute," then the "NSA is entitled to withhold it regardless of the requesting party's needs." *Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996); *see id.* at 696 ("A specific showing of potential harm to national security is irrelevant to the language of [section 6]. Congress has already decided that disclosure of NSA activities is potentially harmful.") (alterations and citation omitted).

For these reasons, the Government has properly withheld certain information contained in the VEP Document from disclosure under FOIA Exemption 3.

D. Defendants Have Properly Withheld Information Protected by the Deliberative Process Privilege Under FOIA Exemption 5.

Exemption 5 shields from mandatory disclosure "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 protects Government materials that "fall within a recognized litigation privilege" such as the deliberative process privilege, on which Defendants rely here. *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1135 (9th Cir. 2014)

[6] FOIA requires that, if the statute was enacted after the date of enactment of the OPEN FOIA Act of 2009, the subsequently enacted statute must specifically cite to 5 U.S.C. section 552(b)(3). The OPEN FOIA Act of 2009 was enacted on October 28, 2009, Pub. L. 111-83, 123 Stat. 2142, 2184; 5 U.S.C. § 552(b)(3)(B), however, after the applicable National Security Act provision was enacted. Accordingly, the OPEN FOIA Act requirement is inapplicable here.

(citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)).

"By maintaining the confidentiality of the give-and-take that occurs among agency members in the formulation of policy, the deliberative process privilege under Exemption 5 encourages frank and open discussions of ideas, and, hence, improves the decisionmaking process." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988); *see also Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (purpose of the deliberative process privilege "is to prevent injury to the quality of agency decisions") (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975)). "Congress [has] expressed concern that if agencies were forced to 'operate in a fishbowl,' candid exchange of ideas within an agency would cease and the quality of decisions would suffer." *Assembly of the State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (quoting S. Rep. No. 813, 89th Cong. 1st Sess. 9 (1965)). Thus, the Ninth Circuit has emphasized that "exemption 5 'was intended to protect not simply deliberative *material*, but also the deliberative *process* of agencies.'" *Nat'l Wildlife Fed'n*, 861 F.2d at 1118 (quoting *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974)) (emphasis supplied by Ninth Circuit); *Haswell v. Nat'l R.R. Passenger Corp.*, 310 F. App'x 184, 185 (9th Cir. Jan. 26, 2009) (same) (quoting *Nat'l Wildlife Fed'n*, 861 F.2d at 1118).

The deliberative process privilege, under Exemption 5, "shields from disclosure documents that are both 'predecisional' and part of the agency's 'deliberative process.'" *Kowack*, 766 F.3d at 1135; *see also, e.g.*, *Maricopa Audubon Soc'y*, 108 F.3d at 1093; *Assembly of the State of Cal.*, 968 F.2d at 920. The Ninth Circuit has "adopted the D.C. Circuit's definition of these terms." *Maricopa Audubon Soc'y*, 108 F.3d at 1093; *see also, e.g.*, *Assembly of the State of Cal.*, 968 F.2d at 920; *Nat'l Wildlife Fed'n*, 861 F.2d at 1117–19.

Material is "predecisional" if it is "antecedent to the adoption of agency policy." *Nat'l Wildlife Fed'n*, 861 F.2d at 1117 (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). Predecisional documents—in contrast to "documents explaining or interpreting [a] decision after the fact," *Assembly of the State of Cal.*, 968 F.2d at 920—are "'prepared in order to assist an agency decisionmaker in arriving at his decision' and may include 'recommendations

[and] draft documents.'" *Maricopa Audubon Soc'y*, 108 F.3d at 1093 (quoting *Assembly of the State of Cal.*, 968 F.2d at 920.

Predecisional materials are "deliberative" if "disclosure of the materials would expose [the] agency's decisionmaking process in such a way as to discourage candid discussions within the agency and thereby undermine the agency's ability to perform its functions." *Kowack*, 766 F.3d at 1135 (quoting *Maricopa Audubon Soc'y*, 108 F.3d at 1093). However, materials need not include recommendations or express opinions to be considered "deliberative." Rather, "the District of Columbia Circuit has repeatedly interpreted exemption 5 to protect documents that would reveal the *process* by which agency officials make these determinations, whether or not the documents themselves contain facts [or] non-binding recommendations regarding law and policy." *Nat'l Wildlife Fed'n*, 861 F.2d at 1119 (collecting cases). On the basis of that extensive authority, the Ninth Circuit, too, concluded that "the scope of the deliberative process privilege should not turn on whether [the court] label[s] the contents of a document 'factual' as opposed to 'deliberative.'" *Id.* Quoting *Wolfe v. Dep't of Health & Human Services*, 839 F.2d 768 (1988) (*en banc*), the Ninth Circuit emphasized: "[i]n some circumstances, even material that could be characterized as 'factual' would so expose the deliberative process that it must be covered by the [deliberative process] privilege." *Nat'l Wildlife Fed'n*, 861 F.2d at 1119 (quoting *Wolfe*, 839 F.2d at 774).

Consistent with that guidance, the Government has withheld two narrow categories of information under Exemption 5 to safeguard both the deliberative process of the VEP, and the deliberative process involved in its creation. First, the Government has redacted information from the header of each page regarding the deliberative process through which the VEP was created. *See* Hudson Decl. ¶ 41. Specifically, the redacted header reveals the recommendation forwarded by the interagency working group involved in the creation of the VEP to a higher authority within the Executive Branch, as well as a date reflecting the timing of that process. *Id.* Ms. Hudson explained that, although the redacted header does not identify the members of the higher authority by name, it does provide a level of specificity that would tend to reveal particular positions within the Government with minimal effort. *Id.* The second category of information redacted under

Exemption 5 comprises the names of small government components identified as participating in the VEP. *Id.* ¶ 43. The deliberative process privilege, through Exemption 5, protects both of these categories of information from disclosure.

1. The header information revealing the inner workings of the deliberative process involved in the creation of the VEP is appropriately redacted under Exemption 5.

The first category of information withheld under Exemption 5—the header reflecting the timing of when the interagency working group involved in the creation of the VEP forwarded its recommendation to a higher authority within the Executive Branch, *see* Hudson Decl. ¶ 41—is "predecisional" by definition, since it consists of detail regarding the then-ongoing deliberative process. *See Wolfe*, 839 F.2d at 774 (information about the timing of when one agency forwarded a recommendation to another for the latter's review was "unquestionably predecisional"). Under the standard adopted in *National Wildlife Federation*—where the Ninth Circuit adopted the D.C. Circuit's approach to factual information revealing the process by which agency officials make determinations, *see* 861 F.2d at 1119—it is also deliberative. *See id.*

Indeed, in *Wolfe*, the D.C. Circuit, sitting *en banc*, considered information strikingly similar to that contained in the header, and concluded that "[t]he purposes of Exemption 5 can be adequately served only by permitting [the Government] to withhold" such information. *See* 839 F.2d at 776. There, the plaintiffs sought records reflecting the dates on which proposals were forwarded among the Food and Drug Administration ("FDA"), the Secretary of Health and Human Services ("HHS") and the Office of Management and Budget ("OMB"). *Id.* at 770–71. The plaintiffs did not seek information about the substance of the proposals, or changes to those proposals made during the consultation among these agencies; rather, they sought only records indicating which FDA proposals (by title) were pending for review by HHS or OMB, and the dates of transmittal of proposals from FDA to HHS, from HHS to OMB, and from OMB back to HHS. *Id.* The *en banc* court rejected the view (accepted by a prior panel) that "the mere fact that 'a recommendation has been made by one agency to another' is not information 'sufficiently 'deliberative' to trigger the protections of the privilege.'" *Id.* at 773 (quoting *Wolfe v. Dep't of Health & Human Servs.*, 630 F. Supp. 546, 550 (D.D.C. 1985)).

In reversing the panel's ruling, the *en banc* court emphasized that the information sought would disclose that "preliminary recommendations have been accepted or rejected, at various levels of review," and that the very fact of forwarding, for each rule, would be "the functional equivalent of an intra-agency or inter-agency memorandum that state[d] 'We recommend that a regulation on this [named] subject matter be promulgated.'" *Id*. at 774. The court further explained that "the information sought would reveal the timing of the deliberative process and . . . the agency in which the deliberative process [was then] going forward." *Id* at 775. The court explained that "[t]hus the information sought [would] generally disclose the recommended outcome of the consultative process at each stage of that process" as well as the source of any decision not to move forward with a proposal. *Id.*

The court reasoned that, particularly when subordinates are reporting to superiors, disclosure of the requested information "could chill discussion at a time when agency opinions are fluid and tentative." *Id.* at 776. Moreover, the court emphasized that the disclosure sought "would force officials to punch a public time clock," and regular requests by the plaintiffs would allow plaintiffs to "learn to identify and publicize" the source of any perceived delay. *Id.* The court noted the likelihood that such attention would "lead to hasty and precipitous decision-making," cautioning that "[d]ecisional delay is not a fact but an opinion," and that what some may perceive as "delay," might be attributable to, *inter alia*, "the difficulties of weighing competing values." *Id.* The court concluded "[i]t is just such a fishbowl that Congress sought to avoid when it enacted Exemption 5." *Id.*

Following *Wolfe*, the court in *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13 (D.D.C. 2011), held that Exemption 5 protected "information revealing the dates that certain actions in the deliberative process were (or were not) undertaken." 796 F. Supp. 2d at 28. The court there explained that "releasing information about the timing of the deliberative process would 'disclose the recommended outcome of the consultative process at each stage of that process' and that such information [was] therefore properly protected under the deliberative process privilege." *Id.* (quoting *Wolfe*, 839 F.2d at 775).

Just as in *Wolfe*, the header information in this case would reveal the date on which a group within the Government conveyed a specific recommendation to another group within the Government, regarding an ongoing deliberative process in which both were participating. As Ms. Hudson explains, although the redacted header does not expressly state the working group's opinions, it signals the working group's conclusion regarding whether the higher Executive Branch authority should move forward with the VEP as proposed within the document. Hudson Decl. ¶ 41 n.5. The Court in *Wolfe* emphasized that this type of information constitutes the "functional equivalent" of a memorandum expressing an opinion regarding the forwarded policy. 839 F.2d at 774. The header information here would reveal, just like the information requested in *Wolfe*, that a particular recommendation (whether to move forward with the VEP), was provided to a specific group within the Executive Branch, and the date on which that step in the deliberative process occurred. Moreover, because the header identifies the authority receiving the recommendation with a level of specificity that would tend to reveal particular positions within the Government with minimal effort, Hudson Decl. ¶ 41, disclosure would result in the very situation the court in *Wolfe* cautioned against.

Indeed, Ms. Hudson explains that the same effects against which the *Wolfe* court cautioned—a chill on the deliberative process, and undue time pressure on the officials involved in deliberations, *see* 839 F.2d at 776—are likely to result if information of the type contained in the header here is not protected from disclosure. *See* Hudson Decl. ¶ 42. She highlights that such effects are particularly likely to damage the deliberative process where that process involves the "complex balancing of important goals such as national security and transparency, as the VEP is designed to do." *Id.* For all of these reasons, the header information is appropriately redacted from the document under Exemption 5.

2. The names of small government components participating in the deliberative process are appropriately redacted under Exemption 5.

The second category of information redacted from the document under Exemption 5—identities of relatively small government components participating in the VEP listed in Sections 6.3, 6.6.1, 6.7, 6.7.1, 6.8, and Annex B of the document—also is protected from disclosure by the

deliberative process privilege. The Ninth Circuit has recognized that the deliberative process privilege, applied through Exemption 5, may be invoked to shield the identities of process participants from disclosure. *See AIDS Healthcare Found. v. Leavitt*, 256 F. App'x 954, 957 (9th Cir. 2007). In *AIDS Healthcare Foundation*, the Court affirmed that the identities and affiliations of decision-makers with respect to specific grant applications were appropriately protected under Exemption 5, and rejected a plaintiff's objection that such information was "non-exempted purely factual material." *See id.* Indeed, the Court observed that if such information were disclosed, "it would be impossible to have any frank discussions of . . . policy matters in writing." *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

The D.C. Circuit similarly reasoned in *Brinton v. Dep't of State* that Exemption 5 protects the authors of deliberative documents, *see* 636 F.2d 600, 604 (D.C. Cir. 1980), and lower courts have likewise approved the protection of participants in the deliberative process. *Cofield v. City of LaGrange*, 913 F. Supp. 608, 616 (D.D.C. 1996) (applying reasoning of *Brinton* to protect "internal routing notations that identify agency personnel involved in the deliberative process even where such notations are on copies of documents, the originals of which have been released (sans notation)"); *Tax Reform Research Grp. v. IRS*, 419 F. Supp. 415, 423 (D.D.C. 1976) (approving redaction of process participant identities, notwithstanding that the agency had otherwise released the documents at issue in their entirety because "the (b)(5) exemption is intended to protect the decision-making process used by the agency in arriving at its policy decisions").

Here, Ms. Hudson's declaration explains why it is especially important to protect the redacted information about VEP participants from disclosure. *See* Hudson Decl. ¶¶ 44–45. First, given the public interest in the VEP, subjecting readily identifiable VEP participants to public pressure could harm the integrity of the process itself, and undermine the ability of the participants to appropriately consider the weighty issues they must address each time they decide whether, when, or how a specific vulnerability should be disclosed. *Id.* ¶ 44. Consistent with "the ultimate objective of exemption 5"—"to safeguard the deliberative *process* of agencies," *National Wildlife Federation*, 861 F.2d at 1119—it is appropriate to shield the identities of the VEP participants from

disclosure.

This is especially so in this case because, as Ms. Hudson explains, there is an additional risk—beyond that present in such cases as *AIDS Healthcare Foundation* and *Brinton*—that small groups participating in the VEP will likely be the target of activities by foreign intelligence services if their identities are disclosed. Hudson Decl. ¶¶ 33, 45. The VEP participants' work implicates important equities because the undisclosed vulnerabilities considered through the VEP can implicate the U.S. Government's ability to collect crucial intelligence, potentially disrupt a terrorist attack, prevent the theft of intellectual property, or even discover more dangerous vulnerabilities that are being used by hackers or other adversaries to exploit our networks. *Id.* In light of these stakes, there is a substantial risk that these VEP participants will be targeted for espionage if their identities are known, raising concerns similar to those discussed in Section III.B above. *See id.*

For all of these reasons, the identities of relatively small government components participating in the VEP that are redacted from Sections 6.3, 6.6.1, 6.7, 6.7.1, 6.8 of the VEP Document are appropriately protected from disclosure under Exemption 5.

E. Defendants Have Produced All Reasonably Segregable Portions of the Document.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b)(9). While the Government has the burden to show that it has discharged this obligation, *see Pacific Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008), it is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material." *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013) (citation omitted).

Defendants have discharged this obligation by reviewing the withheld information in the VEP Document line by line and by attesting that they have disclosed all non-exempt information that reasonably could be disclosed. *See* Hudson Decl. ¶ 46. And "evidence of [the Government's] good faith," *Hamdan*, 797 F.3d at 781, in this regard is shown in "paragraphs 6.3, 6.6.1, 6.7.1,

6.8.2, and 7, which were previously portion marked as classified but have now been released in part and redacted in part." Hudson Decl. ¶ 46; *see Hamdan*, 797 F.3d at 779 ("The district court may rely on an agency's declaration in making its segregability determination."). Accordingly, Defendants have shown that they have produced all "reasonably segregable portion[s]" of the responsive records, 5 U.S.C. § 552(b).

IV. CONCLUSION

For the reasons set forth above, the Court should grant Defendants' motion for summary judgment and enter judgment for the Defendants.

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Respectfully submitted,

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