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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 **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT** Hon. Richard Seeborg

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I. INTRODUCTION

Summary judgment in favor of Defendants is proper. Defendants have shown in their initial brief that their claimed FOIA Exemptions 1, 3, and 5 are fully supported. *See* Memorandum of Points and Authorities in Support of the Defendants' Motion for Summary Judgment ("Defs.' Mot."), ECF No. 32-1, at 6-18. Plaintiff challenged each of these exemptions in its opposition to the Government's motion and in their own cross-motion for summary judgment. *See* Notice of Motion and Cross Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment ("Pl. Cross-Mot."), ECF No. 34. But none of Plaintiff's arguments preclude the Court from granting summary judgment for Defendants.

With regard to the information withheld under Exemptions 1 and 3, the Government has since re-appraised all redactions taken in the Vulnerabilities Equity Process Document ("VEP Document") and lifted certain redactions that were previously taken. In support of their summary judgment motion covering the remaining redactions, the Government proffers the declarations of a subject matter expert and an original classification authority who both attest that the remaining redactions are proper. While Plaintiff does not challenge any redactions in the VEP Document by arguing that the information is not subject to either Exemption 1 or Exemption 3, it does argue that the Government has waived these exemptions by officially acknowledging the contents of the VEP Document. That is not so. As the Government's declarants attest, none of the remaining redacted information has been publicly disclosed. And, though the Court will need to review the Government's classified declaration *in camera* that discusses the content of the VEP Document in detail in order to confirm this fact, none of the information that has been officially disclosed is redacted.

As for the information withheld pursuant to Exemption 5, the Government likewise lifted a redaction from the header of the VEP Document. For the reasons explained in the Defendants' summary judgment motion and the declaration submitted therewith, the remaining information redacted from the VEP Document under Exemption 5 is appropriately protected by the deliberative process privilege. Plaintiff's challenges to those redactions are premised on its assumptions that

the privilege cannot protect predecisional information after deliberations have ended, and that the privilege cannot apply to an overarching and ongoing process like the VEP. Neither the case law nor the policy rationale underlying the privilege supports such a narrow reading. On the contrary, the information withheld under Exemption 5 here is the kind of material that courts have recognized must be protected to safeguard the integrity of the Government's deliberative processes.

Finally, the Court need not, as Plaintiff suggests, undertake the burden of reviewing the underlying document through *in camera* review. The briefs, the robust public declarations, and the classified declaration provide ample support for the Government's position that its withholdings are proper under FOIA. The Court need look no further.

II. ARGUMENT

A. Defendants Have Properly Redacted Information in the January 14, 2016 VEP Document That Is Exempt Under Exemptions 1 and 3.

In their opening brief, Defendants identified the categories of information being withheld from the VEP Document; *see* Defs.' Mot. at 7-8, 10-11; explained why the information being withheld under Exemption 1 was classified and the harm that could result from its disclosure, *see id.* at 8-9; and explained how the information withheld under Exemption 3 satisfied the criteria for withholding pursuant to an applicable federal statute, *see id.* at 10–11. FOIA requires nothing more. *See Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (Exemption 1); *ACLU v. FBI*, 2014 WL 4629110, at *3 (N.D. Cal. Sept. 16, 2014) (Exemption 1). *See also Minier v. CIA*, 88 F.3d 796, 800-01 (9th Cir. 1996) (Exemption 3).

Since Defendants filed their initial brief on October 30, 2015, however, the Government has once more re-reviewed the VEP Document to determine whether any more information ought to be or could be released to the public. *See* Supplemental Declaration of Jennifer L. Hudson ("Suppl. Hudson Decl.") (Exhibit A, hereto) ¶¶ 2-3.[1] Based on Ms. Hudson's review of the "accompanying exhibits" to Plaintiff's cross-motion and her consultation with subject matter experts, she

[1] Ms. Hudson is Director of the Information Management Division of the Director of National Intelligence. *See* Declaration of Jennifer L. Hudson ("Hudson Decl."), Exhibit B to Defendants' summary judgment motion, ECF No. 32. She is an Original Classification Authority and provided a declaration in support of Defendants' summary judgment motion. *See id.* ¶¶ 1-3.

determined that "a few words in the VEP Document ought to be unredacted" and that certain other information was no longer classified and thus could be released. *See id.* As a result, the Government is now disclosing a new version of the document as an exhibit to this filing. *See* January 14, 2016 VEP Document (Exhibit B, hereto).[2]

Redactions remain in the January 14, 2016 VEP Document, however. The redacted information falls within at least one of the following four categories of information: "(1) certain actions taken in response to the identification of a vulnerability; (2) timelines pertaining to the functioning of the VEP; (3) the identities of certain entities involved in particular aspects of the VEP; and (4) the process of addressing cryptographic vulnerabilities." Suppl. Hudson Decl. ¶ 4.[3] Ms. Hudson, as part of her latest review of the VEP Document, confirmed that the information in these categories previously redacted pursuant to Exemption 1 remained appropriately classified for the reasons she had previously stated. *See id.* ¶ 6. Similarly, she also confirmed that the information in these categories previously redacted pursuant to Exemption 3 remains subject to protection from disclosure pursuant either to 50 U.S.C. § 3024(i) or 50 U.S.C. § 3605, for the reasons she previously articulated. *See id.* ¶ 7; *see also* Defs' Mot. at 10–11. Finally, Ms. Hudson once "again conducted a line-by-line review of the VEP Document to ensure that all reasonably segregable, non-exempt information has been released" in light of her review of pertinent

[2] Defendants also adjusted two labels on information that had been previously redacted, but labelled incorrectly through clerical error. Information in Section 6.1(f) that had been redacted pursuant to Exemptions 1 and 3 should also have been labeled with Exemption 5, but was not due to an oversight; Defendants are no longer withholding the text under Exemptions 1 and 3, but are continuing to withhold certain information under Exemption 5, and have added the correct label to so indicate in the January 14, 2016 VEP Document. *See* Exh. B. Likewise, due to a clerical error, a redaction in Section 6.6.1(b) was previously labelled with Exemption 5, but should have been labelled with Exemptions 1 and 3; that has been corrected in the January 14, 2016 VEP Document as well. *See id.* Courts allow the Government to correct such errors. *See, e.g.*, *August v. FBI*, 328 F.3d 697, 702 (D.C. Cir. 2003) (permitting the Government to assert exemptions that had been omitted due to human error); *Gerstein v. CIA*, 2008 WL 4415080, at *13 (N.D. Cal. Sept. 26, 2008) (permitting the Government to assert exemptions over information that it had inadvertently failed to raise in its initial brief).

[3] As the declarant notes, these four categories are "a refinement" of the withholding categories that were previously "set forth in paragraph 32" of her prior declaration. *See* Suppl. Hudson Decl. ¶ 4.

information and her further consultation with subject matter experts. *See* Suppl. Hudson Decl. ¶ 9. While examples of this line-by-line review abound, as evidenced by the amount of information throughout the January 14, 2016 VEP Document that has been unredacted since the prior iteration of the document, this careful review is most evident in Section 6.6.2 and in Annex A where "redactions have been lifted of certain section titles, partial sentences, and whole sentences within . . . previously fully redacted paragraphs." *Id.*

B. Defendants Have Not Waived These Exemptions By Official Acknowledgment.

Plaintiff does not challenge the redacted information on the basis that it is not classified or on the basis that it is not subject to protection from disclosure by statute. *See* Pl. Cross-Mot. at 8–15. Instead, Plaintiff argues that "the withheld information has already been publicly disclosed by the government in other circumstances" so as to "overcome" the "otherwise valid FOIA exemption[s]." *Id.* at 8. That is not the case with the January 14, 2016 VEP Document.

An agency may be compelled to provide information over a valid FOIA exemption claim only when the specific information at issue has already been fully, publicly, and officially disclosed. *See Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Plaintiff "bear[s] the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id.* Plaintiff must show that (1) the requested information is "as specific as the information previously released;" (2) that the requested information "match[es] the information previously disclosed"; and (3) the information has "already . . . been made public through an official and documented disclosure." *Pickard v. Dep't of Justice*, 653 F.3d 782, 786 (9th Cir. 2011) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)).[4] "Prior disclosure of similar information does not suffice" to negate the government's classification; "instead, the *specific* information sought by the plaintiff must already be in the public domain by official

[4] In *Pickard* the Ninth Circuit was elaborating on the meaning of "official confirmation" in the context of confirming the identity of a confidential informant, but it opined that the test was the same as that for "official acknowledgment" under the FOIA. 653 F.3d at 786. If anything, one would expect the test for acknowledgment of properly classified information to be more stringent than that applied to law enforcement information.

disclosure." *Wolf*, 473 F.3d at 378; *see also Public Citizen v. Department of State*, 11 F.3d 198, 203 (D.C. Cir. 1993) ("[A]n agency will not be held to have waived exemption 1 absent a showing by a FOIA plaintiff that the *specific information at issue* has been officially disclosed."). The "official acknowledgement" test is a "stringen[t]" one, *Public Citizen*, 11 F.3d at 201-02, to be applied with "exactitude," *Wolf*, 473 F.3d at 378.[5] The stringency of the test thus presents a "high hurdle" to Plaintiff out of deference to "the Government's vital interest in information relating to national security and foreign affairs." *Public Citizen*, 11 F.3d at 203.

Plaintiff cannot clear this "high hurdle." According to Plaintiff, "the government has illegally withheld at least two categories of information," Pl. Cross-Mot. at 8, which comprise the Government's use of "[v]ulnerabilities for [o]ffensive [p]urposes," *id.* at 9, and the "*specific* policy considerations that participants in the VEP employ." *Id.* at 12. With regard to offensive cyber capabilities, Plaintiff asserts that the Government has "redacted all references to decisions to retain and exploit vulnerabilities for so-called offensive purposes," *id.*, even though this fact "has been confirmed by government officials in documented public statements and by publicly released government documents." *Id.* at 9. In support of this argument, Plaintiff directs the Court to various exhibits attached to its summary judgment motion that contain information in varying degrees of specificity as support for its proposition that the Government possesses offensive cyber capabilities and that it may exploit known vulnerabilities for those purposes. *See* Pl. Cross-Mot. at 9–12; *compare* Exhibit C, at 4 to Pl. Cross-Mot. (referencing the "application of offensive capabilities to defend U.S. information systems"), *with* Exhibit E, at 7, to Pl. Cross-Mot. (noting that there "are a limited set of vulnerabilities that we may need to retain for a period of time in

[5] The "stringency" of this official acknowledgment test was "made clear" in the D.C. Circuit case, *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990). *See Public Citizen*, 11 F.3d at 202. In *Fitzgibbon* the district court found that the CIA had waived its Exemption 3 withholding for information relating to the location of a specific CIA station after 1975 because, in that year, a Congressional committee report revealed the location of the station. The D.C. Circuit, however, held that the disclosure did not operate as a waiver of information regarding the station's location before or after 1975. *See Fitzgibbon*, 911 F.2d at 765-66; *see also EFF v. Dep't of Justice*, 2014 WL 3945646, at *6 (N.D. Cal. Aug. 11, 2014) (a request seeking the "specific identities of all telecommunications service providers that participated" in a government program was "not identical to" a putative official acknowledgement that there were "three different providers" involved).

order to conduct legitimate national security intelligence and law enforcement missions"). The Court need not address this issue. In the January 14, 2016 VEP Document references to the *fact* that the Government has offensive cyber capabilities have been unredacted and so have references to the *fact* that the Government may "retain and exploit vulnerabilities for so-called offensive purposes." Pl. Cross-Mot. at 8; *see also* January 14, 2016 VEP Document, Sections 3, 4; Annex A. The redaction of other information that may relate to these facts in some way is addressed below, *see infra*, at 7-8.

With regard to specific policy considerations, Plaintiff argues that the Government has improperly redacted "information about the actual policy considerations involved in weighing" the VEP equities to "reach a decision" even though the Government has "already disclosed those considerations in other contexts." Pl. Cross-Mot. at 8. In support, Plaintiff quotes from the White House Cybersecurity Coordinator's blog post in which he lists "a few things" he would "want to know when an agency proposes temporarily withholding knowledge of a vulnerability." Exhibit B to Pl. Cross-Mot.; *see also* Pl. Cross-Mot. at 12–13 (quoting those considerations). Plaintiff also quotes from statements purportedly made by Admiral Mike Rogers, the current NSA Director, at Stanford University about the "thought process" "from a policy side" regarding vulnerabilities decision making. *See* Exhibit I to Pl. Cross-Mot.; *see also* Pl. Cross-Mot. at 13 (quoting a series of questions for consideration). From these exhibits, Plaintiff distills what it calls "a common set of criteria." Pl. Cross-Mot. at 13. But, other than speculating that Sections 6.2, 6.8.1, and 6.8.2 of the VEP Document "most obviously" contain "policy considerations," Pl. Cross-Mot. at 13,[6] Plaintiff provides nothing to suggest that anything even akin to the considerations set forth in its brief may be found in the VEP Document. *See CAIR v. FBI*, 749 F. Supp. 2d 1104, 1113 (S.D. Cal. 2010) ("There is no basis, and Plaintiffs have supplied none, to believe that the publicly available information is as specific"—or even matches—"the information that the [agencies] seek[] to withhold.").

[6] While the redactions in Sections 6.2 and 6.8.1 remain in the January 14, 2016 VEP Document, the redaction in Section 6.8.2 has been lifted. And the information beneath the redaction in Section 6.8.2 has nothing to do with the "policy considerations" identified by Plaintiff.

To the extent that information relating to either offensive cyber capabilities or the VEP policy considerations identified by Plaintiff falls within one of the four categories of information that are still being redacted, *see* Suppl. Hudson Decl. ¶ 4, that information has not been officially disclosed. To support this proposition, the Government has submitted two declarations. *See* Suppl. Hudson Decl. ¶ 5; Redacted Declaration of James B. Richberg ("Redacted Richberg Decl.") (Exhibit C, hereto) ¶¶ 16, 25, 29, 34. In her declaration, Ms. Hudson attests that she has reviewed the contents of Plaintiff's exhibits and has consulted with subject matter experts, *see* Suppl. Hudson Decl. ¶ 2, and, having done so, she concludes that none of the currently redacted information has "been disclosed by the United States Government." *Id.* ¶ 5. In doing so, she "concur[s]" with James B. Richberg. *See id.* Mr. Richberg is the National Intelligence Manager for Cyber (NIM-Cyber) for the Director of National Intelligence ("DNI").[7] *See* Redacted Richberg Decl. ¶ 1. In his role as NIM-Cyber, he is "the DNI's intelligence community (IC) lead for cyber intelligence issues" and is "responsible to the DNI for the integration of" intelligence community "collection and analysis on cyber intelligence issues." *Id.* ¶ 3. He has a "comprehensive understanding of cyber issues," is "very familiar" with the VEP Document, and has "become familiar" with the exhibits to Plaintiff's summary judgment motion. *See id.* ¶¶ 6, 7. Based on that knowledge, Mr. Richberg has concluded that the information still being redacted in the January 14, 2016 VEP Document pursuant to Exemptions 1 and 3 has not been disclosed to the public. *See id.* ¶¶ 16, 25, 29, 34.

Moreover, to the extent that any remaining redactions cover information related in some way either to offensive cyber capabilities or the policy considerations identified by Plaintiff, the Government is unable to demonstrate on the public record why the information in any one of the exhibits presented by Plaintiff is either not as "specific" or does not otherwise "match[]" the information redacted in the January 14, 2016 VEP Document. *See Pickard*, 653 F.3d at 786 (requiring that the "information requested must be as specific as the information previously

[7] The DNI 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. *See* Defs.' Mot. at 6 n.2

released" and that it "match the information previously disclosed"); *see also Public Citizen*, 11 F.3d at 201 ("specific information in the public domain" must "duplicate[]" the information "being withheld"). To do so would be to reveal the very information Defendants are seeking to protect. In these circumstances, the Government is permitted to submit a classified declaration for the Court to review *in camera* and *ex parte.* "It is well settled that a court may examine an agency declaration *in camera* and *ex parte* when release of the declaration would disclose the very information that the agency seeks to protect." *Greyshock v. U.S. Coast Guard*, 107 F.3d 16 (9th Cir. 1997) (unpublished opinion); *see also Lion Raisins v. United States Dep't of Agric.*, 354 F.3d 1072, 1082, 1083 (9th Cir. 2004) ("[I]*n camera* review of government affidavits" "is justified where the government's public description of a document and the reasons for exemption may reveal the very information that the government claims is exempt from disclosure."). Indeed, district courts do "not err by examining a classified declaration rather than the documents themselves" as "[s]ubstitution of an affidavit is preferred when the national security exemption applies." *Greyshock*, 107 F.3d 16.

The Government has submitted just such a classified declaration here. While the content of the classified portions of that declaration obviously cannot be described here, it suffices to say that the classified declaration contains details about the information within each of the four identified categories that remains redacted in the January 14, 2016 VEP Document as well as a classified description of the damage to national security that could result from the disclosure of such information. As with the public declaration already submitted, the Court is "required to accord 'substantial weight'" to this classified declaration so long as it is not "controverted by contrary evidence in the record or by evidence of [agency] bad faith." *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992); *see also* Defs.' Mot. at 5, 9. From its *in camera* review of that classified declaration, the Court will be able to determine whether the information in Plaintiff's exhibits is as "specific" as the information redacted in the January 14, 2016 VEP Document and whether or not the information in Plaintiff's exhibits is a "match[]" for the information remaining redacted. Defendants submit that it is not.

For all of these reasons, Defendants have not waived their ability to assert Exemptions 1 and 3 over the pertinent information remaining redacted in the January 14, 2016 VEP Document.

C. Defendants' Withholdings Under Exemption 5 Are Proper.

As Plaintiff acknowledges, Defendants seek to protect just two narrowly-defined categories of information from the VEP Document under Exemption 5, *see* Pl. Cross-Mot. at 16: (1) information regarding an interagency working group's recommendation to a higher authority within the Executive Branch regarding the creation of the VEP, Hudson Decl. ¶ 41; and (2) information identifying small government components that will be participating in the VEP, *see id.* ¶ 43.[8] Defendants' motion explained why these limited redactions are necessary, and why they are properly protected by the deliberative process privilege. *See* Defs.' Mot. at 11–18. For the reasons explained below, Plaintiff's arguments to the contrary are mistaken.

First, Plaintiff argues that Exemption 5 does not apply in this case because the VEP document constitutes the Government's adopted policy. *See* Pl. Cross-Mot. at 16–18. But, as explained below, the Government does not seek to withhold the substance of that policy under Exemption 5. With respect to the first category of information that the Government *does* seek to withhold—header information regarding the process by which the VEP document was created—Plaintiff argues that such information should not be protected because the deliberative process of creating the VEP is over. There is no support for Plaintiff's claim, however, that Exemption 5's protection ends at the conclusion of a given deliberative process. In fact, in its final argument, Plaintiff, too, seems to reverse course, arguing that process participants' identities do not warrant protection because those entities *have not completed* a particular instance of the deliberative process. As Defendants explain however, there is no support for this approach either. In reality, *Wolfe v. Dep't of Health & Human Services*, 839 F.2d 768 (D.C. Cir. 1988), highlighted by Defendants in their motion, *see* Defs.' Mot. at 14–16, supports the application of the deliberative process privilege to an overarching, ongoing process like the VEP. For all of these reasons, and for

[8] Additionally, in light of public information reviewed by Ms. Hudson, Defendants exercised their discretion to release the date listed in the header of the VEP Document, *see* Exh. B, narrowing the amount of information covered by one of the categories currently withheld under Exemption 5.

the reasons discussed in Defendants' motion, the two narrow categories of information redacted from the VEP Document under Exemption 5 are properly protected by the deliberative process privilege.

1. It is of No Moment that the VEP Document Has Been Adopted Because Defendants Have Not Withheld the Substance of the VEP Document Under Exemption 5.

First, Plaintiff argues that Exemption 5 cannot apply in this case because the VEP Document constitutes final agency policy. Asserting that final agency policy "may never be withheld under Exemption 5," Pl. Cross-Mot. at 16, Plaintiff focuses on evidence that the VEP document has been adopted by the Government. *Id.* at 16–18 But the Government's redactions under Exemption 5 encompass only limited details regarding the deliberative process that led to the creation of the VEP, and the identities of small government entities that will participate in the deliberative process going forward. *See* Hudson Decl. ¶¶ 41, 43. Because the Government does not seek to withhold the final agency policy that constitutes the substance of the VEP document under Exemption 5, Plaintiff's argument is misplaced.

In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the Supreme Court explained that "the purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." 421 U.S. at 151. Plaintiff highlights *Sears* in its argument, *see* Pl. Cross-Mot. at 16, but ignores that the Supreme Court premised its discussion on the assumption that "the ingredients of the decisionmaking process [will] not [be] disclosed." *Id.* at 151. In *Sears*, as in the three other cases on which Plaintiff relies, *see* Pl. Cross-Mot. at 16, the Court assessed whether Exemption 5 required disclosure of the *substance* of agency memoranda. *See id.* at 150–54; *see also Brennan Ctr. for Justice v. Dep't of Justice*, 697 F.3d 184, 202–207 (2d Cir. 2012); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868–69 (D.C. Cir. 1980). The holdings of these cases—that Exemption 5 "calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy," *Sears*, 421 U.S. at 153—simply has no application here, where the Government has disclosed the

substance of the "effective law and policy" at issue.[9]

2. Exemption 5 Continues to Protect the Deliberative Process that Created the VEP.

Citing *Sears* again, Plaintiff next argues that Exemption 5 cannot apply to header information regarding the deliberative process that led to the creation of the VEP because that deliberative process has been completed. Pl. Cross-Mot. at 19–20. Ignoring that the Defendants' reasons for protecting such information focus on potential harm to future deliberative processes, *see* Hudson Decl. ¶ 43, Plaintiff urges that "because the VEP Document is 'final,' there is no deliberative process for this information to reveal." *Id.* at 19 (citing *Sears*, 421 U.S. at 161). In effect, Plaintiff contends that the deliberative process privilege continues only so long as the deliberative process itself; once deliberations end, so, too, does any protection. Neither law nor logic supports such a limitation.

To begin with, *Sears* itself is to the contrary. In that case, the Supreme Court highlighted that predecisional, deliberative materials retain the protection of the deliberative process privilege even after post-decisional materials become subject to disclosure; the Court emphasized that "forced disclosure of [communications with respect to the decision occurring after the decision is finally reached]" should not affect the quality of agency decisions "as long as prior communications and the ingredients of the decisionmaking process are not disclosed." *Sears*, 421 U.S. at 151;[10] *see also Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 234 (D.D.C. 2009) ("*CREW*") (highlighting "the Supreme Court's recognition in *Sears, Roebuck & Co.* that 'the future quality of an agency's decisions could be affected if the

[9] As discussed above and in Defendants' motion, any redactions to the substance of the policy are taken under Exemption 1 or Exemption 3.

[10] Although the Court noted that employees would likely be encouraged, not discouraged, by public knowledge that their suggestions were accepted, the discussion in *Sears* on which Plaintiff relies addresses not whether predecisional recommendations lose the protection of the privilege once a final decision is rendered, but whether an agency can claim the privilege over the content of intra-agency memoranda that have been incorporated by reference into a final opinion. *See Sears*, 421 U.S. at 161. As discussed in Section C.1 above, because the substance of agency policy has not been withheld under Exemption 5 in this case, this discussion is inapposite.

ingredients of the decisionmaking process are . . . disclosed'") (quoting *N. Dartmouth Properties, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 984 F. Supp. 65, 68 (D. Mass.1997)). Thus, the deliberative process privilege operates not solely to protect the integrity of a particular process while it is ongoing, but also "to avoid 'a chilling effect on communication between agency employees regarding similar projects [in] the future.'" *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 27 (D.D.C. 2011) (quoting *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 204 (D.D.C. 2007)).

Based on these very considerations, the court in *CREW* held that interviews containing "a recounting of the predecisional deliberative process itself," 658 F. Supp. 2d at 233—notwithstanding that they were conducted after the agency had rendered its final decision—were properly protected by the deliberative process privilege. *Id.* at 233–34. The court emphasized "a concern for the chilling effects that such disclosure would have on future agency deliberations." *Id.*

It is this harm—the potential damage to future deliberative processes—that Defendants cited in explaining why the header information requires protection here. *See* Hudson Decl. ¶ 41. As Ms. Hudson stated, "[e]xposing the recommendations made at intermediate stages in the deliberative process to public scrutiny, regardless of whether they were later accepted or rejected, could chill dialogue and lead to less open discussions while the deliberative process is ongoing." *Id.* ¶ 42. "[I]nterested onlookers could use such information as they monitor future deliberative processes to scrutinize the progress of deliberations, pressuring decision-makers to accelerate their deliberations if they judged the process was not progressing at the pace they desired." *Id.* Ms. Hudson emphasized that damage to the process could result particularly in a process that, like the VEP, "involved the complex balancing of important goals such as national security and transparency." *Id.*

As Defendants explained in their motion, this is similar to the potential for harm that the court highlighted in *Wolfe v. Dep't of Health & Human Services*, 839 F. 2d 768 (D.C. Cir. 1988). *See* Defs.' Mot. at 14–16. Emphasizing the damage that could be wrought by the requested

disclosure, the court in *Wolfe* held that "[t]he purposes of Exemption 5 can be adequately served only by permitting [the Government] to withhold" information reflecting the fact of whether and when an agency forwarded a recommendation to another. *Wolfe*, 839 F.2d at 776.

Plaintiff urges that *Wolfe* is distinguishable. *See* Pl. Cross-Mot. at 19–20. It is not. Plaintiff suggests otherwise based on a misreading of that decision, and a misapprehension of what it means for a document to be "predecisional" and "deliberative" under Exemption 5. Plaintiff contends that, in *Wolfe*, "the D.C. Circuit considered proposed rules forwarded between agencies and held that they were 'unquestionably predecisional' for the very reason that they were still proposed rules in the process of being considered by the participating agencies." *Id.* at 19 (quoting *Wolfe*, 839 F.2d at 774). Plaintiff then concludes that "the dates that the proposed rules were forwarded were withheld as deliberative because they would [disclose information] . . . which 'would certainly reveal policies prematurely.'" *Id.* (quoting *Wolfe*, 839 F.2d at 774–75)).

Plaintiff's argument ignores that both terms, "predecisional" and "deliberative," have been defined by the courts in the context of the deliberative process privilege, and neither includes any requirement that the deliberative process to be protected remain ongoing. *See, e.g.*, *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168 (1975) (materials are "predecisional" if they are "prepared in order to assist an agency decisionmaker in arriving at his decision"); *see also* Defs.' Mot. at 12–13 (discussing cases defining each term). In fact, the *Wolfe* court explained that that case "turn[ed] . . . on whether or not the information requested [was] deliberative-that is 'whether it reflect[ed] the give-and-take of the consultative process.'" 839 F.2d at 774 (quoting *Coastal States Gas Corp.*, 617 F.2d at 866). The *Wolfe* court further explained that the deliberative process privilege "focuses on documents which reflect [the] process by which governmental decisions and policies are formulated." *Id.* (citing *Sears*, 421 U.S. at 150). Thus, as Defendants explained in their motion, the court in *Wolfe* focused on the question of what information would have been conveyed by the materials withheld under Exemption 5. That court's analysis did not turn on whether the deliberative process was ongoing; indeed, such a requirement would have been inconsistent with Supreme Court guidance, and the very policy reasons that underlie the

deliberative process privilege. Viewed in context, the holding of *Wolfe* unequivocally supports protecting the header information at issue here.

3. Exemption 5 Protects the Identities of Small Government Entities Participating in the Deliberative Processes that Will Occur as Part of the VEP.

Plaintiff advances two reasons why it contends that the identities of certain process participants should not be protected under Exemption 5. In reality, however, both reasons that Plaintiff highlights offer additional grounds for shielding the identities of process participants from disclosure.

First, reversing its above-discussed argument regarding the creation of the VEP—where Plaintiff argued that information should not be protected because it related to a deliberative process that had already occurred, *see* Pl. Cross-Mot. at 19–20—Plaintiff urges that information should not be protected because it relates to "future hypothetical deliberative processes," *id.* at 21. But those future processes are not merely hypothetical, and information identifying their participants is precisely the kind of material that the deliberative process privilege is meant to shield from disclosure. As Plaintiff emphasizes, the VEP Document has been adopted, *see id.* at 16–18, and "the government uses the VEP Document as its policy when deciding whether to disclose vulnerabilities." *Id.* at 17. Indeed, Ms. Hudson explains that the VEP participants undertake the deliberative process described therein "each time [the VEP] considers a particular vulnerability," Hudson Decl. ¶ 43, and the process participants for which identifying information is redacted under Exemption 5 "are frequent or constant . . . participants in the process." *Id.*

Plaintiff acknowledges case law that supports protecting "authors of deliberative documents" or even "participants in an ongoing deliberative process," Pl. Cross-Mot. at 21, but contends that such cases do not support redacting the identities of VEP process participants. *See id.* Plaintiff does not explain why these groups should receive different treatment under Exemption 5, but it appears that Plaintiff would ask the Court to afford protection under the deliberative process privilege only in settings where a single deliberative document has been authored, or a single deliberative process is underway. Pl. Cross-Mot. at 21.

Wolfe demonstrates that the privilege is not so limited. The court in *Wolfe* applied the deliberative process privilege to three agencies' rule-making framework. *See* 839 F.2d at 769. Just as in this case, where participants undertake a separate deliberative process each time a vulnerability is submitted to the VEP, the three agencies in *Wolfe* separately considered regulatory actions proposed by the FDA as they arose. *See id.* at 770–71. The multiple, ongoing processes (and potential future processes) in *Wolfe* did not prevent the Court from protecting "facts about the inner workings of the deliberative process itself." Indeed, that the instant case presents a whole framework, potentially affecting numerous deliberative processes, rather than just one, should counsel in favor of greater protection, since a greater number of agency decisions may be harmed by the disclosure of information identifying process participants.

Similarly, the reality that the identification of the small government components would increase the risk from foreign intelligence services of interference in the quality of agency decisionmaking, *see* Hudson Decl. ¶ 45, constitutes an additional reason for protecting that information, rather than a risk that must be disregarded under Exemption 5 as Plaintiff contends in its second argument, *see* Pl. Cross-Mot. at 22. Although Plaintiff argues that Defendants' citation to this risk is "unsupported," *id.*, Ms. Hudson explains why foreign intelligence services may be particularly interested in targeting such groups. *See* Hudson Decl. ¶ 45.

Moreover, because the deliberative process privilege is designed to protect the integrity of agency decision-making as Plaintiff acknowledged, Pl. Cross-Mot. at 22, there is no reason to disregard the threat of such interference. As a number of courts have noted, "Congress adopted Exemption 5 because it recognized that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl." *Wolfe*, 839 F.2d at 773 (citing *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242 (D.C. Cir. 1977)). For example, the court in *Wolfe* emphasized that "the statutory framework of the APA allows agencies a space within which they may deliberate," and observed that the plaintiffs in that case "[sought] access to the [requested] information[] in part to issue themselves an invitation to agency deliberations." *Id.* at 776. Holding that the information at issue was protected under the

deliberative process privilege, the court noted "[i]t is just such a fishbowl that Congress sought to avoid when it enacted Exemption 5." *Id.*

The foreign entities discussed in Ms. Hudson's declaration are an example of parties that would seek "to issue themselves an invitation to agency deliberations." *Id.*; *see* Hudson Decl. ¶ 45. And, of course, substantially more than any litigants—or most "other interested group[s]," *Wolfe*, 839 F.2d at 776— such entities would disrupt the integrity of the deliberative process. It would be anomalous indeed if Congress intended for the Court to protect agency processes from undue interference from interested domestic parties, but required the Court to close its eyes to the substantially more troubling potential for foreign surveillance and counter-intelligence threats. Particularly because Plaintiff cites no authority to support such a proposed limitation, *see* Pl. Cross-Mot. at 22, the Court should consider this threat among the reasons why the identities of certain process participants should be protected under Exemption 5.

D. The Court Need Not Resort to *In Camera* Review of the VEP Document.

District courts have discretion to determine whether it is appropriate to conduct *in camera* review of documents the government is withholding pursuant to applicable FOIA exemptions. *See* 5 U.S.C. § 552(a)(4)(B); *Lion Raisins*, 354 F.3d at 1079. *In camera* inspection, however, should "not be resorted to lightly," *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987), and is "disfavored" where "the government sustains its burden of proof by way of its testimony or affidavits." *Lion Raisins*, 354 F.3d at 1079. Here, Defendants have provided robust public declarations in support of their withholdings under FOIA exemptions, and the classified declaration provides additional supporting information as well as a more fulsome description of the contents of the redacted information. Under these circumstances, the Court need not resort to *in camera* review. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1135-36 (9th Cir. 2008) (district court "need look no further" when the "affidavits contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption") (citation omitted).

Plaintiff argues, however, that "*in camera* review of the unredacted VEP Document is necessary" to "quickly and effectively resolve this case" because of the "circumstances present

here and [the] brevity of the single document at issue." Pl. Cross-Mot. at 22. While Defendants acknowledge that the "relative brevity" of the VEP Document is a relevant factor for the Court to consider, *Lane*, 523 F.3d at 1136, "*in camera* review should not be resorted to as a matter of course, simply on the theory that 'it can't hurt.'" *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (citation omitted).

Moreover, Plaintiff's description of the "circumstances present here," Pl. Cross-Mot. at 22, do not counsel in favor of the "rare[] exercise[]" of the Court's discretion to undertake the burden of *in camera* review. *See Lane*, 523 F.3d at 1136. At bottom, Plaintiff claims that Defendants' support for their withholdings is "not credible" because they have previously taken a more restrictive position on those withholdings. *See* Pl. Cross-Mot. at 22-23.[11] This is no basis for the Court to conduct *in camera* review of the VEP Document, however. Courts have "emphatically rejected" lines of argument that "would work mischief in the future by creating a disincentive for an agency to reappraise its position, and when appropriate, release [information] previously withheld." *Military Audit Project v. Casey*, 656 F.2d 724, 754 (D.C. Cir. 1981); *see also Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986) (rejecting the "notion that an agency's disclosure of [information] it had previously withheld renders its affidavits suspect").[12] It would, as the D.C. Circuit noted, "be unwise" "to punish flexibility, lest [the courts] provide the motivation for

[11] Plaintiff also argues that there is a "'greater call for *in camera* inspection' in 'cases that involve a strong public interest in disclosure.'" Pl. Cross-Mot. at 23 (quoting *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980)). In *Allen* the D.C. Circuit "outline[d] some of the considerations that trial courts should take into account in exercising" their discretion whether to conduct an *in camera* review of the documents at issue. *Allen*, 636 F.2d at 1297. The court listed "strong public interest in disclosure" as one of five considerations, the others being judicial economy, the conclusory nature of agency affidavits, agency bad faith, and agency concurrence in *in camera* inspection. *Id.* at 1298-99. Plaintiff has not demonstrated that the other four considerations are present here. *See* Pl. Cross-Mot. at 22–23. And, with regard to the consideration involving a strong public interest in disclosure, the *Allen* Court observed that the "need for in camera inspection is greater" in those "instances" where the agency "deems it in its best interest to stifle or inhibit" a requester's efforts to "ascertain whether" the agency "is properly serving its public function." *Allen*, 636 F.2d at 1299. There is no indication that is the case here.

[12] *See also Schoenman v. FBI*, 2006 WL 1126813, at *19 (D.D.C. Mar. 31, 2006) ("Courts have refrained from accepting legal arguments that would create disincentives for agencies to take actions that would benefit requesters overall.").

intransigence." *Military Audit Project*, 656 F.2d at 754.

For these reasons, the Court need not undertake the burden of conducting an *in camera* review of the VEP Document. Nevertheless, should the Court direct Defendants to provide the unredacted version of the VEP Document for *in camera* review, Defendants will, of course, promptly arrange to make the document available consistent with procedures for handling of classified and other sensitive information.

III. CONCLUSION

For the reasons set forth above, and in Defendants' Memorandum of Points and Authorities in Support of their Motion for Summary Judgment, this Court should grant Defendants summary judgment in this case.

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Respectfully submitted,

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