MARK L. SHURTLEFF, Attorney General of the State of Utah, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.

Civil Action No. 10-2030

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2012 U.S. Dist. LEXIS 157027

September 25, 2012, Decided
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CORE TERMS: declaration, withheld, epa, exemption, responsive, endangerment, supplemental, e-mail, deliberative process, email, summary judgment, disclosure, confidential, withholding, climate, staff members, work-product, attorney-client, undersigned, greenhouse, searched, redacted, reply, staff, material facts, deliberative, privacy, genuine, deliberations, quotations

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JUDGES: DEBORAH. A. ROBINSON, United States Magistrate Judge.

OPINION BY: DEBORAH. A. ROBINSON

OPINION

REPORT AND RECOMMENDATION

Plaintiff, Attorney General of the State of Utah, brought suit against Defendant, United States Environmental Protection Agency (EPA), under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Presently pending for consideration is Defendant's Motion for Summary Judgment (Document No. 21). This matter was referred to the undersigned United States Magistrate Judge for a report and recommendation. Upon consideration of Defendant's motion and memorandum in support thereof, Plaintiff's opposition thereto (Document No. 26), Defendant's reply (Document No. 28), the arguments of counsel at the hearing on the motion, and the entire record herein, the undersigned will recommend that Defendant's Motion for Summary Judgment be granted in part, and denied in part.

BACKGROUND

In accordance with the United States Supreme Court's [*2] decision in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), the EPA was tasked with determining whether greenhouse gases endanger public health or welfare. Declaration of Elizabeth Craig ("Craig Declaration") (Document No. 21-3) ¶ 5. Thereafter, the agency promulgated the Endangerment Finding, by which it found that "six [greenhouse gases] taken in combination endanger both the health and public welfare of current and future generations." *Id.* ¶ 9; *see* Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the CAA, 74 Fed. Reg. 66,496 (Dec. 15, 2009). The agency also found that "the combined [greenhouse gas] emissions from new motor vehicles and new motor vehicle engines contribute to the [greenhouse gas] air pollution . . . ." Craig Declaration ¶ 9. "[T]he findings are a prerequisite to EPA adopting [greenhouse gas] emission standards for new motor vehicles under [Clean Air Act] section 202(a)." *Id.* Among the evidence considered, assessments conducted by the Intergovernmental Panel on Climate Change (IPCC) "serve[d] as the primary basis supporting the Endangerment Finding . . . ." *Id.* ¶ 8. The IPCC was established to provide a "comprehensive and objective [*3] assessment of the state of knowledge of climate change and its potential environmental and socio-economic impacts." Craig Declaration ¶ 7. The IPCC produces multi-volume Assessment Reports, to which the United States Government is a significant contributor. *Id.*

The "EPA received [ten] administrative reconsideration petitions for the Endangerment Finding and two related administrative stay requests were filed." Supplemental Declaration of Elizabeth Craig ("Supplemental Declaration") (Document No. 28-1) ¶ 38. The agency denied these, asserting that "inquires from four independent entities . . . found no evidence of scientific misconduct or intentional data manipulation on the part of climate researchers associated with the [Climatic Research Unit] emails." Craig Declaration ¶ 12; *see* EPA's Denial of the Petitions To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556 (Aug. 13, 2010).

Following consideration of public comments, the agency promulgated a rule establishing a process to phase in permit requirements for stationary sources emitting greenhouse gases that met certain statutory thresholds. [*4] Craig Declaration ¶ 10; *see* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010). A number of states filed suit against the agency, requesting that this Circuit stay the Endangerment Finding and other rules regarding greenhouse gas emissions. Craig Declaration ¶ 11; *see* *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). One of their allegations was that "emails and documents from the Climatic Research Unit [] at the University of East Anglia on the IPCC's Fourth Assessment Report damaged the reliability of the data upon which EPA relied in making its Endangerment Finding." Craig Declaration ¶ 11.

On July 6, 2010, Plaintiff, Utah Attorney General Mark Shurtleff, submitted a Freedom of Information Act request to the EPA. *Id.* ¶ 13. The request sought documents in order "to evaluate more fully the process by which the EPA developed the 'Endangerment Finding' . . . ." *Id.* at 42-59 (Exhibit A). The EPA's FOIA Office received the request on July 19, 2010, and forwarded it

to the EPA Administrator's Office and the EPA Office of Air and Radiation (OAR). *Id.* ¶ 16. Between August 4 and September 21, 2010, [*5] the EPA's Climate Change Division held seven meetings with other EPA departments to "clarify and interpret" the FOIA request, identify individuals with responsive documents, and develop instructions for conducting the search. *Id.* ¶ 17.

Initially, the EPA Administrator's Office of Executive Secretariat and the Office of Air and Radiation's Climate Change Division were designated as the coordinating lead offices. *Id.* ¶ 23; Supplemental Declaration ¶ 8. After the planning meetings, however, the Office of Air and Radiation "assumed primary responsibility" after determining that its employees held most of the records responsive to the request. Craig Declaration ¶ 24. Later, it was determined that the Office of Air and Radiation and the Office of Research and Development likely contained most of the responsive records. *Id.* ¶ 29. The Climate Change Division led the efforts to search for and process all responsive records, and assigned coordinators within other EPA departments that were also thought to possess relevant records. *Id.* ¶ 24. The coordinators were responsible for identifying staff members within their offices who would potentially have responsive records, sending those employees [*6] the search instructions, and confirming that those employees had completed the search. Supplemental Declaration ¶ 11. The agency sent instructions to the employees who were identified as "likely to have records responsive to the request," requesting that they search for records in: "(1) Lotus Notes email and calendar, (2) electronic files in each employee's C: drives, network drives (F: and G: drives), thumb drives, and any documents that are attachments to emails; and (3) paper files in each staff member's office or file cabinets." Craig Declaration ¶ 26. Employees were asked to search in their primary Lotus Notes' mail server, as well as stored information in archived servers. Supplemental Declaration ¶ 19(a).

The search was conducted in three phases. Craig Declaration ¶ 29. First, the Climate Change Division sent the instructions to eight EPA employees within its own office. *Id.* ¶ 30. Those employees were asked to "forward the instructions on to other Agency staff members who may have responsive records but were not included in the initial mailing." *Id.* Ultimately, seventy-three employees across multiple EPA departments received the instructions. Supplemental Declaration ¶ 13. The [*7] employees received a copy of the FOIA request, as well as "specific instructions" regarding sub-sections of the request. Craig Declaration ¶ 30.

Second, the Climate Change Division sent instructions to twenty-four employees across multiple EPA departments. *Id.* ¶ 31. As with the first phase, these employees were asked to forward the instructions on to other staff members. *Id.* A total of sixty-five employees received the instructions. Supplemental Declaration ¶ 14. Again, the employees received the full request and "specific instructions" regarding sub-sections of the request. Craig Declaration ¶ 31.

Third, the Climate Change Division sent instructions to twenty-nine employees across multiple EPA departments. *Id.* ¶ 32. As with the first two phases, the employees received specific instructions and were asked to forward the instructions to other staff members. *Id.* A total of 105 employees received the instructions. Supplemental Declaration ¶ 15.

After the three phases were completed, the agency sent a reminder to eighty-six employees that included the specific instructions from the three search phases. *Id.* ¶ 16. In addition to the three

phases, the Climate Change Division searched for certain [*8] sub-sections of the request. *Id.* ¶ 29; *see also* Supplemental Declaration ¶ 17. The agency created three Lotus Notes databases to collect and process the documents that were deemed potentially responsive. Craig Declaration ¶ 34. Each staff member uploaded his or her collected files to a database. Supplemental Declaration ¶ 12. "[P]rior to closing the databases, the [Climate Change Division] reviewed the databases to confirm the searches were completed." *Id.*

After the search was completed, the agency initially began manually processing over 19,000 records that were potentially responsive. Craig Declaration ¶ 35. The agency redacted exempted information using redaction tape, and documented the withheld portions in a database. *Id.* The agency also logged each record and created an index. *Id.* ¶ 35. After a few months, however, the agency switched to electronic processing. *Id.* First, Climate Change Division staff reviewed the records and categorized the records as "not responsive," "release in full," "withhold in full under a FOIA exemption," "withhold in part under a FOIA exemption," or "duplicative." *Id.* ¶ 36. The withheld in part documents were then converted into PDF files and reviewed [*9] by Climate Change Division staff, who electronically redacted the information. *Id.* Next, a manager reviewed the files to determine if the information could be released, or should be withheld. *Id.* Once the staff updated the documents and the database to reflect the manager's review, attorneys in the agency's Office of General Counsel reviewed all of the records. *Id.* The staff again made updates, in accordance with the attorneys' comments. *Id.* For approximately two hundred records that originated outside of the EPA, the agency consulted with the other federal agencies and the White House offices from which the records originated. *Id.* ¶ 39.

The first document release occurred in the midst of the search process, on October 5, 2010. *Id.* ¶ 33. The agency had identified a "separate previous FOIA request that sought similar records to those requested by the Plaintiff . . ." and produced "the overlapping responsive records" to the Plaintiff. *Id.* The agency also "determined that responsive records for sections A(2)(a), A(4)(a) and E(1)(a) of the FOIA request were already publicly available." *Id.* ¶ 28. The agency alerted Plaintiff on October 18, 2010, and directed Plaintiff to www.regulations.gov, [*10] docket no. EPA-HQ-OAR-2009-0171, and "provided specific website references" to materials housed at www.epa.gov/climatechange/endangerment.html. *Id.* After that, the agency produced responsive documents on a rolling basis from October 2010 to April 2011. *Id.* ¶ 40. In addition, the agency produced documents in five supplemental productions from June 2011 to October 2011. *Id.*

Plaintiff initiated this suit in November 2010, seeking to compel Defendant to produce documents responsive to his FOIA request. *See* Complaint (Document No. 1). On May 25, 2011, the assigned United States District Judge granted Defendant's Motion to Permit a Sample *Vaughn* Index. Order (Document No. 18). In accordance with the order, Defendant submitted a "representative sample of 531 records" that included all 361 records withheld in full, every 75th record of the 9,032 partially redacted records, and 50 records of Plaintiff's choosing. Craig Declaration ¶ 54. After Plaintiff's counsel requested a confirmation of the number of partially-redacted records, the agency determined that the figures were not accurate. *Id.* ¶ 56. The agency modified the figures on July 24, 2011. *Id.* ¶ 57. After the parties conferred in July [*11] 2011, the agency sent a final, sample *Vaughn* index to Plaintiff on August 11, 2011, and sent a *Vaughn* index of the records withheld in full a few days later. *Id.* ¶¶ 59-60. Ultimately, 12,987 records were deemed responsive, of which approximately 8,200 were released in part, 4,445 in full, and

342 withheld in full. *Id.* ¶ 61.

CONTENTIONS OF THE PARTIES

In support of its Motion for Summary Judgment, Defendant posits that there are no material facts in dispute as to any of Plaintiff's claims. Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment ("Defendant's Memorandum") (Document No. 21-1) at 2. Defendant contends that it fully complied with its obligations under FOIA with respect to Plaintiff's July 6, 2010 FOIA request. *Id.* at 1.

In support of its position, Defendant first asserts that it conducted a thorough search to uncover all responsive records. *Id.* at 18. Plaintiff opposes Defendant's contention that it has satisfied its obligations under FOIA. Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment ("Opposition") (Document No. 26-1) at 1. Plaintiff contends that there is "substantial doubt" as to the adequacy [*12] of Defendant's search for records responsive to Plaintiff's FOIA request. Opposition at 8. Specifically, Plaintiff argues that the agency's declaration lacks sufficient detail, in that it fails to explain a "coherent search process." *Id.* at 9-12. Plaintiff also alleges that the agency "neglected" other offices that were likely to have responsive materials. *Id.* at 12. Finally, Plaintiff argues that the affidavit insufficiently describes the agency's search among former employees' files. *Id.* at 15-16. In response, Defendant submits that it adequately described its organized search, demonstrating that it searched its component offices that were likely to have responsive records and that it searched the files of relevant former employees. Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment ("Reply") (Document No. 28) at 3-14.

In regard to documents that were partially or fully withheld, Defendant contends that the withholdings were justified by FOIA Exemptions 4, 5, and 6. Defendant's Memorandum at 25-37. Plaintiff counters that Defendant provided insufficient information to justify its withholdings. [1] Opposition at 16-17. Defendant withheld one email under Exemption 4 [*13] , contending that it contains confidential, commercial information regarding a "voluntarily submitted proposal." Defendant's Memorandum at 26. In support of its withholding, the agency maintains that disclosure would "discourage researchers from submitting such information in the future." *Id.* Plaintiff maintains that Defendant "summarily" concludes that the elements of the exemption are met, without demonstrating that the withholding is justified. Opposition at 18-19. After Plaintiff noted that "there is no declaration or sworn statement from the submitter attesting that she has kept this information confidential from others," *id.* at 19, Defendant submitted such a declaration with its reply. *See* Declaration of Dr. Kristie Ebi ("Ebi Declaration") (Document No. 28-2).

FOOTNOTES

[1] Plaintiff also argues that Defendant "inconsistently invoked exemptions to redact/withhold records on the same subject mater that it previously produced . . ." and this "shows that the EPA still has not produced all responsive documents." Opposition at 32. Defendant explained,

however, that it disclosed information that "would normally be withheld under Exemption 5's deliberative process privilege" because the agency had [*14] "inadvertently disclosed" the documents in a previous FOIA request. Supplemental Declaration ¶ 42.

Invoking FOIA Exemption 5, Defendant alleges that the withheld information is protected by the deliberative process privilege, the attorney-client privilege, or the attorney work-product doctrine. Defendant categorized the documents withheld under the deliberative process privilege into three categories, *see* Defendant's Memorandum at 28-29, arguing that the records were generated prior to the adoption of agency policies, and that the withheld information reflects the deliberations and discussions of agency staff regarding various agency policies. *Id.* at 29-32. In response, Plaintiff first argues that the agency documents regarding the IPCC report or the CRU are not related to the adoption of an agency policy because neither the IPCC nor the CRU are United States agencies. Opposition at 22. Second, Plaintiff argues that the agency has not sufficiently demonstrated its deliberative processes to allow assessment of the role each document played in the decision-making. *Id.* at 24. Next, Plaintiff contends that the agency has withheld segregable non-privileged information by not treating each [*15] individual email in a "string email" chain as a stand-alone document. *Id.* Finally, Plaintiff raises brief arguments that the agency improperly withheld factual information, "non-memoranda or letters," and drafts. *Id.* at 25.

The agency partially withheld records under the attorney-client privilege, submitting that it redacted "communications between an EPA attorney and a client office relating to a legal matter . . . for which the client office sought legal advice" as well as "facts divulged by the client in order to obtain legal counsel." Defendant's Memorandum at 33. Defendant further avers that the redacted information was kept confidential. *Id.* Plaintiff contends that Defendant has not met its burden of justifying the withholding "with respect to each individual document" because Defendant did not demonstrate that the information was confidential or that it relates to a legal matter for which the agency sought professional legal advice. Opposition at 26-28.

In support of its partial withholding of records under the attorney work-product doctrine, Defendant contends that the withheld information contains "substantive attorney revisions, suggested language, and questions and comments" [*16] regarding the "ultimate legal defensibility of the Endangerment Finding." Defendant's Memorandum at 34-35. Further, Defendant asserts that it "reasonably anticipated that there would be litigation" surrounding the Endangerment Finding and that "litigation did ensue." *Id.* at 35. Plaintiff insists that Defendant's justifications are insufficient because it "summarily" invokes the exemption without a "showing of any contemplated litigation at the time of creating each document." Opposition at 28-29.

The agency initially invoked Exemption 2 in withholding records that included "email addresses, internal and active teleconference numbers, teleconference passcodes, log-in procedures, tracking numbers, and internal telephone numbers." Craig Declaration ¶ 63. It later amended its invocation, contending that the teleconference numbers, passcodes, log-in procedures, and other administrative information were unresponsive to the request, [2] and that the internal telephone

numbers were exempt under Exemption 6. *Id.* The agency invoked Exemption 6 to withhold portions of records that contained personal email addresses, cell phone numbers, home phone numbers, or home addresses of government employees [*17] and members of the public; personal medical information; and information regarding an employee's use of leave. Defendant's Memorandum at 36-37. Plaintiff agrees that the phone numbers, home addresses, and medical information are "entitled to some level of protection." Opposition at 30. However, Plaintiff contends that Defendant has not explained why disclosing email addresses, particularly those of government employees, is un unwarranted invasion of personal privacy. *Id.* Plaintiff offers that it is in the public interest to disclose these email addresses to identify which parties "provided input" to the agency. *Id.* at 31. Defendant replies that the individuals have a "significant public interest in minimizing unsolicited communications and harassment" and any public interest in their identities is served by the disclosure of the names of the individuals in the sample *Vaughn* index. Reply at 23.

FOOTNOTES

[2] Defendant maintains that it properly redacted "internal conference numbers, login procedures, and similar administrative information from 807 records" because the information was not responsive to Plaintiff's FOIA request. Defendant's Memorandum at 38. "Plaintiff does not agree that such withholding [*18] was proper. . . ." Plaintiff's Amended Statement of Material Facts as to Which There is a Genuine Dispute (Document No. 30) ¶ 59. Because Plaintiff did not address these redactions in his opposition to Defendant's motion, however, the undersigned concludes that there is no genuine issue of material fact as to the redaction of such "non-responsive" information.

Plaintiff argues that Defendant inappropriately referred Plaintiff to publicly available websites rather than producing some responsive records. Opposition at 33-34. Plaintiff contends that Defendant failed to fulfill its obligation to provide copies of the responsive records or directing Plaintiff to "the specific records." *Id.* at 34. Defendant responds that FOIA "does not require any agency to produce material already made publicly available." Reply at 24.

Finally, Defendant avers that it "established, with reasonable specificity, that responsive documents were redacted in part or withheld in full after a line-by-line review and determination that there were no reasonably segregable portions of documents appropriate for release." Defendant's Memorandum at 40.

APPLICABLE STANDARDS

Summary Judgment

"The court shall grant summary judgment [*19] if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is genuine if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Whether a fact is material is determined based on whether it might affect the outcome of the suit under the governing law. *Id.*

The party seeking summary judgment must identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The court will view the evidence and inferences in the light most favorable to the nonmoving party. *Matsushita v. Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

FOIA

For summary judgment motions in an action under the Freedom of Information Act to compel production of agency records, the agency "is entitled to summary judgment if no material facts are in dispute and if it demonstrates that each document [*20] that falls within the class requested either has been produced . . . or is wholly exempt . . . ." *Banks v. Dep't of Justice*, No. 06-1950, 2012 U.S. Dist. LEXIS 103855, 2012 WL 3061167, at *1 (D.D.C. July 26, 2012) (citing *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 833, 347 U.S. App. D.C. 235 (D.C.Cir. 2001)) (quotations omitted).

The agency bears the burden of proving that it properly withheld records under the enumerated FOIA exemptions. 5 U.S.C. § 552(a)(4)(B). To justify its withholdings, the agency can submit a *Vaughn* index or supporting declarations to describe the withheld documents "without compromising its original withholdings by disclosing too much information." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006). The court may grant summary judgment based solely on information provided in an agency's supporting affidavits or declarations if they are relatively detailed and describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption[s], and are not controverted by either contrary evidence in the record [or] by evidence of agency bad faith." *Banks*, 2012 U.S. Dist. LEXIS 103855, 2012 WL 3061167, at *2 [*21] (citing *Military Audit Project v. Casey*, 656 F.2d 724, 738, 211 U.S. App. D.C. 135 (D.C. Cir. 1981)). "Uncontradicted, plausible affidavits showing reasonable specificity and a logical relation to the exemption are likely to prevail." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 509, 395 U.S. App. D.C. 138 (D.C. Cir. 2011) (citation omitted). However, the agency's submissions "will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 31, 334 U.S. App. D.C. 20 (D.C. Cir. 1998) (citation and quotations omitted).

I. Adequacy of Search

"To prevail on summary judgment, [] the defending 'agency must show beyond material doubt [ ] that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Morley v. Central Intelligence Agency*, 508 F.3d 1108, 1114, 378 U.S. App. D.C. 411 (D.C. Cir. 2007) (quoting *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351, 227 U.S. App. D.C. 253 (D.C. Cir. 1983)). In doing so, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Id.* (quoting *Perry v. Block*, 684 F.2d 121, 128, 221 U.S. App. D.C. 347 (D.C. Cir. 1982)). While the agency [*22] is generally not required to search every records system, the agency cannot limit its search to only one record system if others are likely to house the information requested. *Campbell*, 164 F.3d at 28 (citations and quotations omitted).

The adequacy of the search is case-specific and judged by a standard of reasonableness. *Weisberg*, 705 F.2d at 1351. In demonstrating the reasonableness of the search, the agency may rely upon affidavits as long as they are "relatively detailed," "nonconclusory," and have been submitted in good faith. *Id.* (citing *Goland v. CIA*, 607 F.2d 339, 352, 197 U.S. App. D.C. 25 (D.C. Cir. 1979)). The agency's affidavits do not need to "set forth with meticulous documentation the details of an epic search," but rather, "explain in reasonable detail the scope and method of the search." *Perry v. Block*, 684 F.2d 121, 127, 221 U.S. App. D.C. 347 (D.C. Cir. 1982). The affidavit should "set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched . . . ." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990).

These agency affidavits are accorded a presumption of good faith, which cannot be rebutted by "purely [*23] speculative claims about the existence and discoverability of other documents." *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991). If the record leaves substantial doubt as to the sufficiency of the search, however, the court should not grant summary judgment for the agency. *Truitt v. Dep't of State*, 897 F.2d 540, 542, 283 U.S. App. D.C. 86 (D.C. Cir. 1990).

II. FOIA Exemption § 552(b)(4)

The Freedom of Information Act exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). For purposes of this exemption, a trade secret is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1288, 227 U.S. App. D.C. 151 (D.C. Cir. 1983).

The later category is broader, including records that are: 1) commercial or financial information; 2) obtained from a person; and 3) privileged or confidential. *See* § 552(b)(4); *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290. This exemption [*24] is not limited to records that "reveal basic commercial operations" or "relate to the income-producing aspects of a business"; rather, the terms commercial and financial information are to be given their ordinary meanings. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290.

While disclosure of scientific research can deprive a scientist of career and monetary rewards, similar to the disclosure of commercial information, a "noncommercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce." *Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 244, 164 U.S. App. D.C. 169 (D.C. Cir. 1974). While it is conceivable that an individual grantee engaged in profit-oriented research could have a commercial interest in her research design, *see id.* at 245 n.6, the burden is on the agency to demonstrate this commercial interest, *see id.* at 244.

Information that is voluntarily submitted to the government is deemed confidential if it is of a kind that would customarily not be released to the public by the person from whom it was obtained. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879, 298 U.S. App. D.C. 8 (D.C. Cir. 1992). [*25] This is judged based on an objective standard. *Id.*

III. FOIA Exemption § 552(b)(5)

FOIA Exemption 5 exempts "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). The source of the document must be a government agency, and the document must "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001).

To satisfy the first condition, the source of the document must come from "authority of the Government of the United States," including any executive department, military department, government corporation, establishment in the executive branch of the government, or any independent regulatory agency. *Id.* at 9. Under the second condition, documents are exempt if they are "normally privileged" in civil discovery. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975). For FOIA cases, this standard is not determined based on the specific parties, but rather on what would be routinely disclosed through civil [*26] discovery. *Id.* at 148 n.16; *see also Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1184, 260 U.S. App. D.C. 382 (D.C. Cir. 1987). This exemption generally protects "materials which would be protected under the attorney-client privilege, the attorney work-product privilege, or the executive 'deliberative process' privilege." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862, 199 U.S. App. D.C. 272 (D.C. Cir. 1980).

a. Deliberative Process Privilege

Exemption 5 protects government agency communications that are "deliberative in nature," or "would expose to public view the deliberative process of an agency." *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048, 221 U.S. App. D.C. 96 (D.C. Cir. 1982) (citation omitted). This exemption serves to: protect candid discussions and improve agency policy decisions; protect the public from confusion resulting from premature exposure to discussions; and protect the integrity of the decision-making process. *Id.* (citation and quotations omitted).

The deliberative process privilege protects documents that are "both predecisional and

deliberative." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537, 303 U.S. App. D.C. 249 (D.C. Cir. 1993). A document is predecisional if it was "generated before the adoption [*27] of an agency policy," and deliberative if it "reflects the give-and-take of the consultative process." *Coastal States Gas Corp.*, 617 F.2d at 866. This covers "recommendations, draft documents, proposals, suggestions" and other documents that would "inaccurately reflect or prematurely disclose" the agency's views. *Id.* Material that is "purely factual" cannot generally be withheld unless it reflects "exercise of discretion and judgment calls." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513, 395 U.S. App. D.C. 138 (D.C. Cir. 2011) (citation omitted).

b. Attorney-Client Privilege

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252, 184 U.S. App. D.C. 350 (D.C. Cir. 1977). The privilege extends to communication from an attorney to the client if the attorney's communication is based on confidential information provided by the client. *Id.* at 254. The agency bears the burden of proving that the privilege applies to the withheld information. *See id.*

A "fundamental prerequisite" to the privilege is that the communication [*28] must be confidential "both at the time of the communication and maintained since." *See Coastal States Gas Corp.*, 617 F.2d at 863 (noting that the agency bears the burden of showing that it was "reasonably careful" in protecting the information from general disclosure). Allowing circulation of the information within the agency is "too broad" for purposes of this privilege. *Id.* Instead, the agency should limit circulation of the confidential information to agency members "who are authorized to speak or act for the [agency] in relation to the subject matter of the communication." *Id.* (citing *Mead Data Central, Inc.*, 566 F.2d at 253 n.24).

c. Attorney Work-Product Doctrine

A party may not ordinarily discover documents that were prepared in anticipation of litigation or for trial by or for another party or its representative. Fed. R. Civ. P. 26(b)(3)(A). "The work product doctrine does not extend to every written document generated by an attorney; rather, work product covers only documents prepared in contemplation of litigation." *Senate of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 586, 262 U.S. App. D.C. 166 (D.C. Cir. 1987) (citations and quotations omitted) (holding that an affidavit simply asserting that [*29] the document was prepared in anticipation of litigation was too "bare an assertion").

In determining whether a record was prepared in anticipation of litigation, the important factors are the "nature of the document" and the "factual situation in the particular case." *Id.* at 586 n.42 (citation and quotations omitted). The lawyer must have "had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *In re Sealed Case*, 146 F.3d 881, 884, 330 U.S. App. D.C. 368 (D.C. Cir. 1998). If a document is protected under the work-product doctrine, segregability is not required. *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 371, 369 U.S. App. D.C. 49 (D.C. Cir. 2005) (reiterating the Circuit's position that

the work-product doctrine does not "distinguish between factual and deliberative material"); *see also* *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 620, 326 U.S. App. D.C. 53 (D.C. Cir. 1997).

IV. FOIA Exemption § 552(b)(6)

Additionally exempted from disclosure are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Application of this exemption to "similar files" is proper when [*30] the information sought to be disclosed applies to "a particular individual." *U. S. Dept. of State v. Washington Post Co.*, 456 U.S. 595, 602, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982). If the government record does apply to a particular individual, the court must determine whether disclosure would constitute a clearly unwarranted invasion of that individual's privacy. *Id.*

This requires a balancing of "the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act . . . ." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976). This involves weighing the "privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier v. FDIC*, 164 F.3d 37, 46, 334 U.S. App. D.C. 37 (D.C. Cir. 1999). The court must "first determine whether disclosure of the files would compromise a substantial, as opposed to de minimis, privacy interest . . . ." *Multi Ag Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1229, 380 U.S. App. D.C. 1 (D.C. Cir. 2008) (citation and quotations omitted). In assessing the public interest, the only relevant interest is "the extent to which disclosure [*31] of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *U.S. Dept. of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994), 114 S. Ct. 1006, 127 L. Ed. 2d 325 (citation and quotations omitted).

V. Previously Disclosed Records

An agency need not make available records that the agency has already disclosed under FOIA subsections (a)(1) and (a)(2). *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 152, 109 S. Ct. 2841, 106 L. Ed. 2d 112 (1989); *see also* 5 U.S.C. § 552(a)(3); *cf.* *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1437, 298 U.S. App. D.C. 125 (D.C. Cir. 1992) (finding the record in question had not been disclosed under subsections (a)(1) or (a)(2) where the requester only had access to the source documents on which the record was based). The determinative factor is whether it was the agency itself who previously disclosed the records. *Tax Analysts*, 492 U.S. at 152 (holding that the Department of Justice improperly withheld agency records when it refused a request for copies of district court tax decisions that the agency had in its file).

DISCUSSION

I. Adequacy of Search

Plaintiff's argument that the agency has not described a "reasonably [*32] coherent search

process" primarily challenges the organization and coordination of the agency's search. *See* Opposition at 9-11. Contrary to Plaintiff's argument, the undersigned finds that the Declaration and Supplemental Declaration of Elizabeth Craig describe the search process in reasonable detail. The agency outlined its approach in assessing the request, Craig Declaration ¶ 17 (noting that it held seven planning meetings); documented its coordination structure, *id.* ¶¶ 23-24 (explaining which agencies were leading the search, at various times); described its strategy for disseminating the instructions to agency employees, *id.* ¶¶ 27-32; and explained its supervision of the search, *id.* ¶ 24 (noting that coordinators were assigned in other EPA offices); *see also* Supplemental Declaration ¶¶ 11-12 (describing the coordinators' responsibilities and noting that an employee's name would appear in the database after he or she had uploaded files).

Plaintiff cites *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 92 (D.D.C. 2009), in support of its argument that Defendant's description of its search process is inadequate as a matter of law. Opposition at 11. In *Defenders of [*33] Wildlife*, however, the court found that the declarations were inadequate because they made "conclusory statements that the searches were adequate." *Id.* at 91. For example, one declarant stated that he had "conducted the search in good faith using methods that were reasonably expected to produce the information requested," while another stated that he checked his own files and central files "were searched." *Id.* at 91-92. In contrast, Defendant's declarations explained what search methods were used, Craig Declaration ¶¶ 23-39, and what records were searched, *id.* ¶ 26. Further, Defendant explained the search in greater detail in its reply. *See, e.g.*, Supplemental Declaration ¶¶ 8-11 (outlining the offices involved), ¶¶ 13-16 (listing the recipients of the search instructions), *id.* ¶ 19 (describing the agency's records systems).

Defendant argues that the affidavits failed to identify the specific search terms used, with the exception of those used for the request "relating to the CRU email leak." Opposition at 11-12. The court recognizes that a lack of search terms can often be a primary consideration in assessing the adequacy of the affidavits. *See People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 293 (D.D.C. 2007) [*34] ("[F]ederal courts have placed emphasis on whether an agency provides information about the search terms used and the specific files searched for each request."). Given the case-by-case determination of reasonableness, however, "there is no uniform standard for sufficiently detailed and nonconclusory affidavits." *Id. Compare Maydak v. United States DOJ*, 362 F. Supp. 2d 316, 326 (D.D.C. 2005) ("[T]he record provides no information about the search terms and the specific files searched for each request."), *with Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 50 (D.D.C. 2006) (finding, in response to requester's contention that the agency should indicate "what Boolean operators (if any) were used to accomplish the electronic search," that "FOIA does not demand this degree of detail").

Further, in cases where the court emphasized the lack of search terms, it was in the context of affidavits describing the search in significantly vaguer descriptions than the ones provided in this matter. *See People for the Am. Way Found.*, 503 F. Supp. 2d at 293-94 (citing to a declaration that described that the agency employees "looked for responsive [*35] documents"); *Kean v. Nat'l Aeronautics Space Admin.*, 480 F. Supp. 2d 150, 157 (D.D.C. 2007) (citing language from the affidavits and summarizing that many only include "which offices in the Center the FOIA requests was forwarded on to, and a summary answer that no responsive records were found");

Nat'l Sec. Counselors v. Cent. Intelligence Agency, 849 F. Supp. 2d 6, 11 (D.D.C. 2012) (noting that an affidavit did not "detail what search terms were used" where the agency had merely declared that it "conducted a thorough and diligent search of relevant . . . records systems"). In contrast, the EPA instructed its employees as to the search parameters to uncover documents responsive to Plaintiff's FOIA request. *See, e.g.*, Craig Declaration ¶¶ 30-32. While each instruction was not in the format of specific search terms, the agency's descriptions of the search parameters are sufficiently detailed to determine what agency employees were tasked with searching for.

The agency affidavits also sufficiently describe the offices that were searched. *See* Craig Declaration ¶¶ 23-25; Supplemental Declaration ¶ 10. In response to Plaintiff's assertions regarding other EPA offices that were also likely [*36] to contain responsive documents, the agency provided an explanation as to why those offices lacked responsive documents. Supplemental Declaration ¶¶ 21-26; *see* *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1487, 240 U.S. App. D.C. 339 (D.C. Cir. 1984) (finding that the agency's affidavits "stating that it has no reason to believe materials will be found in those [agency] components" withstood the requester's challenge that the agency should have searched the files of two components); *cf.* *Campbell v. United States DOJ*, 164 F.3d 20, 28, 334 U.S. App. D.C. 20 (D.C. Cir. 1998) (noting that an agency cannot limit its search if other record systems are "likely to house the information requested). Finally, Defendant included sufficient information describing its search of former employees' files in its reply. Supplemental Declaration ¶¶ 27-28.

For all of the foregoing reasons, the undersigned finds that the agency affidavits demonstrate the reasonableness of the search in a sufficiently detailed manner, and recommends that this court grant the Defendant's Motion for Summary Judgment as to the adequacy of the search conducted for Plaintiff's FOIA request.

II. FOIA Exemption § 552(b)(4)

In December 2007, Dr. Kristie Ebi, voluntarily [*37] sent a proposal to the EPA to solicit interest in developing a model of the health risks related to climate change. Ebi Declaration ¶¶ 5, 8. Dr. Ebi is an independent consultant for ESS, LLC, conducting research on climate change, *id.* ¶ 1, and was an independent consultant for the EPA's Office of Research and Development from 2007 to 2008, *id.* ¶ 2. Dr. Ebi states that she has not received any funding to develop her model. *Id.* ¶ 7. Dr. Ebi's model has not been developed by other researchers, *id.* ¶ 8, and she contends that disclosure will harm her competitive position in obtaining future funding, *id.* ¶ 10.

Aside from the harm to Dr. Ebi's future competitive position as the first developer of this model, Defendant has not proffered facts to demonstrate the commercial nature of Dr. Ebi's information concerning her model proposal. *See* *Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 244-45, 164 U.S. App. D.C. 169 (D.C. Cir. 1974) (finding an interest in nondisclosure founded on "professional recognition and reward" to be outside the scope of exemption four). *Compare* *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290, 227 U.S. App. D.C. 151 (D.C. Cir. 1983) (deeming information submitted [*38] to the FDA by manufacturers who marketed certain devices commercial due to the information's effect on the products' market approval), *with* *Wash. Research Project, Inc.*, 504 F.2d at 245 n.6

(finding that research projects submitted to NIH by scientists affiliated with research and educational institutions, hospitals, and state agencies were not commercial in nature).

Dr. Ebi's proposed model has not been developed, nor is it under development by her or any other researcher. Ebi Declaration ¶¶ 7-8; *see* *Physicians Comm. for Responsible Med. v. Nat'l Insts. of Health*, 326 F. Supp. 2d 19, 24-25 (D.D.C. 2004) (finding a scientist's research was not commercial information where it had "the potential for pharmaceutical development" but had not been marketed or used). Other than noting that she works as an "independent contractor," the agency has not demonstrated the commercial nature of Dr. Ebi's development of health risk models and has thus not met its burden. Because the agency has not met its burden in proving the first prong, this court has not addressed whether the information is confidential, that is, whether it is of a kind that would customarily not be released to the public by the [*39] person from whom it was obtained.

Accordingly, the Defendant has not met its burden of proving there is no genuine issue of material fact in regards to the applicability of exemption four to the withheld record, EPA3-583.

III. FOIA Exemption § 552(b)(5)

a. Deliberative Process Privilege

Defendant withheld approximately 342 records in full and 7,600 record in part under the deliberative process privilege. Craig Declaration ¶ 68. Defendant posits that the records "pertain to myriad EPA decisionmaking processes" but that the "majority of information withheld under Exemption 5 [falls] into three categories . . . (1) email and draft comments on the IPCC reports; (2) internal review, emails, and drafts of the Endangerment Finding; and (3) briefing materials and talking points related to both the Endangerment Finding and the University of East Anglia CRU's emails." *Id.* ¶ 68.

As a preliminary matter, Plaintiff argues that "the EPA is not entitled to summary judgment as to the documents that do not fall within one of the three categories as [it] makes no attempt to justify redacting/withholding those documents." Opposition at 20. While the "agency may not claim exemptions too broadly," "categorization" [*40] can aid the court's review of a large number of documents that "implicate the same exemption for similar reasons." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 147 (D.C. Cir. 2006). The agency's decision to provide document specific information in the sample *Vaughn* indices and "then summarize the commonalities of the documents in a supporting affidavit" was appropriate given the number of records at issue. *See* *id.* at 146-48 (stating that the agency's "combined approach" of a *Vaughn* index plus supporting declaration was "legitimate").

E-mail Deliberations and Draft Comments on the IPCC reports

During the preparation of IPCC reports, participating governments must send one "integrated set of comments" after reviewing the report. *Id.* ¶ 69. The State Department and the Office of Science and Technology Policy served as the United States' "focal point" to the IPCC. *Id.* The EPA also participated in the United States' review of the IPCC report. *Id.* Defendant maintains

that the documents at issue reflect deliberations over the United States' comments on the IPCC reports, including "substantive edits, recommendations, analysis, and opinions." *Id.* ¶ 70.

Plaintiff argues that the documents [*41] were not generated prior to the "adoption of an agency's policy" because the IPCC is not a United States governmental agency. Opposition at 22. The deliberative process privilege, however, does not turn on the agency's ability to "identify a specific decision" in connection with the documents prepared. *See* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975). The United States government adopted a policy, in offering its official comments after conducting a government review of the IPCC reports. Defendant has described the review process that was involved, Craig Declaration ¶ 69, and what role the draft deliberations and comments played in that process, *id.* ¶ 70; *see* *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868, 199 U.S. App. D.C. 272 (D.C. Cir. 1980) (requiring that the agency establish "what deliberative process is involved" and what role the documents play "in the course of that process"). Unlike the cases cited by Plaintiff, the documents at issue offered recommendations as to the United States' required review and comment on the IPCC report. *See* Craig Declaration ¶ 69-70. *Compare* *Sakamoto v. United States EPA*, 443 F. Supp. 2d 1182, 1200 (N.D. Cal. 2006) (finding that [*42] e-mail exchanges between an employee and supervisor regarding workload did not lead to a governmental decision or policy), *with Vaughn* Index (Document No. 21, Exhibit BB) at 144 (describing that EPA-28 "was to facilitate further discussion among the U.S. government about what should be included in the final draft of U.S. Government's comments").

These deliberations occurred before the United States finalized and submitted its integrated set of comments. Thus, the documents were pre-decisional, as they were generated before the adoption of an agency policy and were "recommendatory in nature." *See* *Coastal States Gas Corp.*, 617 F.2d at 866 (noting that the reviewing court should determine whether the document is recommendatory or a draft of what will later become a final document); *see also* *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513, 395 U.S. App. D.C. 138 (D.C. Cir. 2011) (noting that advisory committees have no authority to set final agency policy). Further, the documents reflect the "give-and-take" of the inter-agency consultative process, as the e-mails and draft comments contributed to the discussion regarding what would go into the United States' final, integrated, comments. [*43] *See* *Coastal States Gas Corp.*, 617 F.2d at 866 (asking whether the document weighed the pros and cons of agency adoption of one viewpoint or another); *see also* *Ancient Coin Collectors Guild*, 641 F.3d at 513 (D.C. Cir. 2011) (finding that certain reports were deliberative because they made recommendations or expressed opinions on legal or policy matters).

It follows, therefore, that the withheld e-mail deliberations and draft comments on the United States' review of the IPCC reports were properly withheld under the deliberative process privilege.

Internal Review, E-mails, and Drafts of the Endangerment Finding

Prior to the issuance of the EPA's final Endangerment Finding, agency staff engaged in discussions and drafts of the finding, drafted a technical support document, and drafted a response to comments document. Craig Declaration ¶ 71.

This Circuit has not only found deliberative communications exempt, but also "communications which, if revealed, would expose to public view the deliberative process of an agency." *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048, 221 U.S. App. D.C. 96 (D.C. Cir. 1982) (affirming the finding that a preliminary draft was properly withheld). Applying the exemption to drafts [*44] of documents also "prevent[s] the public from misconstruing the views of an individual [agency staff member] to be the views of the [agency]." *Id.* at 1048-49 (noting that the draft represented one staff member's opinion and "only after the manuscript completed the . . . review process did it reflect the official [agency] view").

Plaintiff cites *Northwest Environmental Advocates v. United States Environmental Protection Agency*, No. 05-1876, 2009 U.S. Dist. LEXIS 10456, 2009 WL 349732 (D. Or. Feb. 11, 2009) in arguing that the EPA improperly withheld drafts of scientific documents. Opposition at 20-21. In *Northwest Environmental Advocates*, the court ruled that disclosure of "largely scientific drafts" was "unlikely to harm future agency decisionmaking or to result in embarrassment to the agencies" because the "decisions at issue were not open to discretionary decisionmaking." *Nw. Envtl. Advocates*, 2009 U.S. Dist. LEXIS 10456, 2009 WL 349732, at *7 (analyzing the deliberative process privilege in the context of a challenge to the agency's decision under the APA). The court noted that whether the agencies were "using the best scientific information" was a question before the court, and the documents were "precisely the sort of information that [*45] ought to be in front of the court" when reviewing agency decisions under the arbitrary and capricious standard. *Nw. Envtl. Advocates*, 2009 U.S. Dist. LEXIS 10456, 2009 WL 349732, at *8. The court did, however, find that documents reflecting internal discussions regarding methods of analysis or application of the law were properly withheld. *Id.*

However, the undersigned finds that *Northwest Environmental Advocates* does not inform the issue presented here. First, this court is tasked with reviewing the agency's withholding of documents responsive to a FOIA request, not with reviewing the agency's overall decision reflected in those documents. Second, the relevant question is whether the drafts are deliberative under the standard articulated in this Circuit. *See Coastal States Gas Corp.*, 617 F.2d at 866 (asking "whether it reflects the give-and-take of the consultative process"); *see also Reliant Energy Power Generation, Inc. v. Fed. Energy Regulatory Comm'n*, 520 F. Supp. 2d 194, 204 (D.D.C. 2007) (finding that draft reports, and edits or discussions regarding edits to drafts, were protected by the exemption over the requester's objection that the creation of the report "involved a factual investigation rather than [*46] a policy formulation"); *id.* at 206 (recognizing that spreadsheets and tables analyzing raw data of "natural gas and electric trends" were rendered part of the deliberative process based on their use by the agency in writing a report); *Goodrich Corp. v. U.S. Envtl. Protection Agency*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (finding that a draft groundwater flow model, challenged as "purely factual," reflected the agency's deliberative process due to the "selection and calibration of data").

This Circuit distinguishes between records that "bear on the formulation or exercise of agency policy-oriented judgment," and "materials relating to standard or routine computations or measurements over which the agency has no significant discretion." *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1435-36, 298 U.S. App. D.C. 125 (D.C. Cir. 1992). Thus, the court's inquiry is "whether the agency has plausibly demonstrated the involvement of a

policy judgment in the decisional process relevant to the requested documents . . . ." *Id.* at 1436.

Here, the agency has proffered sufficient evidence to demonstrate that the Endangerment Finding was more than a "standard or routine computation." First, the agency, [*47] "while focusing [its] inquiry narrowly on the science," was determining whether greenhouse gases may "reasonably be anticipated to endanger public health or welfare." Craig Declaration ¶ 5; *cf. Petroleum Info. Corp.*, 976 F.2d at 1437 (finding that an agency record that organized public records "in a more manageable form" and corrected any errors was "essentially technical and facilitative"). Second, the agency, in considering its finding, held a public comment period, Supplemental Declaration ¶ 37, and conferred with other agencies and the White House, Craig Declaration ¶ 71. The amount of input solicited supports a finding that the Endangerment Finding was an "exercise of agency policy-oriented judgment." Disclosure of the drafts and staff discussions regarding drafts would thus reveal the agency's deliberative process in developing the Endangerment Finding. The court is satisfied that the drafts of the Endangerment Finding, and discussions regarding those drafts, were properly withheld, as they are predecisional and deliberative documents.

Briefing Materials and Talking Points

Defendant withheld briefing materials and talking points that were created by agency staff to "inform their [*48] management" about issues regarding the Endangerment Finding and the University of East Anglia CRU's e-mails. Craig Declaration ¶ 72. In interpreting the statutory wording of "memorandums or letters," *see* 5 U.S.C. § 552(b)(5), courts focus on the content of the documents rather than the form. *Compare McGrady v. Mabus*, 635 F. Supp. 2d 6, 19 (D.D.C. 2009) (finding that brief sheets containing only personnel and performance data are neither memoranda nor letters), *with Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (noting that "talking points and recommendations for how to answer questions" that were prepared by employees for the decision-makers were properly withheld), *and Hornbostel v. U.S. Dep't of the Interior*, 305 F. Supp. 2d 21, 31 (D.D.C. 2003) (holding that "work plans, status reports, briefings, opinion papers, and proposals" regarding formulation of policy decisions were predecisional and deliberative). Thus, the court is not persuaded by Plaintiff's argument that the agency improperly withheld documents because they were not memoranda or letters.

In *Citizens for Responsibility and Ethics in Washington v. United States Department of Homeland [*49] Security*, the agency withheld "briefings and reports about events occurring in the aftermath of Hurricane Katrina." 514 F. Supp. 2d 36, 46 (D.D.C. 2007). The court rejected the plaintiff's argument that the documents did not contemplate an agency policy, and found that the agency "properly withheld the briefings and reports as communications regarding the analysis of the ongoing policy of the Government's response to Katrina." *Id.* Similarly, Defendant's descriptions support a finding that the withheld communications dealt with the agency's ongoing policy in handling the Endangerment Finding and the CRU e-mails. *See, e.g., Vaughn* Index (Document No. 21, Exhibit CC) at 4 (noting that EPA-350 reflects a "discussion" about "editing draft questions and answers for internal EPA use"); *id.* at 33 (describing that EPA-124 reflects "comments and suggestions on responses to questions"); *id.* at 127 (explaining that EPA2-3603 reflects an agency staff member's summary and analysis of a briefing that occurred for policy development and debate). The court is satisfied that the materials were properly

withheld under the deliberative process privilege, as they were created by agency staff prior to finalization [*50] of the agency's policies and reflect the deliberations that occurred during development of the agency's policies regarding its response to the Endangerment Finding and the University of East Anglia CRU e-mails.

b. Attorney-Client Privilege

Defendant invoked the attorney-client privilege to withhold portions of 16 records. Craig Declaration ¶ 78. In support of its claim of privilege, Defendant submits that each redaction withholds "communications between an EPA attorney and his/her client relating to a legal matter . . . for which the client office sought legal advice." *Id.* ¶ 78. As an example of the records withheld under this exemption, Defendant offers EPA-105, a redacted e-mail from an agency Office of General Counsel attorney to EPA staff members. *Id.* ¶ 80; Craig Declaration Exhibit FF.

Despite the explanation offered through the Craig Declaration, the undersigned finds that Defendant has not met its burden of proving that the attorney-client privilege applies to the redacted information. *See* *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 254, 184 U.S. App. D.C. 350 (D.C. Cir. 1977) (finding that descriptions that simply stated the "subject, source, and recipient of the legal opinion [*51] rendered" gave "no indication as to the confidentiality of the information"); *see also* *Hall v. Cent. Intelligence Agency*, 668 F. Supp. 2d 172, 192 (D.D.C. 2009) (noting that the court could not determine whether the communications were privileged because the agency had not described the "responsibilities" of the employees that communicated with the agency attorneys). The agency must demonstrate that the information on which the advice was based was confidential. *See* *Mead Data Central, Inc.*, 566 F.2d at 254. Defendant does contend that the example document contains legal advice based on "information provided by the CCD in preparation of the Endangerment Finding's Response to Comments documents." Craig Declaration ¶ 80. Defendant did not, however, meet its burden of showing that it was "reasonably careful" in protecting the information. *See* *Coastal States Gas Corp.*, 617 F.2d at 863.

Defendant argues that "Ms. Craig attested that the communication . . . was shared only with EPA staff members who were also working on the Endangerment Finding, all of whom where authorized to act for the EPA in connection with the Endangerment Finding . . . ." Reply at 20. Ms. Craig's declaration states however, [*52] that the information was shared with those with a "need-to-know, including EPA staff members who were working on the Endangerment Finding." Craig Declaration ¶ 80; *see also* Supplemental Declaration ¶ 36. Ms. Craig's use of the word "including" implies that the information was potentially shared with others. The agency has not demonstrated that the information maintained its confidential status, in that it was only shared with those who were "authorized to speak or act" in relation to the subject matter of the communication. *See* *Coastal States Gas Corp.*, 617 F.2d at 863 (noting that a "fundamental prerequisite" is "confidentiality both at the time of the communication and maintained since").

Defendant bears the burden of "establish[ing] their right to withhold information from the public and they must supply the courts with sufficient information to allow [the court] to make a reasoned determination that they were correct." *Id.* at 862. The undersigned concludes that there

is a genuine issue of material fact as to whether the information withheld under the attorney-client privilege is confidential.

c. Attorney Work-Product Doctrine

Defendant withheld 14 records based on the attorney work-product [*53] doctrine. Craig Declaration ¶ 81. Defendant asserts that the records contain "substantive attorney revisions, suggested language, and questions and comments that relate to the ultimate legal defensibility of the Endangerment Finding." *Id.* To demonstrate that the records were created in anticipation of litigation, Defendant notes that it received over 380,000 comments in response to the proposed Endangerment Finding, during a sixty day public comment period. Supplement Declaration ¶ 37. Defendant further notes that it received ten administrative reconsideration petitions for the Endangerment Finding, two related administrative stay requests, and is defending related consolidated cases. Supplemental Declaration ¶ 38.

The records in question were created by agency attorneys to advise their client, the agency, on the possibility that it would face litigation regarding the validity of the Endangerment Finding. Craig Declaration ¶ 81; *see* *In re Sealed Case*, 146 F.3d 881, 885, 330 U.S. App. D.C. 368 (D.C. Cir. 1998) (noting that agency lawyers sought to protect the agency from future litigation about a particular transaction, even though a specific claim had not been asserted). At oral argument with respect to the [*54] pending motion, Plaintiff argued that Defendant has not properly identified a specific claim that was anticipated in preparation of the documents. The Court of Appeals for this Circuit has held, however, that "[where] lawyers claim they advised clients regarding the risks of potential litigation, the absence of a specific claim represents just one factor that courts should consider in determining whether the work-product privilege applies." *Id.* at 887 (distinguishing cases in which a specific claim was required because the government lawyers were acting as prosecutors or investigators, with cases in which a specific claim was not required because government lawyers were acting as legal advisors to their agency clients). Similar to the withholding at issue in *In re Sealed Case*, the affidavits in this matter "could have been more specific," but they still "sufficiently establish that . . . the lawyer, knowing critics were scrutinizing [the transaction], prepared documents in anticipation of litigation over exactly that relationship." *See* *id.* at 886.

Looking at the "nature of the document," the records contained attorney revisions and comments regarding the defensibility of the Endangerment [*55] Finding. Craig Declaration ¶ 81. This is unlike the scenario in which the agency attorneys prepare "objective analyses of agency regulations." *See* *In re Sealed Case*, 146 F.3d at 885. Second, the "factual situation" indicated that there was significant public attention and criticism of the finding. *See* Supplemental Declaration ¶ 37.

Defendant has provided sufficient information to establish that it had a subjective anticipation of litigation when the documents were created. The records at issue provided attorney advice and revisions to the agency's position, in light of the critical comments received. Supplemental Declaration ¶ 37. While not dispositive, subsequent challenges to the Endangerment Finding support the fact that the agency had a subjective belief that litigation was a real possibility, and that the belief was objectively reasonable. *See* *Cuban v. Secs. & Exch. Comm'n*, 795 F. Supp. 2d

43, 55-56 (D.D.C. 2011).

Accordingly, the undersigned concludes that the information was properly withheld under the attorney work-product privilege.

IV. FOIA Exemption § 552(b)(6)

Plaintiff concedes that cell phone numbers, home phone numbers, home addresses, and medical information are "entitled [*56] to some level of protection." Opposition at 30. Plaintiff does, however, dispute that Defendant has met its burden of showing that all of the e-mail addresses should be redacted, arguing that disclosure of the e-mail addresses would help the public identify which federal agencies were involved in the decision-making. *Id.* at 30-31. The remaining email addresses at issue include personal e-mail addresses of agency staff, the official internal e-mail address of EPA Administrator, and the official e-mail addresses of staff members within the Executive Office of the President. Supplemental Declaration ¶ 39.

The e-mail addresses in question are "similar files" for purposes of § 552(b)(6), as they apply to "particular individuals." *See U. S. Dept. of State v. Wash. Post Co.*, 456 U.S. 595, 602, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982). Balancing the individuals' non-de minimis privacy interest against the public interest, the disclosure of the e-mail addresses would not "shed light" on the EPA's performance of its statutory duties or "otherwise let citizens know" what the agency is up to. *See U.S. Dept. of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994); *see also Gov't Accountability Project v. U.S. Dept. of State*, 699 F. Supp. 2d 97, 106 (D.D.C. 2010) [*57] (finding that release of individuals' personal e-mail addresses constituted a clearly unwarranted invasion of privacy and served no public interest). To the extent that the public has an interest in seeing which individuals or entities were involved in discussions with the EPA, the names of the e-mail address holders that were disclosed provide this information. *See* Supplemental Declaration ¶ 40.

Accordingly, the undersigned finds that Defendant has met its burden of proving there is no genuine issue of material fact in regards to the applicability of exemption six to the partially withheld records in question.

V. Previously Disclosed Records

In response to three sub-sections of the FOIA request, A(2)(a), A(4)(a), and E(1)(a), Defendant directed Plaintiff to alternative sources in lieu of producing the responsive records for the Plaintiff. Craig Declaration ¶ 28; Supplemental Declaration ¶ 18; Craig Declaration, Exhibit O. Defendant directed Plaintiff to the record for the Endangerment Finding at www.regulations.gov, and also noted its availability at the EPA's docket office in Washington, D.C. Craig Declaration Exhibit O. Further, Defendant provided the URLs to documents on the EPA's [*58] website, www.epa.gov. *Id.* These alternative sources to the requested documents were disclosed by the EPA itself. *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 152, 109 S. Ct. 2841, 106 L. Ed. 2d 112 (1989). In providing this information online, the agency has made it available for public inspection and copying. *See* 5 U.S.C. § 552(a)(2) ("For records created on or after November 1, 1996, within one year after such date, each agency shall make such records

available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means.").

Therefore, the court finds no genuine dispute as to any fact material to Defendant's reference to records previously disclosed by the agency.

VI. Segregability

Plaintiff contends that the agency withheld non-privileged information in string e-mails, and "has improperly withheld other information, including: facts . . . ." Opposition at 24-25. The government is required to disclose non-exempt material that is "reasonably segregable" from the withheld information. 5 U.S.C. § 552(b). "[T]he agency must provide a 'detailed justification' for its non-segregability . . . . However, the agency is not required [*59] to provide so much detail that the exempt material would be effectively disclosed." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776, 354 U.S. App. D.C. 49 (D.C. Cir. 2002) (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261, 184 U.S. App. D.C. 350 (D.C. Cir. 1977)). As discussed above, factual material can be withheld under certain circumstances.

Here, Defendant has attested that it "evaluated each record responsive to this FOIA request for segregability of non-exempt material." Craig Declaration ¶ 37, see also *id.* ¶¶ 66, 73, 79, 82, 86, 89. The agency contends that factual material that was withheld under exemption five was not segregable because the "selection of those facts was an integral part of the deliberations." *Id.* ¶ 73; *see, e.g.*, *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513, 395 U.S. App. D.C. 138 (D.C. Cir. 2011) (finding that factual summaries were properly withheld because they "were culled" from a "much larger universe of facts" and thus reflected an exercise of judgment as to what issues were most relevant); *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1538-40, 303 U.S. App. D.C. 249 (D.C. Cir. 1993) (distinguishing between factual summaries that extracted pertinent facts and organized them for [*60] a specific purpose with a factual summary that was "in substance an inventory, presented in chronological order").

Further, the agency included a segregability description for the documents listed in its *Vaughn* indices. While the court notes that many of the descriptions under "Segregability" in the *Vaughn* indices are merely recitations of the legal standard, the descriptions of the exemption invoked for the withheld information provide sufficient information and context for the withholding. *See Johnson*, 310 F.3d at 776 (finding the agency showed with "reasonable specificity" that a record could not be further segregated where its *Vaughn* index described the documents and exemptions, and its affidavit attested that each document was reviewed and determined not to contain reasonably segregatable information); *Milton v. U.S. Dep't of Justice*, 842 F. Supp. 2d 257, 260 (D.D.C. 2012) ("An affidavit stating that an agency official conducted a review of each document and how she determined that no document contains segregable information fulfills the agency's obligation.") (citing *Johnson*, 310 F.3d at 776-77).

Thus, "the plaintiff must point either to 'contradictory evidence in the record' or [*61] provide 'evidence of agency bad faith' in order to refute the agency's assertions." *Milton*, 842 F. Supp. 2d at 260-61. Plaintiff has provided examples of e-mail chains withheld under exemption five, *see* Opposition Exhibit C, arguing that the agency "invoked the privilege as to multiple emails in a

single document without treating each individual email as a stand-alone document," Opposition at 24. This argument alone, however, does not point to contradictory evidence or allege bad faith. *See, e.g.*, *Elec. Frontier Found. v. U.S. Dep't of Justice*, No. 10-641, 2012 U.S. Dist. LEXIS 127868, 2012 WL 3900737, at *9 (D.D.C. Sept. 10, 2012) (reviewing an e-mail chain, submitted as one record, and finding it was properly withheld). Defendant addressed the redactions of these email chains in its sample *Vaughn* index. Because Plaintiff has not raised other allegations, the court finds that Defendant met its burden in regards to segregability.

CONCLUSION

On the basis of the foregoing findings, it is, this 25th day of September, 2012,

RECOMMENDED that Defendant's Motion for Summary Judgment (Document No. 21) be **GRANTED** as to the adequacy of the search conducted for Plaintiff's FOIA request, the information withheld under the deliberative [*62] process privilege, the information withheld under the attorney work-product doctrine, the information withheld under Exemption 6, Defendant's reference to records previously disclosed by the agency, and the redaction of unresponsive information; and it is

FURTHER RECOMMENDED that said motion be **DENIED** as to the withholding of EPA3-583 under Exemption 4, and the information withheld pursuant to the attorney-client privilege.

/s/ DEBORAH. A. ROBINSON

United States Magistrate Judge