**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| JUDICIAL WATCH, INC., | ) | |
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| Plaintiff, | ) | |
| | ) | Civil Action No. 1:10-cv-00851 (RBW) |
| v. | ) | |
| | ) | |
| U.S. DEPARTMENT OF JUSTICE, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant U.S. Department of Justice. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment and Plaintiff's Response to Defendant's Statement of Material Facts Not in Genuine Dispute and Plaintiff's Statement of Material Facts Not in Genuine Dispute in Support of Plaintiff's Cross-Motion for Summary Judgment.

Dated: December 7, 2010

Respectfully submitted,

/s/ Michael Bekesha
Michael Bekesha (D.C. Bar No. 995749)
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(202) 646-5172

*Attorney for Plaintiff*

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**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this memorandum of law in opposition to the motion for summary judgment of Defendant U.S. Department of Justice and in support of Plaintiff's cross-motion for summary judgment. As grounds thereof, Plaintiff states as follows:

## I. Introduction.

At issue in this case is Defendant's refusal to shed any light on what appears to be a politically motivated dismissal of serious voter intimidation claims. For over a year, the U.S. Commission on Civil Rights ("the Commission") has investigated Defendant's atypical action in *United States v. New Black Panther Party for Self-Defense*, Civil Action No. 2:09-cv-0065 (E.D. Pa.), of dismissing voter intimidation claims against three defendants who did not contest their own liability. U.S. Commission on Civil Rights, *An Interim Report: Race Neutral Enforcement of the Law? DOJ and the New Black Panther Party Litigation*, November 19, 2010 (available at http://www.usccr.gov/NBPH/CommissionInterimReport_11-23-2010.pdf) at 1. The

Commission received an explanation from Defendant that the dismissal of claims "was based on a review of the totality of the circumstances and was simply a matter of career people disagreeing with other career people about the adequacy of the evidence under the pertinent law." *Id*. at 2. The Commission however obtained information that has placed Defendant's explanation "into serious doubt." *Id*. The evidence suggests that "hostility to race-neutral enforcement influenced the decisionmaking process" in *United States v. New Black Panther Party for Self-Defense*. *Id*. at 3. The discrepancy between these contradicting versions of events remains unresolved. It is under these set of circumstances that Plaintiff sent the Freedom of Information Act ("FOIA") request at issue here to Defendant.

Instead of releasing all responsive records, Defendant has withheld approximately eighty documents in their entirety. In its Memorandum of Law in Support of its Motion for Summary Judgment ("Def's Mem."), Defendant asserts that Plaintiff is trying to invade a privileged area in civil discovery. Def's Mem. at 1. That is simply incorrect. Defendant implicitly, if not explicitly, asserts that Plaintiff should have simply accepted Defendant's withholdings of approximately eighty documents without explanation or justification. Yet, it is Defendant's burden – and not that of Plaintiff – to justify any and all withholdings. Prior to filing its Motion for Summary Judgment, Defendant failed to adequately justify all of its withholdings. Now, after filing its motion, Defendant still has not satisfied the burdens of FOIA with respect to all of its withholdings. Therefore, Defendant is required by statute to produce the documents that Defendant so brazenly refuses to produce.

## II. Argument.

### A. Summary Judgment Standard.

FOIA generally requires complete disclosure of requested agency information unless the information falls into one of FOIA's nine clearly delineated exemptions. 5 U.S.C. § 552(b); *see also Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). In light of FOIA's goal of promoting a general philosophy of full agency disclosure, the exemptions are to be construed narrowly. *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Department of State v. Ray*, 502 U.S. 164, 173 (1991).

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to "withhold or disclose information under FOIA are reviewed *de novo*." *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp.2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. United States Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

For an agency to prevail on a claim of exemption, it must "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. Central Intelligence Agency*, 607 F.2d 339, 352 (D.C. Cir. 1978). "Reliance on 'agency affidavits is warranted if the affidavits describe the

documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Sciba v. Board of Governors*, 2005 U.S. Dist. LEXIS 45686, *4 (D.D.C. Nov. 5, 2005) (*quoting Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). The court may require an *in camera* inspection of the withheld documents to "insure that agencies do not misuse the FOIA exemptions to conceal non-exempt information." *Carter v. U.S. Department of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987) (*quoting Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1298 (D.C. Cir. 1980)).

Finally, an agency must demonstrate that, even where particular exemptions properly apply, all non-exempt information has been segregated and disclosed. *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1116 (D.C. Cir. 2007); *Shurberg Broadcasting of Hartford v. Federal Communications Commission*, 617 F. Supp. 825, 828 (D.D.C. 1985). A segregability determination is absolutely essential to any FOIA decision. *See Summers v. Department of Justice*, 140 F.3d 1077, 1081 (D.C. Cir. 1998).

**B. Defendant's Search for Responsive Records Was Inadequate.**

As an initial matter, pursuant to 5 U.S.C. § 552(a)(2)(E)(ii)(c), an agency must demonstrate that it has conducted "a search reasonably calculated to uncover all relevant documents." *Steinberg v. U.S. Department of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (*quoting Weisberg*, 745 F.2d at 1485); *see also Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Oglesby v. U.S. Department. of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)) (An agency must show that it made "a good faith effort to conduct a search

for the requested records, using methods that can be reasonably expected to produce the information requested.").

Moreover, Defendant "bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation." *McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983). To satisfy its burden, an agency may submit declarations that describe its search for responsive records in a "relatively detailed and non-conclusory" manner. *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Additionally, if the reasonableness of a search is challenged, as in this case, an agency must "demonstrate 'beyond a material doubt' that the search was reasonable." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (*quoting Weisberg*, 705 F.2d at 1351).

With respect to its search of the Civil Rights Division, Defendant has failed to show that it conducted a search that would reasonably produce responsive records. Defendant has provided little more than conclusory language. In his declaration, Nelson D. Hermilla testified that "the FOI/PA Branch staff searched and detailed inventory for the issues responsive to [Plaintiff's] request. After reviewing the records that had been created within the relevant time frame, the Civil Rights Division determined the search to be complete." Declaration of Nelson D. Hermilla ("Hermila Decl.") at ¶ 9. Mr. Hermilla did not testify to, and Defendant does not provide any evidence of, the methods used to conduct the search. There is no discussion of search terms, the files searched, or how Defendant determined which records were responsive. Defendant simply requests that the Court and Plaintiff accept, at face value, that the search was reasonable. Defendant therefore fails to satisfy its burden, and the Court should order Defendant to perform a proper search for responsive records pursuant to FOIA.

With respect to the search conducted by the Office of Information Policy ("OIP"), Vanessa Brinkmann testified that searches were conducted in the Offices of the Attorney General ("OAG"), Deputy Attorney General ("ODAG"), Associate Attorney General ("OASG"), Legal Policy ("OLP"), Legislative Affairs ("OLA"), Intergovernmental and Public Liaison ("OIPL"), and Public Affairs ("OPA"). Declaration of Vanessa R. Brinkmann ("Brinkmann Decl.") at ¶ 6. With respect to OAG, Ms. Brinkmann testified, "[O]n February 2, 2010, OIP conducted a search of three OAG officials' computer files. The terms used to complete this search were 'New Black Panther Party,' 'NBPP,' 'New Black Panther,' and 'NBP.'" *Id* at 10. Although Ms. Brinkmann's declaration is at least more specific than Mr. Hermilla's declaration, it also fails to satisfy Defendant's burden. Ms. Brinkmann's declaration does not explain why only three computers were searched, which three computers were searched, or why the names of the three defendants were not searched. Similarly, according to Mr. Hermilla, only a few search terms were used in searching the files of six ODAG employees. Again, there is no discussion or explanation concerning why the search was limited to those computers or those few search terms. Finally, with respect to the remaining offices – OASG, OLP, OLA, OIPL, and OPA – Defendant fails to provide any information besides the mere fact that a search was conducted and that Defendant believes it was adequate. Defendant therefore has failed to demonstrate that OIP conducted a search reasonably calculated to uncover all relevant documents, and the Court should order Defendant to perform a proper search for responsive records pursuant to FOIA.

### C. The *Vaughn* Index and Declarations Are Inadequate and Therefore Fail to Satisfy Defendant's Burden.

"The typical FOIA case 'distorts the traditional adversary nature of our legal system's form of dispute resolution.'" *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145

(D.C. Cir. 2006) (citations omitted). "When a party submits a FOIA request, it faces an 'asymmetrical distribution of knowledge' where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request." *Id.* Because of this lopsided relationship, the burden is on the agency to establish its right to withhold information from the public. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

To meet this burden, agencies generally rely on *Vaughn* indexes, affidavits, and/or declarations that "describe the [withheld information] and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *see also Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). An agency's *Vaughn* index must supply "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Central, Inc. v. U.S. Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). Additionally, a *Vaughn* index should "consist of 'one document that adequately describes each withheld record or deletion and sets forth the exemption claimed and why that exemption is relevant.'" *King v. United States Department of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (*quoting Paisley v. Central Intelligence Agency*, 712 F.2d 686, 690 (D.C. Cir. 1983)).

Similar to the requirements for a *Vaughn* index, declarations submitted by a governmental agency in justification for its exemption claims "cannot support summary judgment if they are 'conclusory, merely reciting statutory standards, or if they are too vague or sweeping.'" To accept an inadequately supported exemption claim 'would constitute an

abandonment of the trial court's obligation under the FOIA to conduct a de novo review.'" *King*, 830 F.2d at 218-219.

Although Defendant has offered two declarations in excess of twenty pages, the declarations do little to correct the asymmetrical distribution of knowledge. Defendant fails to provide anything more than vague, conclusory statements. The two declarations provide no specificity with respect to the exemptions claimed on particular documents; Defendant only produces declarations that speak in generalities. For example, Ms. Brinkmann asserted:

> Department employees routinely e-mail each other, sharing interpretations, opinions and language, giving and responding to suggestions, and providing input as they develop litigation positions, brief senior officials, and draft documents or respond to inquiries. E-mail operates as a way for individual Department of Justice employees to communicate with each other. … Indeed such online discussions most resemble conversations between staff members which are part of the give and take of agency deliberations.

Brinkmann Decl. at ¶ 43. Instead of affirmatively stating that the withheld documents are emails in which department employees shared interpretations, opinions and language, giving and responding to suggestions, and providing input, Defendant produced a declaration that simply descries Defendant's operations in a general fashion. Defendant therefore has not satisfied its burden of adequately describing each withheld record and the reasons why a particular exemption claimed is relevant to that specific document.

Similarly, Ms. Brinkmann claimed:

> All of the documents in Group 1 of the attached *Vaughn* index are prime examples of how exchanges between a litigating component and the senior management offices allow for a more fulsome decision-making process. . . . If communications such as those in Group 1 are routinely released to the public, Department employees will be much more circumspect in their discussions

> with each other and in providing all pertinent information and viewpoints to senior officials in a timely manner.

Brinkmann Decl. at ¶ 45. Yet, Ms. Brinkmann does not affirmatively state that Group 1emails *are* exempt from disclosure pursuant to the deliberative process privilege. Nor did she testify that each and every document of the group represents an exchange between a litigating component and the senior management offices. In fact, she cannot do such. Many of the documents of Group 1 withheld pursuant to the deliberative process privilege are documents among individuals of the litigating component and not between a litigating component and the senior management offices. Consequently, the only evidence presented by Defendant is declarations which are too broad to be of any use in determining whether Defendant properly withheld responsive records.

**D. Defendant Improperly Withheld Information under FOIA.**

**1. Defendant Improperly Withheld Information Under Exemption 5.**

Exemption 5 of FOIA allows an agency to withhold records or information that is "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). Courts have recognized three types of Exemption 5 withholdings: the deliberative process privilege, the attorney-client privilege, and the attorney work product doctrine. *See Coastal States*, 617 F.2d at 862. Defendant purportedly invokes both the deliberative process privilege and the attorney work product doctrine over almost all eighty responsive records.

**a. Defendant Improperly Applies the Deliberative Process Privilege.**

The burden is on Defendant to show that the eighty records at issue should be withheld in whole or in part pursuant to the deliberative process privilege. *Wilderness Society v. United*

*States Department of the Interior*, 344 F. Supp. 2d 1, 9 (D.D.C. 2004). To overcome its burden, Defendant must show that the records are both pre-decisional and deliberative. *Id.* at 10.

**i. Information Must be Deliberative.**

In order to withhold information pursuant to the deliberative process privilege, an agency must demonstrate that the information would "reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (*quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). Further, the information must be "predecisonal and it must be deliberative[,]" and the agency should "not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual." *Id*. (citations omitted).

To be part of the deliberative process, the document must be part of the decisionmaking process, or, as the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has described, "[must] reflect[] the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866. Moreover, the D.C. Circuit has stated, "[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Id.* at 868. Furthermore, "if documents are not a part of a clear 'process' leading to a final decision on the issue . . . they are less likely to be properly characterized as predecisional; in such a case there is an additional burden on the agency to substantiate its claim of privilege." *Id*. For example, the D.C. Circuit has held that "[t]he identity of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision

already made." *Id.* In this case, Defendant has failed to show that every document was part of the process leading to the final decision to dismiss three of the defendants in *U.S. v. New Black Panther Party for Self-Defense*. Defendant does not explain how that decision was made or who made that decision. Nor does Defendant satisfactorily assert that each and every withheld, responsive record was used in the decisionmaking process.

Frankly, Defendant does little more than go through the motions in its brief, its *Vaughn* index, and its declarations. Instead of satisfying its burden on each and every document, Defendant generally asserts that all of the documents are deliberative. In other words, Defendant merely makes "barren assertions that an exempting statute has been met." *Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency*, 610 F.2d 824, 831 (D.C. Cir. 1979). Yet, such statements "cannot suffice to establish the fact." *Id.* It is longstanding precedent that "an agency cannot meet its obligation simply by quoting the statutory language of an exemption." *Army Times Pub. Co.* v. *Department of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993) (remarking that affidavits "[p]arroting the case law" were insufficient); *Voinche* v. *Federal Bureau of Investigation*, 412 F. Supp. 2d 60, 69 (D.D.C. 2006) (agency failed to satisfy its burden where declaration "merely quote[d] the statutory language" of an exemption).

**ii. Information Must Be Pre-Decisional.**

The U.S. Supreme Court has defined pre-decisional documents as those "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp*., 421 U.S. 168, 184 (1978). Moreover, pre-decisional documents "must precede, in temporal sequence, the 'decision' to which it relates." *General Electric Co. v. Steven Johnson*, 2006 U.S. Dist. LEXIS 64907, *13 (D.D.C. Sept. 12, 2006). If the document succeeds an agency's decision, in temporal sequence, it must reflect an agency's continuing

process of examining its policies. *Wilderness*, 344 F. Supp.2d. at 13-14. "Post-decision draft documents which examine and make recommendations to an agency's policies can be withheld. Such later created documents are not necessarily rationalizing or supporting the agency decision, as they may be evaluating it and making recommendations on it." *Id.* In other words, an agency may withhold records pursuant to the deliberative process privilege only if it relates to future policy decisions, not solely the prior decision. Whereas pre-decisional records are privileged, "communications made after the decision and designed to explain it [] are not" privileged. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151-152 (1975). The reason for excluding post-decisional documents from FOIA Exemption 5 is simple: documents created after the decision cannot cause injury to the deliberative process. *Id*. ("It is difficult to see how the quality of a decision will be affected by communications ... occurring after the decision is finally reached.").

To satisfy its burden of proof with respect to post-decisional documents, Defendant must show that the documents include "the ingredients of the decision-making process." *Id*. at 151. Most recently, this Court held that post-decisional documents qualified as pre-decisional only after "[b]oth the declarations submitted by the agency and this Court's in camera review of the records [made] clear that the information withheld by [the agency] recounts the 'ingredients of the decisionmaking process.'" *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, 658 F. Supp. 2d 217, 234 (D.D.C. 2009). Again, Defendant only generally asserts that the documents are pre-decisional. Defendant never identifies when a decision was made or how a specific document was used to make the decision. Defendant only makes barren assertions that the documents were created prior to a decision being made. *See* Hermilla Decl. at ¶ 12.

**iii. Withholding of Information Must Prevent Injury.**

The purpose of the deliberative process privilege is to protect the "quality of administrative decision-making [which] would be seriously undermined if agencies were forced to 'operate in a fishbowl' because the full and frank exchange of ideas on legal or policy matters would be impossible." *Mead Data,* 566 F.2d at 256; *Dudman Comm. Corp. v. Department of the Air Force,* 815 F.2d 1563, 1567 (D.C. Cir. 1987) ("[W]ere agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."); *Petroleum Information Corp v. U.S. Department of the Interior*, 976 F.2d 1429, 1433-1434 (D.C. Cir. 1992) ("While the deliberative process privilege serves a number of related purposes, its 'ultimate aim' is to 'prevent injury to the quality of agency decisions.'" (*citing Sears*, 421 U.S. at 151 (1975)). As the D.C. Circuit has explained:

> [T]he key question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.

*Dudman Comm. Corp.*, 815 F.2d at 1568. Therefore, in order to succeed on a deliberative process privilege claim under Exemption 5, an agency must demonstrate that the withheld information at issue "would actually inhibit candor in the decision making process if available to the public." *Army Times Pub. Co. v. Department of the Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993). "An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm." *Mead Data,* 556 F.2d at 258. "It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Id.*

Completely absent from Defendant's *Vaughn* Index and declarations is any demonstration that disclosure of the withheld records would cause harm to its decision-making

process. In fact, Defendant simply ignores the requirement. Instead of addressing the burden required by the D.C. Circuit, Defendant blames Plaintiff for suggesting that Defendant follow the law. Def's Mem. at 22 ("Plaintiff seeks to impose on the Department the additional burden of demonstrating a chilling effect from disclosure of those communication[s]."). Defendant moreover asserts that the requirement of showing that withheld information "would actually inhibit candor in the decision making process if available to the public" is "clearly [] not the law in this Circuit." *Id*. at 21. Defendant attempts to defend its incorrect position without citing to the D.C. Circuit. *Id*. at n. 14.

**b. Defendant Improperly Applies the Attorney Work Product Doctrine.**

In order to exempt information pursuant to the attorney work product doctrine, an agency must demonstrate that the material was "prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." *Sears*, 421 U.S. at 154. Importantly, "it is firmly established that there is no privilege at all unless the document was initially prepared in contemplation of litigation, or in the course of preparing for trial." *Coastal States*, 617 F.2d at 865. While there is no requirement that actual litigation be pending, it is absolutely necessary that "at the very least some articulable claim, likely to lead to litigation, must have arisen." *Id.*

More specifically, Defendant "must establish that the documents 'must at least have been prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind' and provide some indication whether the documents have been shared with third parties, which would amount to a waiver of the privilege." *Wilderness,* 344 F. Supp. 2d at 17 (*citing Judicial Watch.,* 297 F. Supp. 2d at 268. Because the agency failed to provide the names

of the authors or recipients it "ha[d] no context in which to assess whether the attorney work-product privilege protects the documents from disclosure." *Wilderness*, 344 F. Supp.2d at 18.

Here, Defendant essentially claims across-the-board that all records are exempt from production pursuant to the attorney work product privilege. Def's Mem. at 16 ("The majority of these records are classic attorney work product."). Yet, from the declarations and the *Vaughn* index is it unclear exactly what type of information is being withheld. Not everything written or discussed by attorneys is work product. Mr. Hermilla testified that "Authors of some of the emails … intended to make appropriate officials aware of all the legal and policy implications pertaining to the legal strategies, merits, constitutional issues, and proposed relief." Hermilla Decl. at ¶ 27(A)(7). Moreover he asserted, "If a line attorney is aware that his or her policy analysis or proposed recommendations may be released to the public." *Id*. In both of these statements, Defendant concedes that the Department attorneys were acting not as attorneys but as Department supervisors. Defendant therefore has not adequately identified which documents were created by Department employees acting as attorneys and which documents were created by Department employees acting as government officials.

Defendant states, "While Plaintiff apparently recognizes that the draft pleadings and draft memoranda are privileged and thus is not challenging their withholding, Plaintiff inexplicably challenges the withholdings of Department attorneys' discussions of those drafts." Def's Mem. at 17. Yet, Defendant's characterization is grossly incorrect. Plaintiff did not challenge the withholdings of the draft pleadings and draft memoranda because Plaintiff did not believe such documents would educate the public of "what the government is up to." *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989). The public wants to know and has a right to know why political appointees dismissed the claims against three of the

defendants in *U.S. v. New Black Panthers for Self-Defense* in which career attorneys wanted to proceed. Therefore, Plaintiff does not "inexplicably" challenge Defendant's withholdings. It does so with the full force of the law.

Finally, based on Defendant's own admissions, many of the documents are not exempt from disclosure simply based on the definition of the attorney work product doctrine. Defendant asserts, "The Department additionally has withheld as attorney work product records, including some post-dating the filing of the notice of dismissal in the *New Black Panther* case, 'inasmuch as they were created in connection with or describe events occurring during the course of the [*New Black Panther Party*] litigation.'" Def's Mem. at 17. Although the courts have broadly defined the scope of the attorney work product doctrine, the courts have never found that such can be applied to documents created after litigation has ended for the purpose of explaining a decision. While there is no requirement that actual litigation be pending, it is absolutely necessary that "at the very least some articulable claim, likely to lead to litigation, must have arisen." *Coastal States*, 617 F.2d at 865. More specifically, the D.C. Circuit has held that documents prepared subsequent to the closing of a case are presumed not to have been prepared in anticipation of litigation. *Senate of Puerto Rico ex rel. Judiciary Comm. v. United States DOJ*, 823 F.2d 574, 586 (D.C. Cir. 1987).

**E. Defendant Improperly Withheld Specific Records.**

While Plaintiff challenges the Board's withholdings generally, it also asserts the following challenges to the withholding of thirty-seven specific documents.

**Document Nos. 13, 14, 36, 44, 49, 50, 55, 57, 67, 68, and 69**

Plaintiff challenges the withholdings of Document Nos. 13, 14, 36, 44, 49, 50, 55, 57, 67, 68, and 69. Mr. Hermilla describes these documents as "several draft documents and revisions

with forwarding emails reflecting the predicisional back and forth discussions containing analysis of the law and facts, questions, suggestions, legal strategies, and proposals for claims of relief, etc." Hermilla Decl. at ¶ 10. Based on this description, Defendant asserts both deliberative-process privilege and attorney-client privilege over these documents.

As asserted above, a document must be part of the decisionmaking process to be properly withheld. To be part of the decisionmaking process, the D.C. Circuit has stated that a document "[must] reflect[] the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866. Further, the Court has explained that "the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Id*. at 868. Moreover, "if documents are not a part of a clear 'process' leading to a final decision on the issue … they are less likely to be properly characterized as predecisional; in such a case there is an additional burden on the agency to substantiate its claim of privilege." *Id*. The Court therefore concluded:

> [T]he identity of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.

*Id.*

Document Nos. 13, 14, 36, 44, 49, 50, 55, 57, 67, 68, and 69 are not part of a clear process because they are not from a subordinate to a superior in the normal course. Although Steve Rosenbaum, at the time, was Acting Deputy Assistant Attorney General and reported to Sam Hirsch, Deputy Associate Attorney General, it was Mr. Rosenbaum who was responsible for making the final decision. Although technically the decision was that of Loretta King, then-Acting Assistant Attorney General, Mr. Rosenbaum was the lead attorney on the case. As

current-Assistant Attorney General Thomas Perez stated before the Commission, "The judgment in this case to proceed in the way that was chosen was made by Steve Rosenbaum and ultimately by Loretta King." Hearing on the Department of Justice's Actions Related to the New Black Panther Party Litigation and Its Enforcement of Section 11(b) of the Voting Rights Act, May 14, 2010 (available at http://www.usccr.gov/NBPH/05-14-2010_NBPPhearing.pdf) at 23. In each of those documents, Mr. Rosenbaum was informing Mr. Hirsch on the current status and informing him on how the Civil Rights Division was going to proceed. For example, the *Vaughn* index describes Document No. 49 as a "summary of [Mr. Rosenbaum's] analysis and various discussions with VOT Section on legal issues and merits and expressing his frank statements about the quality of evidence and representations of facts and case law." *Vaughn* Index, Exhibit D to Declaration of Nelson D. Hermilla ("Hermilla *Vaughn* index") at 10. This document, as all of the documents challenged in this subsection of the brief, is not part of any decisionmaking process. These documents are merely documents apprising OASG of the status of the case and the current analysis as submitted to the head of the Civil Rights Division from subordinates in the Voting Section.

Defendant also incorrectly asserts that these documents are exempt from production pursuant to the attorney work product doctrine. Yet, Document Nos. 13, 14, 36, 44, 49, 50, 55, 57, 67, 68, and 69 do not contain any information that can be characterized as attorney work product. These documents are informational emails to the political office of the OAG. These emails are nothing more than summaries of the actions that the career lawyers were taking. As the D.C. Circuit has held:

> The work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure

> everything that a lawyer does. Its purpose is more narrow, its reach more modest.

*Jordan v. United States DOJ*, 591 F.2d 753, 775 (D.C. Cir. 1978). Of course, the authors and recipients of the responsive records are attorneys; yet, the recipients were not acting as attorneys making decisions in litigation: they were acting as supervisors overseeing and staying informed about the work of their employees. The attorney work product doctrine is not broadly construed to include such communications.

**Document No. 82**

Document No. 82 is an email from Mr. Rosenbaum to Ms. King dated May 22, 2009. The *Vaughn* index describes the document as "Acting DAAG to supervising Acting AAG forwarding copies of Acting DAAG's comments and candid concerns on merit, legal strategies, and scope of relief in VOT Section's proposed pleadings in April." Hermilla *Vaughn* index at 14. The dismissal of three of the defendants in *U.S. v. New Black Panther Party for Self-Defense* occurred on May 15, 2009. Therefore, it "succeeds [the] agency's decision, in temporal sequence." As stated above, the law of this Circuit requires that the document "reflect an agency's continuing process of examining its policies." *Wilderness*, 344 F. Supp.2d. at 13-14. Document No. 82 does not do this. This document simply forwards the reasoning behind the decision that was made at least 7 days prior. Based on the post-decisional nature of the document, Defendant has failed to satisfy its burden that this document is exempt from production pursuant to the deliberative process privilege.

More clearly, the attorney work product doctrine does not, and cannot, apply to this document. The attorney work product doctrine can only be properly claimed for documents prepared in anticipation of litigation. On May 22, 2009, 7 days after the case was closed, the

email could not have been created in anticipation of litigation. *Senate of Puerto Rico*, 823 F.2d at 586 (Documents prepared subsequent to the closing of a case are presumed not to have been prepared in anticipation of litigation.).

**Document No. 80**

Defendant cannot, and does not, satisfy the burden associated with withholding documents pursuant to deliberative process which were created after a decision was made. The *Vaughn* index describes Document No. 80 as an email in which the "Acting DAAG advised his supervisor that final versions of pleadings were filed with court and provided copies of documents." Hermilla *Vaughn* index at 16. Moreover**,** the *Vaughn* index states that "the document advises of a final order in the NBPP litigation and discusses nature of the relief." *Id*. Based on that description there is nothing deliberative about Document No. 80. It is nothing more than an email informing other divisions that there is a final order in *U.S. v. New Black Panther Party for Self-Defense*. Moreover, to the extent that the document "shows details and facts in relation to the nomination process in the Department" (*Id*.), that section may be segregated as non-responsive and irrelevant to the issue currently before this Court.

**Document Nos. 83 – 85**

Although Defendant asserts that Document Nos. 83-85 were prepared as "part of the Department's development of its response to public inquires about the dismissals in the *New Black panther Party* case" (Def's Mem. at 28-29), the *Vaughn* index makes no reference of the fact that these emails have anything to do with responding to press inquiries. The *Vaughn* index describes Document No. 83 as comments "on publicity about NBPP litigation and legal analysis of default judgments and inaccuracies of the stated facts in the NBPP case." Hermilla *Vaughn*

index at 16. Based on Defendant's own description, Document No. 83 does not contain any information related to any deliberations; it simply provides information about a past decision.

Similarly, Document No. 84 is nothing more than an email chain explaining "that internal deliberative discussions are protected" as well as comments and characterization of the facts and law in *U.S. v. New Black Panther Party for Self-Defense*. *Id*. at 17. Based on the *Vaughn* index, there is nothing about this document that even remotely resembles information that may be properly withheld pursuant to the deliberative process privilege.

Finally, Document No. 85 also is nothing more than a summary of past events. The *Vaughn* index simply describes this post-decisional document as comments "on reasons for dismissal of defendants in NBPP litigation and legal analysis of dismissals and legal obligations of DOJ." *Id*. Never have the courts found a document that simply explains a final decision to be deliberative in nature. Defendant again fails to adequately and properly assert claims of exemption.

**Document Nos. 86 – 99**

Document Nos. 86-89 are "fourteen memoranda prepared at the request of the Office of Professional Responsibility ("OPR") in connection with its ongoing investigation into allegations that the Civil Rights Division's handling of the *New Black Panther Party* case was influenced by political considerations." Def's Mem. at 31. Defendant asserts that these records may be properly withheld pursuant to Exemption 5 and Exemption 7.

Document Nos. 86-99 do not consist of material protected by the attorney work product doctrine. These records are undated memoranda prepared for a matter unrelated to *U.S. v. New Black Panther Party for Self-Defense*. In his declaration, Mr. Hermilla testified that these documents were prepared in response to an October 23, 2008 OPR memorandum. On October

23, 2008, the events at issue in *U.S. v. New Black Panther Party for Self-Defense* had yet to take place, Defendant had yet to start an investigation of a non-existent event, and no employee of Defendant was being investigated for actions not yet taken. Moreover, the records were prepared by employees of the Civil Rights Division for OPR. OPR does not have jurisdiction over voting or anything that occurred on November 4, 2008. Even if the OPR investigation pertains to *U.S. v. New Black Panther Party for Self-Defense* and the memoranda were similarly related, Defendant has failed to show that the memoranda were prepared in anticipation of litigation. Since the memoranda are undated, the documents could just have easily been created after May 15, 2009, the date in which the dismissal of three of the defendants in *U.S. v. New Black Panther Party for Self-Defense* were entered. Even if the memoranda describe discussions that took place prior to May 15, 2009, if the memoranda themselves were created after such date, the attorney work product privilege does not apply. *Senate of Puerto Rico*, 823 F.2d at 586.

With respect to the claim of exemption pursuant to the deliberative process privilege, Defendant has not adequately satisfied its burden. Because of the temporal sequence of the document, the document must do more than just explain the decision that was made. *Sears*, 421 U.S. at 151-152 ("Whereas pre-decisional records are privileged, communications made after the decision and designed to explain it [] are not privileged."). Defendant asserts that Document Nos. 86-99 are exempt from production because they are "records created subsequent to the dismissal decision that describe those deliberations." Def's Mem. at 25. Yet, Defendant has failed to show that the fourteen memoranda contain "the ingredients of the decision-making process." *Sears*, 421 U.S. at 151. Defendant simply asserts that the records contain the "author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation." Hermilla *Vaughn* index at 18-20. Defendant also asserts

that the documents contain the author's description of "discussions among officials on litigation strategy and various litigation options and assessments of outcomes." *Id*. In other words, Defendant has failed to state who the authors of the memoranda are and what discussions they were describing. Defendant does not assert that any of these individuals partook in the decisionmaking process related to the dismissal of three of the defendants in *U.S. v. New Black Panther Party for Self-Defense*. These memoranda could simply be documents prepared by Justice attorneys of another division. Moreover, "thoughts on litigation developments" is not the same as arguments that were actually considered and accepted or rejected. These responsive records are nothing more than after-the-fact justifications or explanations of the action. *CREW*, 658 F. Supp. 2d at 233. They are not descriptions of the deliberations themselves. *Id.*

Defendant also failed to adequately assert that it is entitled to withhold Document Nos. 86-99 pursuant to Exemption 7. The threshold faced by an agency claiming Exemption 7 requires a demonstration that records were "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982). If it cannot make such a showing, Defendant cannot utilize any of Exemption 7's components.

The D.C. Circuit has set forth a two-part test whereby the government can show that its records are law enforcement records. First, Defendant must show that "the investigatory activity that gave rise to the documents is 'related to the enforcement of federal laws.'" *Jefferson v. DOJ*, 284 F.3d 172, 177 (D.C. Cir. 2002). Second, Defendant must establish "a rational nexus between the investigation at issue and the agency's law enforcement duties." *Id.*

Although one may argue that all investigatory activity is for law enforcement purposes, this Circuit has not adopted such a broad definition. An agency may conduct an investigation which is nothing more than general, regular employee monitoring. *Id.* ("Material compiled in

the course of … internal agency monitoring does not come within Exemption 7(C) even though it 'might reveal evidence that later could give rise to a law enforcement investigation.'"). Instead, an agency's investigation of its own employees is for law enforcement purposes only if it "focuses 'directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions.'" *Id.* at 182. In other words, the investigation must do more than to determine whether the agency's employees are "acting in accordance with statutory mandate and the agency's own regulations." *Rural Housing Alliance v. United States Department of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974).

Defendant has failed to satisfy the burden of showing that the responsive records may be withheld as law enforcement records. Defendant has not indicated what alleged illegal acts occurred. Nor has Defendant specified who may have committed those acts. Defendant has simply and unsubstantially asserted that the responsive records were created in connection with "an investigation into 'allegations that the Department's actions, including the voluntary dismissal of its complaint against three of the four defendants in *United States v. New Black Panther Party for Self-Defense, et al.* were influenced by political considerations.'" Def's Mem. at 32. Defendant has not asserted any statute in which the Department of Justice cannot take political considerations into account in deciding whether to voluntarily dismiss charges against a defendant. In other words, Defendant has not asserted a potentially illegal act which must be investigated.

The OPR investigation commenced on October 23, 2008, which was not only prior to the commencement of *United States v. New Black Panther Party for Self-Defense, et al.*, but also prior to the event at issue in that case. Therefore, the responsive records withheld pursuant to Exemption 7 also cannot be said to be anything more than "internal agency monitoring." The

records were not even created in response to an investigation about a specific event. For numerous reasons, Defendant has improperly withheld Document Nos. 86-99 pursuant to Exemption 7.

**Document Nos. 101, 102, 103, 104, 105, and 107**

Defendant grossly misconstrues Exemption 5 when it claims Document Nos. 101, 102, 103, 104, 105, and 107 are not subject to disclosure. These documents, based on the descriptions provided by Defendant, are nothing more than status updates. These documents are not part of the decisionmaking process as they do not play a role in the decision to dismiss three of the defendants in *U.S. v. New Black Panther Party for Self-Defense*. Document No. 101 is an email in which an employee briefs his supervisor "on the current status of litigation." *Vaughn* Index, Exhibit J to Declaration of Vanessa R. Brinkmann ("Brinkmann *Vaughn* index") at 1. Document No. 102 is an email in which a supervisor asks an employee "for an update on the NBPP litigation." *Id*. Document No. 103 is an email chain forwarding along the "legal analysis from" the Civil Rights Division's Appellate Division. *Id*. The email is not part of the decisionmaking process because it is sent by the individual who made the decision to his supervisor in an effort to notify the supervisor. Document No. 104 is an email chain consisting of "an update on the status of deliberations." *Id*. at 2. It is not an email containing actual deliberations. Document No. 105 is an email discussion "regarding current status of the NBPP litigation." *Id*. Once again, the responsive record does not consist of information that is deliberative in nature. Document No. 107 also has no relation to the exemption claimed. Document No. 107 is an email "forwarding court papers filed in the NBPP litigation." *Id*. Once again, there is nothing deliberative about this responsive record.

**Document No. 116**

The *Vaughn* index describes Document No. 116 as:

> [A] detailed 'chronology' of the Department's involvement in the NBPP litigation. . . . This document contains an unvarnished presentation of author's thoughts on litigation decisions, actions, strategies, and recommendations as they developed, as well as ruminations and retrospective analyses on the variety of decisionmaking processes . . . with respect to the NBPP litigation.

Brinkmann *Vaughn* index at 3. As noted above, the decision to dismiss three of the defendants in *U.S. v. New Black Panther Party for Self-Defense* was made by Mr. Rosenbaum and Ms. King. The author of Document No. 116 is Mr. Hirsch. *Id*. Therefore, the document was prepared by an individual who was not even involved in the decisionmaking process. He is not supporting the agency decision; he is simply evaluating it. Because the document was not prepared in the context of making any decision and does not outline the arguments made during the decisionmaking process, this responsive cannot be properly withheld pursuant to the deliberative process privilege.

Similarly, because this document was created after the decision to dismiss three of the defendants in *U.S. v. New Black Panther Party for Self-Defense*, the attorney work product privilege does not, and cannot, apply. *Senate of Puerto Rico*, 823 F.2d at 586.

**F. *In Camera* Review of the Withheld Records May Be Appropriate.**

Plaintiff asserts that Defendant has failed to satisfy its statutory burden pursuant to FOIA to withhold any responsive records. However, if the Court believes that the claims of exemption may minimally satisfy Defendant's burden, the Court has "the option to conduct *in camera* review." *Juarez v. DOJ*, 518 F.3d 54, 59-60 (D.C. Cir. 2008); *Allen*, 636 F.2d at 1298 ("Where the agency fails to meet that burden, a not uncommon event, the court may employ a host of

procedures that will provide it with sufficient information to make its *de novo* determination, including *in camera* inspection.")

The D.C. Circuit has held, "[*I*]*n camera* review may be particularly appropriate when either the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims." *Quinon & Strafer v. Federal Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). Moreover, the Court has explained that "when the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents, *in camera* review may be more appropriate." *Id.*

At issue are approximately eighty documents, primarily consisting of email chains. Defendant claims that these records are exempt from disclosure pursuant to attorney work product. Plaintiff asserts that Defendant has not adequately shown that the records are in fact attorney work product and should be privileged. Because the requested records are "few in number and of short length[,]" Plaintiff asserts that the Court could reasonably review the responsive records *in camera*. *Allen*, 636 F.2d at 1298. Since attorney work product is claimed, it may be difficult for the agency to provide more detailed explanations of the documents. "Sufficiently detailed justifications for the agency's withholding is often impossible, however, because such justifications would reveal the very information sought to be protected. In those instances, we doubt that there is any way the agency action could be sustained without in camera inspection. And in camera inspection permits the courts in such instances to fulfill their statutory obligation to conduct a meaningful de novo review." *Id.*

Finally, the Circuit Court has held:

> In cases that involve a strong public interest in disclosure there is also a greater call for in camera inspection. The Freedom of Information Act was aimed at ending secret law and insuring that

> this country have an informed, intelligent electorate. When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency's withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for in camera inspection is greater.

*Id.* at 1299.

**III. Conclusion.**

For the foregoing reasons, Defendant's motion for summary judgment should be denied and summary judgment should be entered in Plaintiff's favor.

Dated: December 7, 2010

Respectfully submitted,

/s/ Michael Bekesha_____

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(202) 646-5172

*Attorney for Plaintiff*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| JUDICIAL WATCH, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No. 1:10-cv-00851 (RBW) |
| v. | ) | |
| | ) | |
| U.S. DEPARTMENT OF JUSTICE, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE AND PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendant's Statement of Material Facts Not in Genuine Dispute and Plaintiff's Statement of Material Facts Not in Genuine Dispute in Support of Plaintiff's Cross-Motion for Summary Judgment:

**I. Plaintiff's Response to Defendant's Statement of Material Facts Not in Genuine Dispute.**

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

5. Undisputed.

6. Undisputed.

7. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

8. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

9. Undisputed.

10. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

11. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

12. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

13. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

## II. Plaintiff's Statement of Material Facts Not in Genuine Dispute in Support of Plaintiff's Cross-Motion for Summary Judgment.

For its own LCv.R. 7.1(h) statement of material facts not in genuine dispute, Plaintiff respectfully refers the Court to Defendant's statement and Plaintiff's response thereto, set forth above.

Dated: December 7, 2010

Respectfully submitted,

/s/ Michael Bekesha_____
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*Attorney for Plaintiff*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| JUDICIAL WATCH, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No. 1:10-cv-00851 (RBW) |
| v. | ) | |
| | ) | |
| U.S. DEPARTMENT OF JUSTICE, | ) | |
| | ) | |
| Defendant. | ) | |
| _____ | ) | |

**[PROPOSED] ORDER**

Upon consideration of Plaintiff's Cross-Motion for Summary Judgment against Defendant U.S. Department of Justice, any opposition thereto, and the entire record herein, it is hereby ORDERED that:

1. Plaintiff's Cross-Motion for Summary Judgment is granted.

SO ORDERED.

DATE:_____ _____
Reggie B. Walton
United States District Judge