IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO
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 reply to Defendant U.S. Department of Justice's opposition to Plaintiff's cross-motion for summary judgment. As grounds thereof, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

Contrary to Defendant's assertions, this case is not about whether Plaintiff approves or disapproves of the Department of Justice's prosecutorial decisionmaking in *United States v. New Black Panther Party for Self-Defense*, Civil Action No. 2:09-cv-0065 (E.D. Pa.) ("*New Black Panther Party* case"). It is about political interference in that decisionmaking process and Defendant's efforts to avoid public scrutiny of that interference. Regardless of what this case is "about," however, the only legal issues before this Court concern the scope of FOIA Exemption 5. For material to be withheld pursuant to the deliberative process privilege, Defendant must demonstrate precisely how the disclosure of such material would harm its decision making process. Defendant has failed to do so. Similarly, Defendant misconstrues the attorney work

product doctrine. Material created *post* litigation is not protected under the attorney work product doctrine. Defendant has not satisfied its burden under FOIA and must produce all responsive material.

II. Argument.

Contrary to Defendant's assertions, Plaintiff has not conceded the propriety of Defendant's withholdings pursuant to FOIA Exemption 5. Specifically, Plaintiff challenged, and continues to challenge, Defendant's assertion that all material at issue is protected by the deliberative process privilege, the attorney work product doctrine, or both.[1]

A. Defendant has not demonstrated that disclosure of the withheld material would harm its decision making process.

Plaintiff does not attempt to impose an additional burden on Defendant or seek to redefine Defendant's burden under the deliberative process privilege. Defendant's Memorandum of Law in Support of its Motion for Summary Judgment ("Def's Mem.") at 22; Defendant's Reply and Opposition to Plaintiff's Cross-Motion for Summary Judgment ("Def's Rep.") at 15. Plaintiff instead requests that Defendant comply with the well-established law of this Circuit. Pl's Opp. at 13-14. For Defendant to properly withhold material pursuant to the deliberative process privilege, it must demonstrate specifically how the disclosure of such material would harm its decision making process. *Horowitz v. Peace Corps*., 428 F.3d 271, 276 (D.C. Cir. 2005).

[1] Defendant has submitted supplemental declarations. Based on the additional information found in these supplemental declarations and absent from the original declarations, Defendant has satisfied its burden of demonstrating that it conducted a reasonable search for responsive records. Similarly, Defendant corrected its mistake. Now that Plaintiff knows that the OPR memorandum was sent on October 23, 2009, and not on October 23, 2008, Plaintiff is satisfied with Defendant claims of Exemption 7. Only Defendant's withholdings under FOIA Exemption 5 remain at issue.

Starting in 1987 with *Dudman Communications Corp. v. Department of Air Force*, the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") has continuously held that courts must "focus less on the nature of the materials sought and more on the effect of the materials' release." 815 F.2d 1565, 1568 (D.C. Cir. 1987). More succinctly, the key question in determining whether material is deliberative 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.

Horowitz, 428 F.3d at 276 (*quoting Dudman Comm. Corp.*, 815 F.2d at 1568); *see also, Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989) ("The pertinent issue is what harm, if any, the [document's] release would do to [an agency's] deliberative process."); *Access Reports v. Department of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991) ("The 'key question' in identifying 'deliberative' material is whether disclosure of the information would 'discourage candid discussions.'"). Therefore, in order to succeed on a deliberative process privilege claim under Exemption 5, an agency must demonstrate with specificity that the withheld material 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); *Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 778 ("The burden of demonstrating that disclosure would be likely to have adverse effects on agency decisionmaking falls on the government.").

Moreover, an agency "cannot meet its statutory burden of justification by conclusory allegations of possible harm." *Mead Data Central, Inc. v. U.S. Department of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). It must "show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Id.* Such can be done through

declarations or testimony. In *Horowitz*, the D.C. Circuit concluded that the requested material was properly withheld pursuant to the deliberative process privilege only after reviewing testimony that showed "making [the withheld] documents publicly available would deter [individuals] from creating them and deprive such officials of the benefit of review and comment from other departments." *Horowitz*, 428 F.3d at 276-277. Similarly, in *Formaldehyde Institute*, the D.C. Circuit held that the withheld records were properly exempt from disclosure pursuant to the deliberative process privilege only after it reviewed indisputable evidence "that disclosure of reviewers' comments would seriously harm the deliberative process." 889 F.2d at 1124. In that case, the agency produced declarations asserting that the

> release of reviewers' editorial comments would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all. Furthermore, a government author is likely to be less willing to submit her work to a refereed journal at all if critical reviews could come to light somewhere down the line.

Id. Both in *Horowitz* and *Formaldehyde Institute*, the D.C. Circuit held that the material was properly withheld pursuant to the deliberative process privilege only after the agencies adequately presented evidence that the disclosure of the withheld material would cause harm to its decision making process.

In addition, in both *Gutman v. Department of Justice*, 238 F. Supp. 2d 284 (D.D.C. 2003) and *Hamilton Sec. Group, Inc. v Department of Housing and Urban Development*, 106 F. Supp. 2d 23 (D.D.C. 2000), cases relied upon by Defendant, the District Court applied the very standard articulated by the D.C. Circuit. In *Gutman*, the District Court explicitly stated, "The critical factor in determining whether the material is deliberative in nature 'is whether disclosure of the information would discourage candid discussion within the agency.'" 238 F.2d at 293 (*quoting Access Reports*, 926 F.2d at 1195). Moreover, the Court found that the responsive

material was properly withheld pursuant to the deliberative process privilege because it represented "precisely the kind of information Exemption 5 was designed to protect, and that its disclosure could potentially 'stifle honest and frank communication' within the defendant-agency." *Id*. (*quoting Coastal States*, 617 F.2d at 866). Similarly, in *Hamilton Sec. Group, Inc.*, the District Court stated, "As explained by the D.C. Circuit, [whether material is deliberative in nature] focuses on "whether disclosure of the requested material would tend to 'discourage candid discussion within an agency.'" 106 F. Supp. 2d at 31 (*citing Petroleum Inf. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992)). Based on precedent, for Defendant to properly withhold material pursuant to the deliberative process privilege, it must demonstrate that the disclosure of such material would harm its decision making process.

Yet, Defendant does not even attempt to demonstrate with specific evidence that disclosure of the withheld material "would actually inhibit candor" or otherwise harm its decision making process. It presents no evidence of the potential harm in any of its declarations, supplemental declarations, or *Vaughn* indexes. Because Defendant has failed to satisfy its burden that disclosure of the withheld material would be likely to have adverse effects on its decisionmaking (*Wolfe*, 839 F.2d at 778), Defendant must produce all responsive material.

B. Material created post litigation is not protected under the attorney work product doctrine.

The law of this Circuit is clear. The attorney work product doctrine is "limited to documents prepared *in contemplation of* litigation." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) (emphasis added). More specifically, contrary to the unfounded assertions of Defendant, post-litigation documents are not protected under the attorney work product doctrine. In *Senate of Puerto Rico ex rel. Judiciary Comm. v. United States DOJ*, the D.C. Circuit held that material prepared subsequent to the closing of a case is

presumed not to have been prepared in anticipation of litigation. 823 F.2d 574, 586 (D.C. Cir. 1987) ("In particular, we note that the DOJ investigation into the Cerro Maravilla incident was closed officially on April 16, 1980, and did not reopen until August 1983; absent any additional support, we are reluctant to credit a claim that documents generated while there was no active investigation underway were prepared 'in anticipation of litigation.'"). Moreover, the D.C. Circuit specifically explained:

> We do not mean to suggest that documents prepared while no active investigations were underway are necessarily unprotected by the work-product doctrine; the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. The presence, or, as in this case, the absence of an ongoing investigation is but one aspect of the relevant 'factual situation' a court must consider in evaluating an agency's work-product claim.

Id. at 587 (internal citations omitted). Contrary to Defendant's assertion that "the date a document is created is clearly not dispositive" (Def's Rep. at 12), quite clearly, this Circuit requires that material be "prepared or obtained because of the prospect of litigation" for it to be protected under the attorney work product doctrine. *Senate of Puerto Rico*, 823 F.2d at 587. The only reason the document-creation date in *Senate of Puerto Rico* was not dispositive was because the case was reopened. Because Defendant is withholding material created after the May 15, 2009 dismissal[2] and has not in any way asserted that the case will be reopened, Defendant has not satisfied its burden of demonstrating that the withheld material was created in anticipation of litigation. Defendant therefore must produce all responsive material.

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[2] Although there is an active injunction against one of the original four defendants, the *New Black Panther* case for all intents and purposes is closed. The only remaining issue under the court's jurisdiction is enforcing the injunction against Minister King Samir Shabazz of "displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia." Order at 4-5 in the *United States v. New Black Panther Party for Self-Defense* (filed May 18, 2009) [Dkt. No. 21]. As evident from the nature and limited scope of the injunction, all issues with respect to the *New Black Panther* case have been settled.

III. Conclusion.

For the reasons set forth in Plaintiff's opening memorandum and the reasons set forth above, Defendant's motion for summary judgment should be denied, summary judgment should be entered in Plaintiff's favor, and Defendant should be compelled to produce all responsive material.

Dated: January 25, 2011

Respectfully submitted,

/s/ Michael Bekesha

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