[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5304

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE

*Defendant-Appelle*e.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

A. Parties and Amici.

The following parties, intervenors, and amici curiae appeared, or sought to appear, below:

Plaintiff: Judicial Watch, Inc.

Defendant: U.S. Department of Justice

The following parties, intervenors, and *amici curiae* are before this Court on appeal:

Plaintiff-Appellant: Judicial Watch, Inc.

Defendant-Appellee: U.S. Department of Justice

B. Ruling under Review.

The ruling under review is the Memorandum Opinion and Order of the United States District Court for the District of Columbia (Kollar-Kotelly, J.) issued on September 18, 2020. The ruling can be found at pages 204-17 of the Joint Appendix.

C. Related Cases.

This case has not previously been before this Court, and Plaintiff is not aware of any other related cases currently pending in this Court or in any other court of which counsel is aware.

/s/ Paul J. Orfanedes

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GLOSSARY OF ABBREVIATIONS

FIA	FOIA Improvement Act of 2016
FOIA	Freedom of Information Act
JA	Joint Appendix

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered its final judgment on September 18, 2020. JA 204. A timely notice of appeal was filed on October 6, 2020. JA 217.

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court erred when it granted Defendant U.S. Department of Justice's motion for summary judgment and denied Plaintiff's cross-motion for summary judgment, denying Plaintiff access to public records requested under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

STATEMENT OF THE CASE

At issue are four records described as "working drafts" of a January 30, 2017 statement by Acting U.S. Attorney General Sally Yates instructing U.S. Department of Justice officials not to defend an executive order issued by President Donald J. Trump. Yates was fired for insubordination after issuing the one-page statement. The District Court upheld Defendant's withholding of the records under FOIA Exemption 5's deliberative process privilege. This appeal concerns the proper application of the deliberative process privilege in a FOIA case and, in particular, under the new "foreseeable harm" standard of the FOIA Improvement Act of 2016 ("FIA").

STATEMENT OF FACTS

Sally Yates was acting U.S. Attorney General from January 20, 2017 to January 30, 2017. She was fired on January 30, 2017, shortly after she instructed Justice Department attorneys not to defend a controversial executive order issued by President Donald J. Trump suspending the issuance of visas and other immigration benefits to nationals of certain countries. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Yates' one-page instruction, issued the same day she was fired, stated in pertinent part:

> On January 27, 2017, the President signed an Executive Order regarding immigrants and refugees from certain Muslim-majority countries. The order has now been challenged in a number of jurisdictions . . . for as long as I am the Acting Attorney General, the Department of Justice will not present arguments in defense of the Executive Order, unless and until I become convinced that it is appropriate to do so.

JA 57. The White House announced later that same day that Yates had been fired:

> The acting Attorney General, Sally Yates, has betrayed the Department of Justice by refusing to enforce a legal order designed to protect the citizens of the United States. This order was approved as to form and legality by the Department of Justice Office of Legal Counsel . . . Tonight, President Trump relieved Ms. Yates of her duties.

JA 59-60.

On February 1, 2017, Plaintiff served a FOIA request on Defendant seeking all emails sent to or from Yates during her ten-day tenure as Acting Attorney General. JA 15 at ¶ 3. Plaintiff filed suit on May 5, 2017, when Defendant failed

to issue a determination on the request within the time required by FOIA. *Id.* at ¶¶ 4 and 5.

Ultimately, Defendant produced some of the requested records without redactions, produced others with redactions, and withheld others in full. JA 16-17 at ¶¶ 8-11. Plaintiff chose to challenge Defendant's withholding in full of the four "working drafts" of Yates' instruction. Each withheld record had been attached to a separate email sent the same day the statement was issued, January 30, 2017.

Some details about the four "working drafts" are important. At 8:41 a.m., Yates' deputy, Matthew Axelrod, emailed Yates Document No. 5853, attached to which was a record named "draft.docx." JA 65. The email contained no message, just the attachment. *Id.* At 1:44 p.m., Axelrod emailed Yates Document No. 5164, attached to which was a record named "Draft2.docx." JA 64. Again, the email contained no message, just the attachment. *Id.* At 2:58 p.m., Yates emailed herself Document No. 5156, attached to which was a record named "Draft2.docx," the same name as the record Axelrod had emailed Yates earlier that afternoon.[1] JA 63. The subject line of the email read "Draft2.docx." *Id.* Again, there was no message. *Id.* At 5:27 p.m., Yates emailed herself Document No. 5153. JA 62. Like the emails Axelrod had sent Yates and Yates had sent herself earlier that

[1] Although difficult to read at this point, the redactions on Document Nos. 5156 and 5163 read "(b)(6) former Acting Attorney General Yates personal email." JA 197-98 at ¶¶ 11 n1. and 12 n.2.

afternoon, the 5:27 p.m. email had an attachment named "Draft2.docx." *Id.* It also had the same subject line as the earlier email Yates sent herself, "Draft2.docx." Defendant designated the four attachments as Document Nos. 5182-1, 5164-1, 5156-1, and 5153-1, to correspond to the document numbers it had assigned to the emails to which they were attached. JA 17 at ¶ 12(a) and 46.

Defendant moved for summary judgment, and the declaration accompanying the motion described the email attachments as follows:

> 12. On April 26, 2018, plaintiff identified the following withholdings to challenge:
>
> a. Documents 5153-1, 5156-1, 5164-1, and 5182-1 are working drafts of the memorandum issued by Acting Attorney General Yates on January 30, 2017, instructing Department of Justice officials not to defend the validity of Executive Order 13,769 . . . These documents are withheld in full pursuant to the deliberative process privilege; they do not contain any segregable, non-exempt information.

JA 17 at ¶ 12(a). Defendant's declaration also contained the following:

> 20. Records in OIP's *Vaughn* Index categorized as "*Draft Memoranda*" are working drafts of a final memorandum stating Department policy and drafts of internal litigation guidance to United States Attorneys. These drafts include multiple revisions made by Department staff.
>
> 21. The drafts that were withheld in full are pre-decisional because they precede the finalization and transmission of the memorandum to United States Attorneys and/or the public. These drafts are also deliberative inasmuch as they reflect successive versions of working drafts and as such, show the internal development of the Department's and officials' decisions. These drafts remained internal to the Department of Justice. Disclosure of these drafts would undermine the ability of Department staff to freely engage in the candid "give

> and take" and forthright collaboration which is critical to the eventual development of well-reasoned and accurate final documents. Department deliberations on these working drafts cannot be effectively or reasonably segregated, because it is the content and evolution of the drafts themselves which reveal the authors' deliberative process. Accordingly, they are protected in full pursuant to the deliberative process privilege. To the extent that non-exempt, final versions of these drafts were identified, i.e. in the case of the draft memorandum stating final Department policy, they have been provided to plaintiff.

JA 22-23 at ¶¶ 20-21 (footnote omitted).[2] The declaration included boilerplate language about FOIA Exemption 5 and the deliberative process privilege generally. JA 20-21 at ¶¶ 14-18. The accompanying *Vaughn* index repeated the description of the attachments contained in the declaration but offered no other meaningful information about the attachments. JA 46.D

Plaintiff cross-moved, arguing that Defendant failed to demonstrate that the deliberative process privilege applied and failed to meet the FIA's foreseeable harm standard. JA 4 (Docket No. 21). Defendant's reply and opposition to Plaintiff's cross-motion contained no further evidence to try to satisfy Defendant's burden of proof with respect to the attachments.

On September 24, 2019, the District Court denied Defendant's summary judgment motion and held Plaintiff's cross-motion in abeyance. JA 119-37. In its

[2] The reference to "drafts of internal litigation guidance" in paragraph 20 of the declaration concerns other records withheld by Defendant that are not at issue here.

ruling, the District Court found that Defendant had "not met several of its burdens under FOIA and the FOIA Improvement Act of 2016." JA 119. Instead of granting summary judgment in Plaintiff's favor, however, the District Court permitted Defendant to try to fix the "identified deficiencies." *Id.*

Defendant filed a renewed motion for summary judgment six weeks later that included a new declaration.[3] JA 138-94. Defendant's new declaration contained three paragraphs devoted to the four withheld attachments:

> 75. Documents 5153-1, 5156-1, 5164-1, and 5182-1 are working drafts of the memorandum issued by Acting Attorney General Yates on January 30, 2017, instructing Department of Justice officials not to defend the validity of Executive Order 13,769 . . . These documents are withheld in full pursuant to the deliberative process privilege and do not contain any segregable, non-exempt information.
>
> 76. The deliberative process privilege is intended to protect the decision-making processes of government agencies from public scrutiny in order to enhance the quality of agency decisions. These documents reflect successive version[s] of working drafts, and as such, show the internal development of the Department's final decisions. With respect to documents 5153-1, 5156-1, 5164-1, and 5182-1, the final decision was Acting Attorney General Yates' letter on January 30, 2017, instructing Department of Justice officials not to defend the validity of Executive Order 13,769. The disclosure of the drafts of this final statement would reveal the drafters' evolving thought-processes regarding the Executive Order, as well as ideas and alternatives considered but ultimately rejected in the final agency decision . . . Disclosure of these drafts would undermine the ability of

[3] The declaration accompanying the renewed summary judgment motion was Defendant's third. Defendant submitted a second declaration as part of the initial round of summary judgment motions, but that declaration is not pertinent to this appeal.

> Department staff to freely engage in the candid "give and take" and forthright internal development of final agency actions. If Department officials believed that their internal working drafts would be made public it is reasonably foreseeable that they would be more circumspect in their drafting, less willing to offer novel or alternative stances or proposals, and less frank in evaluating the work of others. This would obviously impair the quality of agency decisions, as officials would temper their work-product with an eye to future public scrutiny of their nascent views. Moreover, disclosure of pre-decisional drafts will result in public confusion from the disclosure of reasons and rationales that were not ultimately the grounds for the Department's final actions.
>
> 77. These concerns are not limited to documents personally prepared by high government officials, or prepared by others to be issued under the name of such high officials, but they are especially acute in that circumstance. Public statements made by the Attorney General (or Acting Attorney General) concern many of the most sensitive and most significant issues handled by the Department of Justice. Such statements are routinely subjected to multiple rounds of editing and revision, with intense attention to matters of emphasis, phrasing, and tone. Because these statements set policy for a large department, and inform the public about the actions and priorities of that Department, the precise language chosen is a matter of great concern. To release these draft statements would inform the Attorney General, and all subsequent holders of that office, that any draft of a statement prepared by him or under his name could be released to the public, no matter how inaccurate or ill-phrased. The simple possibility of the eventual release of a rejected draft statement on such a high-profile matter as the defense of Executive Order 13,769 would impair everyone involved in the drafting of such a statement, including the Attorney General himself, from thinking, writing, and advising freely. Instead, officials would need to think, write, and advise with the knowledge that their rejected thoughts could shortly be published. And the public would be confused as to the intent of such decision makers when their rejected thoughts and phrases were published.

JA 158-60 at ¶ 75-77.

Plaintiff opposed Defendant's second motion for summary judgment on the grounds articulated in its earlier cross-motion. JA 5 (Docket No. 30). In its opposition, Plaintiff incorporated by reference all the arguments it made in support of its first cross-motion and provided more focused analysis of the FIA as well. JA 5 (Docket No. 30 at pg. 4, n.1).

The District Court granted Defendant's renewed motion, concluding that Defendant had met its burden of showing that the four attachments could be withheld under the deliberative process privilege and had satisfied the additional obligations of the FIA. JA 204. More specifically, it found Defendant had proved it was reasonably foreseeable that release of the four attachments would have a "tangible chilling effect" on high-level officials when "crafting public statements on agency policy." JA 214. Plaintiff filed a timely notice of appeal on October 6, 2020. JA 217.

SUMMARY OF THE ARGUMENT

In enacting the FIA, Congress established a new, heightened standard of proof that agencies must meet when making discretionary withholdings of records requested under FOIA. Congress intended the FIA to shore up FOIA, not preserve a years-long, unsatisfactory status quo of "withhold-it-because-you-want-to" exemptions and "knee-jerk secrecy." Accordingly, Congress mandated that agencies only withhold requested records if it is reasonably foreseeable that

disclosure would harm an interest protected by one of FOIA's exemptions and is not prohibited by law. Because old habits are hard to change, courts must be especially vigilant in enforcing this heightened standard and not reverting back to the largely boilerplate, conclusory assertions typically deemed sufficient to support discretionary withholdings before the FIA.

Defendant reverted to old habits with respect to its withholding of the four attachments at issue here. Despite the District Court giving it two opportunities to justify its withholdings, Defendant provided only vague, conclusory assertions about the attachments that seem at odds with what the emails themselves show. Defendant also failed to establish that reasonably foreseeable harm would result from the release of the attachments. Defendant's submissions are reminiscent of a great many pre-FIA cases. They do not suffice under the new FIA standard.

The District Court erred by crediting Defendant's generic description of the attachments and conclusory assertions of harm. It categorized the attachments as drafts of a high-level statement instead of focusing, as the FIA requires, on the particular drafts and the particular statement at issue. It found that a harmful, chilling effect would result if drafts of high-level statements are disclosed. But not all drafts are alike nor are all high-level statements the same. The FIA did not create broad categories of records that are presumptively entitled to deliberative process protection, which is the upshot of the District Court's "chilling effect"

ruling. Rather, the FIA requires a particularized showing of foreseeable harm resulting from the disclosure of a particular record – a link between a specific harm and specific information in the withheld record. Neither Defendant nor the District Court focused sufficiently on how disclosure of these particular attachments would foreseeably harm a specific interest protected by the deliberative process privilege.

Finally, the government misconduct exception prevents Defendant's withholding of the attachments, as the deliberative process privilege should not protect from disclosure information about plainly insubordinate acts by a high-level government official. The granting of summary judgment in Defendant's favor should be reversed, and the case should be remanded with instructions that the attachments be released to Plaintiff.

ARGUMENT

I. Standard of Review.

Decisions granting summary judgment in FOIA cases are reviewed *de novo*. *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014). The agency bears the burden of showing that a claimed exemption applies. *Id.*

II. Deliberative Process Privilege Standards.

FOIA's Exemption 5 exempts from production in the FOIA context only those records that traditionally would be exempt from production in a civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). This includes the common law deliberative process privilege. *See Dep't of the*

Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001). The DC Circuit has emphasized, however, the "narrow scope of Exemption 5 and the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

A. Deliberative Process Privilege Standards.

To qualify for Exemption 5 protection under the deliberative process privilege, an agency record must be both predecisional and a part of a deliberative process. *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677, 680, n.4 (D.C. Cir. 2008); *Formaldehyde Inst. v. U.S. Dep't. of Health & Human Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989). The terms "predecisional" and "deliberative" have come to apply only to records that contribute to an ongoing deliberative process within an agency. *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991). Simply designating a document as a "draft" does not automatically make it privileged under the deliberative process privilege. *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp.2d 1, 14 (D.D.C. 2004). For the privilege to apply, an agency must identify an issue or decision about which its officials and employees were deliberating and the role played by a record in that deliberative process. *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 585-86 (D.C. Cir. 1987).

Four, interrelated factors are "significant in making the fact-specific determination that a responsive document is properly withheld under the deliberative process privilege." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 20 F. Supp.3d 260, 269 (D.D.C. 2014). "First, courts determine whether a document is predecisional by looking at the timing of the documents' release relative to the date the decision is made." *Id.* "Second, courts look to the relationship between the author and recipient of the document to determine whether a person in the author's position, particularly a subordinate, would typically provide advice to a person in the recipient's position as part of the decision-making process." *Id.* at 270. If the author is not a subordinate but is an "advice-giver rather than a decision-maker, this militates in favor of the document qualifying as part of the deliberative process." *Id.* at 271. "Due to the significance of this second factor, the agency must describe the nature of the decisionmaking authority vested in the office or person issuing the disputed document(s), and the positions in the chain of command of the parties to the documents." *Id.* (internal quotation omitted). "Third, courts assess the nature of the discussion in the challenged document and, specifically, whether it sets out the author's view of options and considerations regarding an agency's policy or, rather, explains or expresses the policy itself." *Id.* Fourth, "courts inquire as to whether the document was responsive to a request, particularly a request from a senior official with decision-making authority to a

subordinate in an advisory position." *Id.* at 272. It is not sufficient for an agency to recite the general elements of the deliberative process privilege without explaining how they apply to the document in question. *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp.2d 142, 161 (D.D.C. 2012).

B. The Four Withheld Records are Not Protected by the Deliberative Process Privilege.

Defendant identifies Yates' January 30, 2017 statement as instructing Department of Justice officials not to enforce the President's executive order. JA 17 at ¶ 12(a), 47, and 158 at ¶ 75. An instruction is not necessarily the same as a decision. In fact, it implies that Yates had already made her decision and was simply conveying it to her subordinates. The deliberative process privilege distinguishes between materials that are predecisional and materials that explain or express a decision. *Judicial Watch, Inc.*, 20 F. Supp.3d at 271. Defendant does not identify when Yates made her decision about the executive order or state whether that decision was reached separate from or at the same time as the instruction to the department. The executive order was issued on January 27, 2017, so Yates had at least three days to decide whether to follow or defy the order before she issued her instruction. Did Yates decide to defy the order, then ask Axelrod to prepare a statement or have a subordinate prepare a statement explaining the decision to the department and instructing department officials accordingly? Defendant's evidence is ambiguous at best.

Defendant also does not identify anything about when the attachments were created or revised other than to assert that they are drafts of Yates' one-page instruction, which does not answer the question whether the instruction was the decision or simply explained or conveyed the decision. The emails to which the records at issue were attached provide some insight on when the attachments may have been created, but Defendant has never asserted that the time stamps on the emails correlate to when the attachments were created or revised. The attachment named "Draft2.docx" was emailed three separate times, but Defendant never said whether the attachment is three copies of the same record or a single record that was revised each time before it was sent. Defendant also does not say that the version of "Draft2.docx" Axelrod emailed to Yates at 1:44 p.m. differs in any meaningful way from the "draft.docx" version he emailed her earlier in the day.

"The identity of the parties is important." *Coastal State*, 617 F.2d at 868; Defendant never identified who authored or revised the attachments other than to make generic references to "Department staff," "attorneys," and "officials." JA 22 at ¶ 20, 46, 158-59 at ¶¶ 76-77. Defendant never said if Axelrod or Yates are the unidentified "Department staff," "attorneys," or "officials" to which Defendant's declarations refer. Axelrod plainly sent the first two attachments to Yates, but emailing an attachment is not the same as drafting or revising an attachment. And, again, because Defendant does not say whether the "Draft2.docx" attachment that

Yates emailed herself later in the day was the "Draft2.docx" attachment Axelrod emailed Yates early in the afternoon or different versions of that record, it is not even possible to say whether the attachments Yates emailed herself reflect revisions made by Yates. The lack of any specificity about when the attachments were created or revised and who created or revised them, along with Defendant's generic references to "Department staff," "attorneys," or officials," shows Defendant's claims for what they are: boilerplate.

Defendant also largely failed to address the "nature of the discussion" presented in the four attachments. "Draft" is not synonymous with "deliberative." *See Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982). Describing the attachments as "working drafts" or "successive versions of working drafts" does not demonstrate anything about whether they are deliberative. If the attachments are sufficiently similar to each other or to the final instruction, they may not show any policy deliberations at all. Changing "happy" to "glad," moving sentences or paragraphs around, or fixing typographical errors is not policy deliberation. In short, Defendant presented only broad, conclusory assertions about the attachments, not specific facts about each individual record. As a result, Defendant failed to prove that the attachments were predecisional or deliberative, a failure fatal to any deliberative process privilege claim. The evidence Defendant presented was simply too conclusory.

Defendant also ignores the larger question raised by Yates' actions. Defendant never addressed and the District Court never decided whether an agency head's deliberate defiance of an executive order and insubordinate act can ever be an agency policy for purposes of the deliberative process privilege. The term "deliberative" as used in Exemption 5 "is considerably narrower than the colloquial meaning." *Judicial Watch, Inc.*, 20 F. Supp.3d at 269. If the purpose of the privilege is to protect open and frank discussion among agency decisionmakers and, ultimately, to prevent injury to the quality of agency decisions, then that purpose cannot be achieved when the discussion at issue concerns a blatant act of insubordination. It cannot be the case that the privilege was intended to protect the thought processes of insubordinate agency heads planning insubordinate acts; nor can it be the case that the privilege was intended to prevent injury to the quality of agency heads' decisions to commit insubordinate acts. Here, Yates' policy choice was to directly and publicly defy the president's executive order. The law cannot protect such choices as legitimate government policy entitled to protection under the deliberative process privilege.

The District Court relied principally on Defendant's "working drafts" label as evidence of the attachments' deliberative nature. JA 211. It also credited Defendant's conclusory statement about the attachments revealing evolving thought processes. *Id.* But these claims were nothing more than conclusory

assertions that do not withstand scrutiny in light of the known facts concerning Yates' instruction. Additionally, the District Court did not revisit the arguments Plaintiff made in its first opposition and cross-motion that were held in abeyance and incorporated by reference into Plaintiff's second opposition, which focused more heavily on the FIA. *Compare* JA 127-29 *with* JA 211.

III. The FOIA Improvement Act of 2016 Heightens Agencies' FOIA Obligations and Requires Foreseeable Harm.

Garnering bipartisan approval and a unanimous Senate vote, the FIA became law on June 30, 2016. Pub. Law No. 114-185, 130 Stat. 538 (2016). The FIA addresses a myriad of FOIA issues, but the one point pertinent to this appeal pertains to the requirement that an agency only withhold a record if "the agency reasonably foresees that disclosure would harm an interest protected by an exemption."[4] *Id*. at 5 U.S.C. § 552 (a)(8)(A)(i). It advances FOIA's "presumption of openness" by requiring "that an agency 'release a record—even if it falls within a FOIA exemption – if releasing the records would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law.'" *Rosenberg v. U.S. Dep't of Defense*, 342 F. Supp. 3d 62, 73 (D.D.C. 2018). In other words, "before claiming an exemption, agencies must first determine whether

[4] Agencies are also permitted to withhold records where release is prohibited by law. *See* 5 U.S.C. § 552 (a)(8)(A)(i).

they could reasonably foresee an actual harm." 162 CONG. REC. H3717 (daily ed. June 13, 2016) (statement of Rep. Meadows).

A. The Purpose and Effect of the FOIA Improvement Act.

After taking office in 2009, then-President Barack Obama directed federal agencies to implement FOIA "with a clear presumption: In the face of doubt, openness prevails." Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009). The Department of Justice was then instructed to defend FOIA denials *only when a foreseeable harm would result* to a FOIA protected interest or the disclosure was prohibited by law. *See Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d. 90, 104 (D.D.C. 2019) (emphasis added).

Notwithstanding this clear directive, agencies continued to overuse FOIA exemptions, particularly Exemption 5 and the deliberative process privilege. *Id.* at 104-05. Congress' concerns permeate the congressional record and lay a clear vision of the intent behind the FIA. The House report states:

> The most important reform is the presumption of openness. Now, while some—but far from all—Federal agencies have made an effort to comply with the letter of the law, very few have complied with the spirit of the law. The presumption of openness puts that spirit into the letter of the law… FOIA includes exemptions because publicly releasing information can sometimes cause more harm than good. But from the beginning, agencies have taken advantage of these exemptions to withhold any information that might technically fit. Under the presumption of openness, agencies may no longer withhold information that is embarrassing or could paint the agency in a

> negative light simply because an exemption may technically apply. This will go a long way toward getting rid of the ***withhold-it-because-you-want-to*** exemption.

162 CONG. REC. H3717 (daily ed. June 13, 2016) (statement of Rep. Meadows). (emphasis added). The Senate report states:

> To put it simply, FOIA was created to ensure government transparency, and transparency yields accountability. After all, a government that operates in the dark, without fear of exposure or scrutiny, is one that enables misdeeds by those who govern and fosters distrust among the governed. … But despite its successes, a continued culture of government secrecy has served to undermine FOIA's fundamental promise. For example, we have seen dramatic increases in the number of backlogged FOIA requests. Folks are waiting longer than ever to get a response from agencies. Sometimes, they simply hear nothing back at all. And we have a record-setting number of FOIA lawsuits filed to challenge an agency's refusal to disclose information. More and more, agencies are simply finding ways to avoid their duties under FOIA altogether. They are failing to proactively disclose information, and they are abusing exemptions to withhold information that should be released to the public. … Most importantly, the bill codifies a presumption of openness for agencies to follow when they respond to FOIA requests. Instead of ***knee-jerk secrecy***, the presumption of openness tells agencies to make openness and transparency their default setting.

162 CONG. REC. S1494-1495 (daily ed. March 15, 2016) (statement of Sen. Grassley) (emphasis added).

Simply put, Congress wanted FOIA to accomplish what FOIA was set out to accomplish: allow members of the public to find out what their government was up to and to "pierce the veil of administrative secrecy and open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

The FIA was enacted to give teeth to FOIA and remove some of the obstacles to openness that had arisen, inadvertently or otherwise, over time. It was "intended to restrict agencies' discretion in withholding documents under FOIA." *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 106. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

B. Defendant Failed to Meet the Foreseeable Harm Standard.

To meet the FIA's foreseeable harm standard, agencies must "articulate both the nature of the harm and the link between the specified harm and the specific information contained in the material withheld." *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) (quoting H.R. REP. NO. 114-391 at 10 (2016)). District courts in this circuit have interpreted the FIA as requiring agencies to supply more than boilerplate recitations of harm and provide "context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure." *Ctr. for Investigative Reporting v. U.S. Dep't of Interior*, No. 18-cv-1599, 2020 U.S. Dist. LEXIS 61201, *11 (D.D.C. April 7, 2020); *see also Judicial Watch, Inc. v. U.S. Dep't of Justice*, No. 19-cv-0800, 2020 U.S. Dist. LEXIS 178773, **6, 8 (D.D.C.

Sept. 29, 2020).[5] Plaintiff has identified only one case in which this Court has applied the FIA in the deliberative process privilege context, *Amadis v. U.S. Dep't of State*, 971 F.3d 364 (D.C. Cir.). Due to the very different nature of the records at issue in that case – forms used by line attorneys at the Department of Justice to adjudicate a particular FOIA appeal – *Amidis* is not instructive here.

Only a harm connected to a protected FOIA interest can satisfy the foreseeable harm standard. *See Rosenberg*, 342 F. Supp. 3d at 73. In *Coastal States*, this Court discussed the purpose of the deliberative process privilege and identified three main interests: (1) assuring that *subordinates within an agency* will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; (2) protecting against premature disclosure of proposed policies before they have been finally formulated or adopted; and (3) protecting against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action that were not in fact the ultimate reasons for the agency's actions. *Coastal States*, 617 F.2d at 866 (emphasis added).

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[5] Courts in other jurisdictions have interpreted the FIA similarly. *See Natural Resources Defense Council v. U.S. Envtl. Prot. Agency*, No. 17-cv-5928, 2019 U.S. Dist. LEXIS 148611 (S.D.N.Y. Aug. 30. 2019); *South Envtl. Law Ctr. v. Council on Envtl. Quality*, No. 3:18CV00113, 2020 U.S. Dist. LEXIS 234479 (W.D. Va. Dec. 14, 2020); *New York Times v. U.S. Dep't of Health and Human Servs.*, No. 20 Civ. 2063, 2021 U.S. Dist. LEXIS 6267 (S.D.N.Y. Jan. 13, 2021).

Defendant's first summary judgment motion made no meaningful effort to satisfy the FIA's new particularized showing of foreseeable harm standard, which is part of the reason the District Court denied Defendant's motion. JA 124-29. Defendant's second motion fared no better. It relies on many of the same types of boilerplate assertions that the FIA was intended to fix and that district courts have found insufficient in light of the FIA.

Defendant's failure to meet the FIA's new requirements is two-fold. First, as demonstrated in Section II.B, *supra*, Defendant failed to provide any specific evidence about when the attachments were prepared, who prepared them, why they were prepared, and how, if at all, they differ from each other or the final version of Yates' instruction. Without such information, it is not possible to assess in the meaningful, particularized manner required by the FIA whether any foreseeable harm will result from the attachments' disclosure. Second, Defendant's assertions of harm are insufficiently connected to any specific information in the attachments and the interests protected by the deliberative process privilege. Defendant's assertions of harm are nothing more than the same types of boilerplate, generic assertions agencies were used to submitting before the FIA was enacted.

From the outset, Defendant has referred to the attachments as "working drafts" rather than identify with any specificity any information in the attachments that warrants withholding them from Plaintiff. Defendant used this "working

drafts" description in its *Vaughn* index and in its first and third declarations. JA 17 at ¶ 12(a), 46, and 158 at ¶¶ 75 and 76. Defendant also claimed generically that the attachments "reflect successive versions of working drafts" that "show the internal development of the Department's final decision" and would "reveal the drafters' evolving thought-processes regarding the Executive Order, as well as ideas and alternatives considered but ultimately rejected in the final agency decision." JA 158 at ¶ 76.

Defendant never identified the "specific information contained in the material withheld" such that any link between that information and any specific harm alleged can be analyzed, as the FIA requires. *Judicial Watch, Inc.*, 375 F. Supp.3d at 100. It never established that the attachments contain "evolving" thoughts or theories or "ideas and alternatives considered but ultimately rejected." It only made a bald, conclusory assertion to this effect. The claim seems unlikely given the one-page final instruction. JA 57. It is a simple, straightforward document: three mostly factual paragraphs followed by a concluding paragraph directing the Department of Justice not to defend the executive order in court. Defendant also never claimed that the attachments reflect the opinions, views, advice, or analysis of any known or identifiable person, although the final version obviously reflects Yates' view. The specific information in the attachments that, if disclosed, would cause harm remains anyone's guess.

The nature of the withheld information is important. *See Rosenberg*, 342 F. Supp. 3d at 79. It might be one thing if: (1) the "draft.docx" version Axelrod sent Yates that morning said Yates supported the executive order and would defend it in court against legal challenges; (2) the "Draft2.docx" version Axelrod sent Yates in the afternoon said Yates would resign rather than defend the order; and (3) the "Draft2.docx" version Yates sent herself mid-afternoon was changed by Yates to declare her open defiance of the order. It is quite another if the only differences between the versions were minor edits and formatting and other non-substantive changes. Instead of Yates' assertion in the final instruction that she was not "convinced that the Executive Order is lawful," did the version of "Draft2.docx" Yates emailed herself that evening say she was "convinced the Executive Order is unlawful?" Obviously, Defendant cannot disclose the substance of the attachments, but the FIA requires more than the conclusory assertions Defendant provided. Instead of satisfying the FIA's new foreseeable harm standard, Defendant reverted to old, pre-FIA habits. Its response to Plaintiff's FOIA request is a quintessential example of what Congress was trying to stop when it enacted the FIA – "withhold-it-because-you-want-to" exemptions and "knee-jerk secrecy."

In addition to failing to identify any specific information in the attachments that would cause harm if released, Defendant failed to link any specific information in the attachments to a specific harm protected by the deliberative

process privilege. Again, it reverted to boilerplate. Defendant claimed that disclosure of the attachments would: (1) impair the quality of agency decisions, as it would have a chilling effect on agency staff, and (2) cause public confusion. JA 159-60 at ¶¶ 76-77.[6]

Defendant described the importance of statements made by the Attorney General and how "such statements" are routinely handled during the drafting phase. JA 159 at ¶ 77. Defendant never linked this routine practice to Yates' instruction or the attachments. It never said that Yates' instruction was prepared according to the practice it described or identified how Yates' instruction was created. The description added no specific information to connect disclosure of the attachments to an actual, foreseeable harm. In fact, it more aptly fits into the category of conclusory, general statements Congress clearly rejected.

Defendant also claimed that release of the attachments would harm agency decisions by chilling agency employees, who would "temper their work-product with an eye to future public scrutiny of their nascent views." JA 159 at ¶ 76. Defendant never explained how anything in *these particular attachments*, if disclosed, would impair the quality of Department of Justice decisions or tied the attachments to *this particular alleged harm* in anything but the most general way.

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[6] In the first round of summary judgment motions, the District Court rejected Defendant's first claimed harm as "boilerplate." JA 127-28.

Not only did this fail to satisfy the FIA, but the Court in *Coastal States* emphasized that the deliberative process privilege protects *subordinates* from the chilling effect of public disclosure of their recommendations, advice, and opinions given to their bosses. *Coastal States*, 617 F.2d at 866; *see also Amadis*, 971 F.3d at 371 (protecting recommendations of line attorneys in the Office of Information Privacy in adjudicating FOIA appeals). An acting attorney general and her deputy – the highest two officials in the department – plainly are not subordinates.

Additionally, Yates' instruction lost all effect when she was fired shortly after she issued the instruction. And years had passed when Defendant sought to withhold the "drafts" of the instruction. Defendant failed to tie disclosure of any particular information in these "drafts" of the withdrawn instruction, which had not been in effect for more than a few hours for what is now four years ago, to reasonably foreseeable harm to Defendant's decisionmaking process. Defendant took its elusive harm connection one step further by claiming that releasing the attachments would inform all future attorneys general that "any draft of a statement prepared by him or under his name could be released to the public, no matter how inaccurate or ill-phrased." JA 159-60 at ¶ 77. All holders of that office obviously would be aware of the requirements of the FIA. The law also makes clear that, in applying the deliberative process privilege in the FOIA context, courts analyze withholdings on a case-by-case basis because the privilege is "so dependent upon

the individual document and the role it plays in the administrative process." *Coastal States*, 617 F.2d at 867. Defendant's broad claim of harm to its decisionmaking process does not withstand scrutiny for these additional reasons.

Defendant's claim of "public confusion" is even more deficient. Defendant offers no reasonable explanation for how the release of the attachments will foreseeably cause public confusion. Its "public confusion" argument is limited to two bare sentences. JA 159 at ¶ 76 ("disclosure of pre-decisional drafts will result in public confusion from the disclosure of reasons and rationales that were not ultimately the grounds for the Department's final actions") and 160 at ¶ 77 ("And the public would be confused as to the intent of such decision makers when their rejected thoughts and phrases were published."). Of course, Defendant has not established that the drafts contain "reasons and rationales that were not ultimately the grounds" for Yates' final instruction or "rejected thoughts and phrases." In addition, the attachments are now four years old. Yates' instruction and the controversy that resulted is simple enough to be understood easily, as is the fact that she was fired as a result of issuing the instruction. Defendant's claim that releasing the attachments now, nearly four years after the fact, will cause public confusion is baseless speculation.

The District Court erred in finding that Defendant had satisfied the FIA's foreseeable harm standard. JA 214. It overlooked Defendant's failure to identify

with any particularity any specific information in the attachments that Defendant sought to withhold. It also erred in analyzing Yates' instruction not as an individual record, but instead as part of a broader category of records – all statements by all attorneys general ever issued.[7] It did not consider what harm would result from the disclosure of "drafts" of Yates' particular instruction, but instead addressed claims of harm foreseeably caused (allegedly) by the disclosure of all attorney general statements generally. In effect, the District Court created a *per se* rule that no drafts of any statements of any attorney general could ever be disclosed under FOIA because doing so would have a chilling effect on future attorneys general. Its ruling is exactly the type of broad brush, non-particularized analysis that Congress sought to change by enacting the FIA.

This Court did not adopt such an approach in *Amadi*s. The "Blitz Forms" at issue in *Amadis* have a single, narrow purpose in a unique and particular agency process – adjudication of administrative FOIA appeals. *Amadis*, 971 F.3d at 370. They lack the infinite variety of uses and subjects, among other characteristics, that attorney general statements may have. Yates' insubordinate instruction to Department of Justice officials not to defend the President's executive order is just one example of the great many uses to which an attorney general statement may be

[7] The District Court took note of Defendant's "public confusion" harm argument, but it was not the basis for the District Court's ruling. JA 212-14.

put. The Court in *Amadis* did not read the FIA as authorizing the creation of broad categories of records that are exempt *per se* from production under the deliberative process privilege, and it was error for the District Court to read *Amadis* as doing so.

IV. The Government Misconduct Exception Prevents Defendant from Withholding the Records Under the Deliberative Process Privilege.

This Circuit has recognized that government misconduct may overcome the deliberative process privilege. "[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997); *see also Enviro Tech Int'l, Inc. v. U.S. Envtl. Prot. Agency*, 371 F.3d 370, 376-77 (7th Cir. 2004) (collecting cases recognizing limits on an agency's deliberative-process privilege claims where the agency engages in wrongdoing).

There is no bright-line test for what constitutes "misconduct," but district courts have developed useful criteria for determining when to apply the exception. First, Plaintiff has the burden of demonstrating "an adequate basis for believing that [the documents] would shed light upon government misconduct." *Hall & Assoc. v. U.S. Envtl. Prot. Agency*, 14 F. Supp. 3d 1, 9-10 (D.D.C. 2014) ("General criticisms of the merits of policy decisions do not amount to evidence of

misconduct.") Second, the misconduct must be related to the deliberative process itself. *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008). ("The 'policy discussions' sought to be protected with the deliberative process privilege were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government. The very discussion, in other words, was an act of government misconduct, and the deliberative privilege process disappeared.")

Insubordination, especially by an acting attorney general seeking to defy an executive order issued by the president, is a "serious breach of the responsibilities of representative government." *ICM Registry, LLC.*, 538 F. Supp. 2d at 133. The records at issue relate directly to Yates' defiance of the President and breach of the duties she owed the President, which resulted in her being fired. The records reflect, or at least are purported to reflect, the thought process by which Yates chose to direct her subordinates to defy the President by not defending the President's executive order. They are, in effect, deliberations on Yates' decision to commit insubordination. They do not warrant protection under the deliberative process privilege and should be made public.

CONCLUSION

Satisfying FOIA obligations can be tedious and hard, as can determining whether FOIA obligations have been satisfied. But Congress decided transparency

was important and, with the enactment of the FIA, clearly intended for agencies and courts to take a different approach to discretionary withholdings like the deliberative process privilege than had been taken in the past. When Congress amends a statute, its amendment is presumed to have a real and substantial effect. Defendant and, in its ruling on Defendant's second summary judgment motion, the District Court, failed to give real and substantial affect to the changes made by the FIA. Finding otherwise would revert to the pre-FIA approach Congress has rejected. Plaintiff respectfully requests that the Court reverse the District Court's order granting Defendant's motion for summary judgment and remand this matter to the District Court with instructions that the withheld records be released to Plaintiff.

Dated: January 25, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 7,734 words (using Microsoft Word 2016), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2021, I filed via the CM/ECF system the foregoing **BRIEF OF APPELLANT** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

/s/ Paul J. Orfanedes