UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION Defendant.	Civil Action No. 07-0048 (RBW)

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In filing this case, plaintiff Citizens for Responsibility and Ethics in Washington ("CREW"), described it as an action "for documents relating to a request NARA made to the United States Secret Service that it cease destruction of visitor records" after transferring them to the White House. Compl. ¶ 1. Switching gears entirely, CREW now casts this case as one about a purported "government-wide effort to prevent the public from learning the truth behind the radical shift in position on the status of White House visitor records." Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment ("Pls. Opp.") at 11; *see also id.* at 16 (speculating that "there was disagreement within the executive branch over how to apply those [maintenance and disposition] procedures to Secret Service records of White House visitors"). This shift in the focus of the litigation reveals the true motivations behind this suit: CREW seeks records reflecting the entire course of the inter-agency deliberations in which the United States Government concluded that WAVES and related records are presidential records. The deliberative process privilege, which protects "the give-and-take of the consultative process," forbids that inquiry. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

There is no doubt what the United States' position is with respect to the status of White House access records. As CREW itself notes, the United States Secret Service ("USSS") and the White House Office of Records Management ("WHORM") executed a Memorandum of Understanding ("MOU") in 2006 that memorialized and confirmed those parties' agreement about the legal status and proper handling of WAVES and related records. CREW is well aware of that MOU's statement (in paragraph 17.a.) that these records "are at all times Presidential records." Not only was this MOU made public in the *Washington Post* litigation, but an additional copy of it was

provided to CREW in *this litigation* by NARA at the time it filed its motion for summary judgment. Moreover, CREW is actively involved in litigation against NARA and the USSS in which CREW disputes that WAVES records are governed by the Presidential Records Act ("PRA"), and not the Federal Records Act ("FRA").

In light of this publicly-available MOU, CREW's repeated allegation that the documents identified in the *Vaughn* Index constitute a body of "secret law" ring hollow. In fact, the very suggestion that NARA *could* create such a body of "secret law" about the records' status under the PRA evinces a fundamental misunderstanding of NARA's legal duties and responsibilities. Contrary to CREW's suggestion, *see, e.g.*, Pls. Opp. at 11, 16, NARA (and, more specifically, NARA's General Counsel) is not the final arbiter of all record keeping issues within the federal government. To the contrary, under the FRA, NARA only possesses the authority to issue regulations for the guidance of other agencies in their management of their own record keeping programs, and to authorize the disposal of non-permanent federal records through the records "scheduling" process – and even that authority is exercised only by the Archivist himself. *See* Supplemental Declaration of NARA General Counsel Gary M. Stern ("Supp. Stern Decl.") ¶¶ 2-3. The antecedent duty to establish and maintain a records management program, and the corresponding duty to determine what constitutes a federal record, belongs to the head of each individual agency. *Id.* ¶¶ 4, 7; 44 U.S.C. §§ 3101, 3102, 3301. Similarly – and of great importance to this case – the duty to determine whether a record is presidential under the PRA belongs to the President, not NARA. *See* Supp. Stern Decl. ¶ 5; 44 U.S.C. § 2203(a). This is so because only the President (or his designee(s)) can determine whether a record was "created or received . . . in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President," as stated in 44 U.S.C. § 2201(2). Thus, NARA's participation

in deliberations about the legal status and the disposition of WAVES records was not an "exercise" of statutory duties but, instead, part of the customary practice in which NARA participates in inter-agency deliberations concerning particular record keeping proposals advanced by other federal agencies. Supp. Stern Decl. ¶ 6.

Moreover, it must be noted that in order to advance this flawed contention that NARA has created a body of "secret law," CREW goes to great lengths to portray NARA's deliberations as containing purely "legal" discussion.[1] Implicit in these characterizations of NARA's communications is the assumption that discussions of "legal," as opposed to "policy," matters are not protected by the deliberative process privilege. That assumption simply is not true. *See, e.g.*, *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) ("[T]he purpose of Exemption 5 is to encourage the 'frank discussion of *legal and policy issues*.'" (quoting legislative history of the FOIA)) (emphasis added).

In addition to attacking the deliberative process rationale for NARA's withholdings, CREW also alleges that none of these documents are protected by the attorney work-product doctrine. CREW takes issue with NARA's assertion that it reasonably believed litigation over the legal status of WAVES and related records was likely because of the fact that "many parties might wish to file FOIA requests seeking to obtain records containing information on individuals who visited the White

[1] *See, e.g.*, Pls. Opp. at 2 ("First, NARA argues that the documents concern a policy issue . . . . In fact, however, the documents concern a legal issue."); *id.* at 9 (Document 3 "was not produced in the process of formulating policy or advice regarding WAVES records, but rather is a statement of the agency's legal position."); *id.* at 14 ("Agency recommendations to NARA on the disposition of agency records" are "legal issues" and are not "deliberative" because "[t]hey set out NARA's technical advice and legal position on the scheduling" of records); *id.* at 15 (communications "do not fall within the deliberative process privilege because they consist of the legal views of NARA's general counsel"); *id.* at 22 ("Thus, because NARA was merely articulating its legal position on record-keeping issues," the communications are not protected by exemption 5).

House," and that such requests "would involve the question of whether these records were 'federal' or 'presidential'" – an issue that could likely become (and *has become*) the subject of litigation. Declaration of NARA General Counsel Gary M. Stern ("Stern Decl.") Stern Decl. ¶ 23.[2] CREW counters that (1) "the documents at issue here were created in 1997 and 2000," and (2) that "NARA has not identified a single FOIA request for these records prior to January 20, 2006." Pls. Opp. at 12-13. The implication is that NARA's communications occurred too far in advance of litigation over the status of WAVES records for NARA to have reasonably believed such litigation likely. This argument is both factually and legally flawed.

Factually, CREW errs in at least two respects. First, they misread the *Vaughn* Index. NARA does not claim the protection of the attorney work-product over any documents created "nine years" prior to any litigation on the issue – *i.e.*, in 1997. *See* Pls. Opp. at 13. In fact, the oldest document for which NARA claims the work-product privilege is an e-mail by NARA General Counsel Gary Stern dated March 3, 2000. *See Vaughn* Index # 5. Second, and more importantly, CREW incorrectly implied that no FOIA requests for WAVES records were made prior to January 2006. In fact, the Secret Service received multiple FOIA requests for White House access records prior to March 2000, *see* Declaration of Latita M. Huff ("Huff Decl.") ¶ 3, and NARA's General Counsel was aware of those requests, *see* Supp. Stern Decl. ¶ 9.

Moreover, CREW's argument is also legally flawed. Litigation need not be pending – or even imminent – at the time of a document's creation for that document to be protected by the attorney work-product doctrine. There need be only "an articulable claim, likely to lead to

[2] This declaration was filed on May 7, 2007, along with Defendant's Motion for Summary Judgment and is referred to herein as "Stern Decl." The supplemental declaration filed along with this reply brief is referred to herein as "Supp. Stern Decl."

litigation." *Coastal States Gas Corp.*, 617 F.2d at 865. "[A] party 'must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable' in the circumstances." *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 78 (D.D.C. 2003). CREW has not challenged NARA's assertion that it subjectively believed litigation likely. *See* Stern Decl. ¶ 23. Therefore, CREW hinges its entire work-product argument on the contention that it was objectively *unreasonable* for NARA to believe that litigation over WAVES' status "was a real possibility," even though USSS had already received FOIA requests for White House access records, and NARA's General Counsel was aware of those requests. *See* Huff Decl. ¶ 3; Supp. Stern Decl. ¶ 9. As the opposite is true – that is, it was objectively *reasonable* for NARA attorneys to believe litigation over the legal status of WAVES and related records was at least "a real possibility" – CREW's argument should be rejected.

For the reasons stated herein, CREW's remaining challenges to NARA's continued withholdings of the documents contained in the *Vaughn* Index should be rejected.[3] For the Court's convenience, Defendant addresses the documents with reference to the categories set forth in the first declaration of NARA's General Counsel and in Defendant's Motion for Summary Judgment.

ARGUMENT

I. NARA VALIDLY WITHHELD DOCUMENTS PURSUANT TO EXEMPTION 5

A. Inter-Agency Deliberations on Disposition of WAVES Records

1. Deliberations on the Proposed WAVES Records Schedules

CREW continues to challenge NARA's withholding of documents that were part of the inter-

[3] CREW has waived its challenge to the withholdings of the following Documents: 1, 2, 4, 6, 8-11, 15a, 19-23, 25, 28, 32-33, 38-39, 41, 43, 47, 50, 52, and 61-75. CREW continues to challenge the withholding of the remaining 37 documents identified in the *Vaughn* Index.

agency deliberations on the disposition of WAVES records. Among the group of documents CREW still seeks are NARA's internal deliberations concerning proposed WAVES records schedules submitted in 1990, 1993, and 1996 (the schedules, which were ultimately withdrawn, have been released). *See Vaughn* Index ## 3, 5, 7. These documents are validly withheld pursuant to both the deliberative process privilege and the attorney work-product doctrine.

CREW first argues that Document 3 cannot be withheld under the deliberative process privilege because it was "not produced in the process of formulating policy or advice regarding WAVES records," and was, instead, "a statement of the agency's legal position." Pls. Opp. at 9. There is no basis for this assertion: Document 3 is an unsigned, undated, single-page cover memorandum attached to a later-withdrawn draft records schedule, *see Vaughn* Index # 3. CREW does not explain how this document could possibly constitute a statement of NARA's official "legal" position with respect to the proper disposition of WAVES records.

Because there is no basis in the record for describing this internal, unsigned memorandum as an official expression of NARA's legal position, CREW attempts to bolster its argument by analogizing Document 3 to the documents at issue in *Tax Analysts v. I.R.S.*, 117 F.3d 607 (D.C. Cir. 1977). In that case, the D.C. Circuit held that I.R.S. Field Service Advice Memoranda ("FSAs") could not be withheld pursuant to Exemption 5 because they "constitute agency law." *See id.* at 617. CREW's analogy must fail, however, because Document 3 is nothing like those FSAs, which were "issued by the Office of Chief Counsel for the IRS" as part of its function of "provid[ing] legal advice to the IRS, direct[ing] litigation in the Tax Court, and provid[ing] guidance and support for litigation in other courts." *Id.* at 608. Unlike the internal, informal NARA memo, FSAs are governed by a handbook instructing staff that each FSA should include "a statement of issues, a conclusions section, a statement of facts, and a legal analysis section," should "recommend a

position on each issue and state any limitations or conditions to which a conclusion may be subject," and should be written in a style that is "exploratory and descriptive so that the strengths and weaknesses of a case are presented and developed candidly." *Id.* at 609 (internal quotation marks omitted). In short, FSAs are standardized, formal analysis memoranda that contain a statement of the law being applied by the agency and are designed to "ensur[e] that field personnel apply the law correctly and uniformly." *Id.* As a consequence, FSAs are "held in high regard and are generally followed" (although they are not technically binding on IRS field personnel). *Id.*

Put simply, Document 3 – an unsigned, undated, one-page cover memorandum – bears no resemblance to the kind of memo at issue in *Tax Analysts*. CREW provides no basis for its assertion that Document 3, like the FSAs, represents "an attempt to develop a body of coherent interpretations of the records schedules of the White House visitor logs." Pls. Opp. at 9. Document 3 is not a statement of formal agency policy but is, instead, merely a "tool[] for *formulating* policy." *Tax Analysts v. I.R.S.*, 97 F. Supp. 2d 13, 17 (D.D.C. 2000) (holding that IRS "Legal Memoranda," unlike FSAs, may be withheld under the deliberative process privilege) (emphasis added).

CREW's challenges to the deliberative process rationale for withholding Documents 5 and 7 are similarly unavailing. CREW maintains that these documents "do not reflect a deliberative process at work" because they are "superior-to-subordinate" communications. *See* Pls. Opp. at 10 (citing *Evans v. U.S. Office of Pers. Mgmt.*, 276 F. Supp. 2d 34, 41 (D.D.C. 2003)). *Evans* cannot support the weight that plaintiff places upon it, however. That case did not hold that "superior-to-subordinate" communications are by definition not deliberative, as plaintiff's citation to that case implies. Indeed, *Evans* did not even concern a "superior-to-subordinate" communication at all. Instead, *Evans* simply held that the Office of General Counsel memoranda at issue in that case were not entitled to the presumption of predecisional character that attaches to communications from a

subordinate to a superior because those specific memoranda "moved 'horizontally' between agency components." *Evans*, 276 F. Supp. at 40.

Moreover, isolating these two e-mails from the rest of the deliberative documents concerning the pending WAVES schedule, so that their deliberative character may be attacked on the ground that they are "superior-to-subordinate" communications, is misleading. Plaintiff is not challenging documents 6 and 8-11, which reveal ongoing deliberations on the proposed schedules between NARA's General Counsel and other NARA employees. These other documents, described in the *Vaughn* Index, reveal that neither Document 5 nor Document 7 represents the end of the internal deliberations on the pending WAVES schedules. On the contrary, Document 6 continues the discussion from Document 5, and Document 8 continues the deliberations described in Document 7. Thus, the *Vaughn* Index clearly supports NARA's assertion that these communications were part of "an ongoing, inter-agency deliberative process connected with reaching a final decision on what was a formerly pending WAVES schedule." Stern Decl. ¶ 15; *see also id.* ¶ 11 (e-mail is "an especially candid medium used by attorneys and others" as part of NARA's deliberative processes, and that release of such e-mails "will have a negative impact on the ability of civil servants to have honest internal conversations essential to . . . decision-making").

In addition, CREW simply misstates the law when it asserts that NARA cannot withhold Documents 5 and 7 unless it establishes that it "has never implemented the opinions or analysis contained in these documents, has never incorporated them into final agency policy programs, never referred to them in a precedential fashion or otherwise treated them as if they constitute agency protocol." Pls. Opp. at 10 (citing *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 151 (1975), and *Tax Analysts*, 117 F.3d at 617-18). That argument has been specifically rejected. In *American Civil Liberties Union v. Department of Justice*, 883 F. Supp. 399, 405 (S.D.N.Y. 1993), for example, the

court rejected plaintiff's contention that the government must "specify what policy was under consideration and affirm that the policy discussed has neither been adopted nor incorporated by reference." The court observed that this proposed standard "goes beyond the disclosure required by *Sears, Roebuck*." *Id.* "An exempt document does not become disclosable because the *policy* it discusses is ultimately adopted . . . . Rather, an exempt communication becomes disclosable if the *document itself* is adopted, formally or informally, as a statement of agency policy." *Id.* (internal citations omitted) (emphasis in original); *see also Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1197 (D.C. Cir. 1991) (allegation that internal DOJ report should be disclosed because DOJ official allegedly referred to the report's conclusions when testifying before the Senate "fell far short of the *express* adoption required by *Sears*." (emphasis in original)).[4]

Recognizing such a heightened pleading standard would turn the deliberative process privilege on its head. If CREW's view of the law were accepted, then before an agency could withhold a deliberative communication, it would have to (1) give a detailed accounting of that communication, comparing it point-by-point to any final agency policy and, presumably, (2) release any communication that (in whole or part) accords with the final policy the agency adopts. NARA need not disclose the contents of its communications in this way before it can properly invoke the deliberative process privilege. Instead, it need only do what it has done here: identify the deliberative process of which the communication was a part (the discussions over proposed schedules for WAVES records) and the role the communications played in that process (the back-and-forth between agency personnel considering issues arising from the proposed, but later

[4] To the extent CREW is attempting to argue that NARA somehow adopted the analysis contained in Documents 3, 5, and 7, CREW – not NARA – bears the burden of proving that NARA has explicitly adopted the reasoning (and not merely the conclusion) of those Documents. *See infra* Part I.C.2 (discussing nonpublic OLC legal advice memorandum).

withdrawn, schedules).

Finally, CREW attacks the deliberative process rationale for withholding these documents by alleging that the failure to release them will result in public confusion. *See* Pls. Opp. at 10. CREW maintains that these documents must be released because there is "no documentation explaining what, if any, action NARA took with respect to the schedules." *Id.* This is not true. The schedules themselves, which were released pursuant to CREW's FOIA request, clearly document what action was taken: the schedules are marked "withdrawn."[5] Moreover, NARA's General Counsel explained in his initial declaration that these records were never scheduled: "In this case, the proposed schedules submitted in the 1990s were withdrawn." Stern Decl. ¶ 14. Hence, CREW cannot credibly allege confusion as to "what, if any, actions" NARA took with respect to these schedules. The only potential for confusion lies in the release of the withheld documents, which discuss issues surrounding a possible records schedule that was never approved. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995) (release of deliberations concerning a decision or policy that "the agency ultimately elected not to issue" risks public confusion).

CREW also attacks NARA's withholding of these documents pursuant to the attorney work-product doctrine. As noted *supra*, CREW's arguments against applying the work-product doctrine to these materials are both factually and legally flawed. Because NARA could reasonably have anticipated litigation over the question of whether WAVES and related records were presidential or federal – in light of the fact that FOIA requests for these records had already been filed, *see* Huff Decl. ¶ 3; Supp. Stern Decl. ¶ 9 – CREW cannot argue that NARA's subjective belief that litigation

[5] The schedule submitted on Feb. 22, 1990 (N1-87-90-2) was marked "withdrawn" on June 20, 1991. The schedule submitted on Mar. 28, 1996 (N1-087-93-03) – which is a revised version of (and is labeled with the same job number as) the schedule submitted on Feb. 9, 1993 – was marked "withdrawn" on Sept. 23, 2002.

might occur was unreasonable. S*ee* Stern Decl. ¶ 23. Moreover, CREW's contention that there might have been no litigation had the records been deemed to be federal, rather than presidential, *see* Pls. Opp. at 13, is beside the point; the fact that one possible outcome of a deliberation might pose less of a litigation risk does not mean that attorneys could not have reasonably anticipated litigation over the subject whose outcome they were debating.

2. Deliberations on 2001 WAVES Retention Memorandum

CREW next challenges NARA's withholding of documents deliberating a recommendation for the management of WAVES and related records and the transfer of certain Clinton Administration WAVES and related records from the USSS to the White House. Specifically, CREW challenges the withholding of Documents 12-14, 15, and 17, alleging that these documents are not deliberative because they represent "NARA's exercise of its statutory responsibility to act on records schedules agencies submit to the Archivist." Pls. Opp. at 14. As noted above, this argument misunderstands – and overstates – NARA's role in inter-agency deliberations about record retention issues. NARA is not the final arbiter of all record retention issues in the government. *See* Supp. Stern Decl. ¶ 7. Nor is it the decision maker with respect to what constitutes a presidential record. *See id.* ¶ 5; 44 U.S.C. § 2203.

Moreover, even by CREW's own description of NARA's duties, these documents do not constitute the "exercise" of NARA's "statutory authority." CREW argues that NARA's statutory obligation is to "act on records schedules agencies submit to the Archivist." Pls. Opp. at 14. But none of these documents (12-14, 15, or 17) are records schedules. Rather, these documents represent inter-agency deliberations about a specific set of recommendations for the management, transfer, and disposition of WAVES and ACR records. *See Vaughn* Index; Stern Decl. ¶ 18-19. NARA regularly participates in these types of inter-agency deliberations at the request of other agencies who are

exercising their statutory duty to create and maintain their own record keeping program. *See* Supp. Stern Decl. ¶ 6-7; 44 U.S.C. § 3102. Given NARA's expertise in dealing with the federal record keeping statutes – an expertise CREW repeatedly points out, *see* Pls. Opp. at 5-6, 11 – it is entirely appropriate for NARA to be involved in such inter-agency deliberations. If CREW were correct that any discussions with NARA on record keeping issues were by definition not deliberative, then other agencies would likely stop including NARA in their pre-decisional communications for fear that tentative or preliminary policy proposals shared with NARA would lose all protection under the deliberative process privilege.

Moreover, among this set of documents (12-14, 15, 17), the only one that represents NARA's response to another agency – *i.e.*, the only one that can even colorably be said to represent an "exercise" of what CREW believes to be NARA's statutory duty to "act on agency proposals regarding the disposition of its records" – is Document 14. But, for the reasons explained in the declarations of NARA's General Counsel, that document, too, is deliberative. Document 14 represents the General Counsel of NARA's response to recommendations made by the White House and the USSS.[6] Nothing said in this document about the status of WAVES records was binding or self-executing, as NARA had no authority to determine whether WAVES records fall under the PRA. *See* Stern Decl. ¶ 31; Supp. Stern Decl. ¶ 5; 44 U.S.C. § 2203(a); *Armstong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991). Instead, in Document 14 NARA's General Counsel merely concurred

[6] The *Vaughn* Index and declaration make clear that Document 13 "consists of a set of *recommendations* . . . on how the USSS proposed to manage, transfer, and dispose of WAVES and ACR records." *Vaughn* Index # 13 (emphasis added). Therefore, CREW's contrary – and unsupported – assertion that this document was not created "to formulate a policy," *see* Pls. Opp. at 14, lacks merit. *See, e.g.*, *Coastal States Gas Corp.*, 617 F.2d at 866 (the category of "deliberative" documents protected by the privilege includes, *inter alia*, "recommendations, draft documents, proposals, [and] suggestions").

with certain recommendations and indicated an intent to work further with the USSS and White House on the management of WAVES and related records. *See* Supp. Stern Decl. ¶ 8. Importantly, those recommendations were never implemented in that form, as they were revisited during the current Administration – which began literally the day after NARA's General Counsel authored Document 14. *Id.* Ultimately, the position of the White House and USSS regarding WAVES and ACR records was memorialized in the aforementioned, public MOU. *Id.* Document 14 – along with the original set of deliberative recommendations that preceded it (Documents 12-13), and the inter- and intra-agency deliberations that followed it (Documents 15, 17) – was part of ongoing inter-agency deliberations about the conclusions ultimately articulated in the MOU. *Id.* As such, this document is pre-decisional and deliberative, and therefore is properly withheld pursuant to Exemption 5.

Disclosing Document 14 would run afoul of the principles underlying Exemption 5, because it would provide a window into inter-agency deliberations concerning WAVES records. If made public, Document 14's unexecuted recommendations could be compared to the position articulated in the MOU, thereby revealing substantive information about the confidential inter-agency deliberations. Preventing this type of window into ongoing deliberations is one of the core purposes of Exemption 5, which was intended to "protect[] the integrity of an agency's decision" by ensuring that "the public should not judge officials based on information they considered prior to their final decisions." *Judicial Watch*, 880 F. Supp. at 12; *see also Coastal States Gas Corp.*, 617 F.2d at 866 (the deliberative process privilege covers documents which would "inaccurately reflect or prematurely disclose the views of the agency"); *Badhwar v. U.S. Dep't of Air Force*, 622 F. Supp. 1364, 1370-71 (D.D.C. 1985) (noting that courts have applied deliberative process privilege where "[r]elease of the document would enable a comparison of the predecisional document with the final

decision it helped produce"), *affirmed in part, vacated in part on other grounds, and remanded*, 829 F.2d 182 (D.C. Cir. 1987).

Finally, plaintiff again argues that these documents are not entitled to work-product protection because NARA did not reasonably anticipate litigation on the legal status of WAVES records. As explained *supra*, that argument is both legally and factually flawed, and should be rejected; attorneys at NARA and the other Executive Branch agencies involved in these deliberations reasonably expected litigation on the issues deliberated therein.

3. Deliberations on 2004 WAVES Retention Memorandum

CREW similarly challenges NARA's withholding of deliberations concerning a set of recommendations made in 2004 for the disposition of WAVES and ACR records. Again, CREW's arguments rest on a misunderstanding about NARA's role in inter-agency deliberations. CREW alleges that "NARA's role in this process is mandated by the FRA, and is not . . . dependent on the desire of any particular agency to seek NARA's views on the disposition of agency records." Pls. Opp. at 16. This gets it exactly backwards. NARA's participation in these deliberations resulted *precisely from* the "desire" of other Executive Branch entities – the Office of Counsel to the President and the USSS – to "seek NARA's views on the disposition of agency records." One need look no further than the *Vaughn* Index, which describes Document 18 as a three-page, "unsigned draft memorandum . . . consisting of a set of recommendations . . . on how the USSS proposed to manage, transfer, and dispose of WAVES records." *Vaughn* Index # 18; *see also* Stern Decl. ¶ 20 (Document 18 is a "draft document providing informal views on one way to address the disposition of WAVES records"). Nor was NARA's involvement in these inter-agency deliberations in any way unusual. "NARA archivists and attorneys are routinely consulted by federal agencies for advice and recommendations in support of an agency's records management activities, and from time to time

we are also consulted by the White House in connection with providing best practices guidance on the management of presidential records." Supp. Stern. Decl. ¶ 6; *see also* Stern Decl. ¶ 14.

Again CREW relies upon *Tax Analysts* in arguing that NARA's deliberations on the informal proposal advanced by the USSS and the White House constitute a body of "secret law." *Id.* Again, as with Document 3, CREW attempts to describe an internal "draft document" from an unknown author as a statement of the official "legal views" of the agency. *See* Pls. Opp. at 15 (discussing Document 26). And, again, CREW's reliance on *Tax Analysts* is misplaced. NARA's intra- and inter-agency deliberative communications in response to the 2004 recommendation are just that: deliberative.[7] There is no indication from the *Vaughn* Index or the Stern declaration that these deliberative communications constitute NARA's final legal opinions. Moreover, as noted, it is the President, and not NARA, that determines whether a record is presidential. *See* Stern Decl. ¶ 31; Supp. Stern Decl. ¶ 5 (President determines whether a record meets 44 U.S.C. § 2201(2)'s definition of a presidential record). The President, or a federal agency, may wish to discuss record keeping issues with NARA, but that does not transform NARA's deliberative communications into anything like the SFAs at issue in *Tax Analysts*.

These communications are also protected by the work-product doctrine. CREW continues to argue that there was a "complete absence of any reasonable basis to anticipate litigation" and that even though litigation *did in fact occur* on this very question, it "did not occur until years later" and therefore "was not reasonably forseeable at the time of the documents' creation" in September 2004. As noted, this statement is misleading; the USSS did receive FOIA requests for White House access records prior to 2006. *See* Huff Decl. ¶ 3; Supp. Stern Decl. ¶ 9. It was therefore reasonable to

[7] CREW concedes as much with respect to the intra-agency communications; it abandons its challenge to the withholding of Documents 19-23, 25, and 28. *See* Pls. Opp. at 15 n.8.

believe that similar FOIA requests might result in litigation.

4. USSS Presentation to NARA and Other Officials

CREW also challenges the withholding of Document 31, which contains part of a PowerPoint presentation given by USSS officials to attorneys and staff at NARA, Department of Justice, Office of Counsel to the President, and the WHORM. CREW argues that it is not deliberative because it contains "purely factual material." Pls. Opp. at 17. That argument ignores the *Vaughn* Index and Stern Declaration, which make clear that this document contained specific policy proposals concerning WAVES and related records management. *See Vaughn* Index # 31; Stern Decl. ¶ 21. As such, it was not "purely factual" but was, instead, part of ongoing inter-agency deliberations over the proper procedures for maintaining and transferring WAVES and related records. *See* Stern Decl. ¶ 21. Indeed, CREW concedes as much in the following paragraph when, in advancing yet another mistaken argument about NARA's "statutory authority to provide its input and legal conclusions," it plainly states that the presentation was "on an issue for which the Secret Service was seeking NARA's views." Pls. Opp. at 17. It is precisely because the presentation advanced proposals on which USSS was seeking input from attorneys and officials at NARA and other Executive Branch entities that it is protected by the deliberative process privilege.

For the same reason, this document is also protected by the attorney work-product doctrine. It was prepared for, and presented to, lawyers and officials from NARA, Department of Justice, Office of Counsel to the President, and the WHORM, and sought their views on the legal status and maintenance of WAVES and related records. This is precisely the issue that NARA reasonably envisioned could (and did) become the subject of litigation. *See* Stern Decl. ¶ 23.[8]

[8] Although CREW continues to challenge the withholding of Documents 18a, 24, 27, 29, 30 (continued...)

B. Documents Related to the Pending *Judicial Watch* Litigation

CREW also challenges a number of documents contained in the second category identified by NARA – documents related to the then-pending *Judicial Watch* litigation. CREW seeks access to a series of e-mail exchanges about the *Judicial Watch* lawsuit involving discussions among attorneys and officials at NARA, the USSS, the Department of Justice, and the Office of Counsel to the President. These e-mails contain candid discussions of "pending issues with respect to the legal status of WAVES records," in light of the filing of the *Judicial Watch* lawsuit, *see Vaughn* Index 34, and, in some instances, the legal positions taken in litigation. *See Vaughn* Index ## 34-37, 40, 42-44, 53; Stern Decl. ¶ 24. As such, they are classic examples of deliberative communications and attorney work-product. *See, e.g.*, *Coastal States Gas Corp.*, 617 F.2d at 868 (noting that memoranda "recommending legal strategy in light of a particular controversy" represented "a classic case of the deliberative process at work" (internal citation omitted)); *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 370 (D.C. Cir. 2005) (holding that e-mails among Department of Justice attorneys discussing legal strategy are protected in their entirety by the work-product doctrine).

CREW's contrary arguments are unavailing. First, CREW argues that these e-mails are not deliberative because "[NARA] has failed to identify exactly what decision it was participating in." Pls. Opp. at 17-18. This argument misunderstands the law. An agency need not "point to an agency final decision" to invoke the privilege. *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1223 (D.C. Cir. 1989)).

(...continued)
– all of which fall into this first category of records concerning inter-agency deliberations on the disposition of WAVES records – CREW makes no argument in its brief about these documents. In light of this absence of any contrary argument, this Court should award summary judgment to NARA with regard to these documents for the reasons set forth in Defendant's Motion for Summary Judgment and accompanying declaration and *Vaughn* Index

Rather,"[t]o establish that the document is pre-decisional," the agency need "merely establish what deliberative process is involved, and the role that the documents at issue played in that process." *Id.* NARA has demonstrated that, through these e-mail communications with attorneys and officials at the Department of Justice (the government attorneys handling the litigation), USSS, and Office of Counsel to the President, it was participating in candid discussions of the legal issues raised by a new case filed against the government. *See Vaughn* Index ## 34-37, 40, 42-44, 53; Stern Decl. ¶ 24. That is sufficient to invoke the protections of the deliberative process privilege.

CREW's other arguments with regard to these documents are red herrings. First, CREW argues that the legal status of WAVES records is no longer at issue in that *Judicial Watch* litigation. *See* Pls. Opp. at 18 (noting that "the only remaining dispute is whether the Secret Service produced all responsive documents"). What issues *remain* in that case is irrelevant to the assertion that government attorneys, at the outset of that litigation, candidly debated the legal issues that might arise, and positions that should be taken, in that litigation. Second, CREW notes that NARA was "not a party to the *Judicial Watch* litigation." *Id.* This too is irrelevant to whether these communications are protected by the deliberative process privilege and work-product doctrine. As CREW itself repeatedly notes, NARA has considerable expertise in the field of records management. Thus, it is entirely appropriate for NARA lawyers and staff to be included in inter-agency deliberations about the pending litigation against the government and the strategy to advance therein. This neither negates the deliberative nature of the communication, nor waives the work-product protection appropriately afforded to the writings of government lawyers developing the United States' litigation strategy. To maintain otherwise, as CREW does, is to ignore that many Executive Branch entities have overlapping expertise and interests which must be accommodated when defending litigation filed against the United States.

C. Deliberations on Status and Disposition of WAVES Records Contemporaneous With Ongoing Litigation

CREW next challenges NARA's withholding of documents created contemporaneously with then-ongoing litigation seeking access to WAVES records, including (1) a draft of the MOU between the USSS and the WHORM, (2) a nonpublic legal advice memorandum issued by the Department of Justice's Office of Legal Counsel ("OLC"), along with a draft of that memorandum, and (3) e-mail communications regarding the drafting of the MOU and the nonpublic advice memorandum. All of these documents were properly withheld pursuant to Exemption 5.

1. Draft of the Memorandum of Understanding

CREW claims that it is entitled to see a draft of the aforementioned MOU executed between the WHORM and the USSS (Document 45) because "NARA has not established that the opinions or analysis contained in the MOU were not incorporated into the final MOU that was made public." Pls. Opp. at 20. CREW again relies on *NLRB v. Sears, Roebuck & Co.* for this proposition. As discussed *supra*, *NLRB* cannot bear the weight that CREW places upon it, *see ACLU v. Dep't of Justice*, 883 F. Supp. at 405, and to hold that it does would be to turn the deliberative process privilege on its head. NARA need not establish that nothing in the draft MOU was incorporated into the final MOU to invoke the deliberative process privilege. On the contrary, draft documents of this sort are routinely protected by the privilege because disclosing them would provide a window into the deliberations in which those documents were revised. "[T]he disclosure of editorial judgments – for example, decisions to insert or delete material or to change a draft's focus or emphasis – would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work." *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987); *see also Russell*, 682 F.2d at 1048 (draft agency report is protected by the deliberative process privilege).

2. Nonpublic Advice Memorandum From DOJ's Office of Legal Counsel

CREW also challenges the withholding of the nonpublic legal advice memorandum authored by OLC (Document 55). It alleges that neither the deliberative process nor attorney-client privilege, nor the attorney work-product doctrine, protects this document from disclosure. CREW is wrong with respect to each of these arguments.

First, this document is clearly shielded by the deliberative process privilege, which protects documents that are both "pre-decisional" – *i.e.*, documents that were "generated before the adoption of an agency policy" – and "deliberative" – *i.e.*, documents that "reflect[] the give-and-take of the consultative process." *Coastal States Gas Corp.*, 617 F.2d at 866. The nonpublic legal advice memorandum satisfies both of these requirements. It is pre-decisional because it was "prepared as part of the governmental deliberative process leading up to the execution of the [MOU]." Declaration of Steven G. Bradbury ("Bradbury Decl.") ¶ 5(a)). It is deliberative because "it is advice submitted for use by decisionmakers at various government entities involved in the decisions to prepare and execute the MOU." *Id.*

CREW attempts to negate the application of this privilege by arguing that the aforementioned MOU adopts the nonpublic OLC memorandum. It speculates that, "[g]iven OLC's advisory role, it is difficult to imagine that" the MOU "reflects a legal position inconsistent with that contained in the OLC advisory memo." Pls. Opp. at 21-22 (citing *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360 (2d Cir. 2005)). But mere speculation that the MOU agrees with the *conclusion* contained in the OLC memorandum is plainly insufficient to constitute adoption of that document:

> To be sure, had the Department simply adopted only the conclusions of the OLC Memorandum, the district court could not have required that the Memorandum be disclosed. Mere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis; both will ordinarily be needed before a court may properly find adoption or incorporation by reference. . . . [T]here must be evidence

> that an agency has *actually* adopted or incorporated by reference the document at issue; mere speculation will not suffice.

Nat'l Council of La Raza, 411 F.3d at 358-59 (emphasis in original). Because the MOU makes no reference to the nonpublic OLC memorandum (*see* Bradbury Decl. ¶ 5(a)), it does not adopt the OLC memorandum, as would be required to strip it of the deliberative process privilege protection to which it is otherwise entitled. *See Nat'l Council of La Raza v. U.S. Dep't of Justice*, 339 F. Supp. 2d 572, 581-82 (S.D.N.Y.2004) (holding that nonpublic OLC advice memorandum is deliberative); *Southam News v. INS*, 674 F.Supp. 881, 886 (D.D.C. 1987) (holding OLC opinion letter "discuss[ing] legal questions regarding the criteria used to evaluate visa applications made by a certain class of individuals" was protected by the deliberative process privilege (quotation marks omitted)); *see also Brinton v. Department of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (holding that legal advice memorandum from the Department of State Legal Adviser "fits exactly within the deliberative process rationale for Exemption 5"); *Int'l Paper Co. v. Fed. Power Comm'n*, 438 F.2d 1349, 1358-59 & n. 3 (2d Cir. 1971) (holding that legal advice memorandum from Federal Power Commission's General Counsel was shielded by the deliberative process privilege).

Second, CREW alleges that this document is not protected by the attorney-client privilege because "NARA has no attorney-client relationship with the Secret Service, the White House, or, most importantly, the OLC." Pls. Opp. at 21. This assertion is incorrect. OLC does advise the Attorney General, the White House, and other entities within the Executive Branch on legal matters. *See* Bradbury Decl. ¶ 2-3. This nonpublic advice memorandum perfectly illustrates OLC's role as legal adviser to the Executive Branch; the memorandum "constitutes confidential legal advice provided by OLC to Executive Branch entities, and reflects facts and information provided to OLC by those Executive Branch entities for purposes of preparing that legal advice." *Id.* ¶ 5(b).

Moreover, consistent with OLC policy – except in those limited circumstances where OLC chooses to publish its memoranda after the passage of time – this memorandum has not been published, and in fact has been shared only with other Executive Branch entities. *Id.* ¶ 4.

Third, CREW maintains that the nonpublic advice memorandum lacks protection under the work-product doctrine because NARA "does not even attempt to explain how there is an articulable claim NARA was involved in that would likely to lead to litigation involving NARA." Pls. Opp. at 22. This argument is sleight of hand. CREW ignores the facts that OLC acts as a legal adviser to the entire Executive Branch, and that when OLC drafted this memorandum there *was litigation ongoing* against Executive Branch agencies – clients of OLC – seeking access to WAVES records under FOIA. Bradbury Decl. ¶ 5(c). Because this memorandum was written by OLC, in its capacity as legal adviser to the Executive Branch, and discussed legal questions then (and now) the subject of litigation, it is protected by the work-product doctrine.

Finally, in continuing to challenge the withholding of Document 45, CREW also seeks access to a preliminary draft of the OLC legal advice memorandum. That draft is protected by the deliberative process and attorney-client privileges, and the attorney work-product doctrine, for all of the reasons noted above (in discussion of Document 55). Moreover, it is further protected under the deliberative process privilege because the creation (and sharing) of that draft was part of the process of formulating legal advice, and because revealing this preliminary draft would impair OLC's ability to serve as an adviser to Executive Branch agencies. *See* Bradbury Decl. ¶ 7; *Dudman Commc'ns Corp.*, 815 F.2d at 1569 (protecting draft documents under the deliberative process privilege); *Russell*, 682 F.2d at 1048 (same).

3. Inter- and Intra-Agency Communications About Drafts of the MOU and OLC Advice Memorandum

CREW also seeks to obtain copies of the inter- and intra-agency communications relating to the drafting of the MOU and the OLC nonpublic advice memorandum. Again, CREW falls back upon its two standard deliberative process arguments: contending (1) that communications from NARA about record keeping issues represent an exercise of NARA duties under the FRA, and (2) that any such statements represent NARA's official legal position, like the SFAs at issue in *Tax Analysts*. *See* Pls. Opp. at 22. As discussed at length *supra*, these arguments lack merit. The FRA does not make NARA the final arbiter over all record keeping questions – including whether something is a presidential record – and informal, deliberative advice does not constitute a body of "secret law." These types of back-and-forth e-mails are typical of, and essential to, the deliberative process by which draft documents such as the OLC memorandum and the MOU are considered. *See, e.g.*, Bradbury Decl. ¶ 8-9 (Documents 45, 48, and 51 are e-mails that "relate to the preparation of OLC's nonpublic legal advice memorandum"); Stern Decl. ¶ 11 (e-mails, such as Document 46, are a medium in which government attorneys and staff candidly "render opinions, recommendations, or advice").

4. Inter-Agency Deliberations About the Transfer and Retention of WAVES and ACR Records in Light of Pending Litigation

Finally, CREW seeks access to communications concerning the transfer and preservation of WAVES records during the pendency of litigation – including litigation in which CREW is a party. *See* Pls. Opp. at 23. Although CREW does not refer to these documents by number, they are identified as Documents 56-60 on the *Vaughn* Index. CREW maintains that these are purely "factual" communications because they concern the "logistics" of maintaining WAVES records. *See* Pls. Opp. at 23. The record reveals the opposite, however: these e-mails are deliberative because

they show that an Associate Counsel to the President made a "request for agency recommendations and opinions" concerning the transfer and retention of documents during litigation, and that attorneys for NARA and the USSS responded with "opinions and recommendations of NARA and USSS staff." Stern Decl. ¶ 29. Moreover, these documents are protected by the work-product doctrine because they represent "deliberations on the logistics and handling of WAVES records, especially in light of pending litigation regarding access issues to such records," *id.*, and because they were sent from (and to) attorneys representing the government in that ongoing litigation.[9]

II. NARA CONDUCTED AN ADEQUATE SEARCH

As demonstrated by the declarations submitted by NARA's General Counsel – *see* Stern Decl. ¶ 5; Supp. Stern Decl. ¶ 10 – NARA "conducted a search 'reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). CREW's allegations to the contrary represent nothing more than "speculative claims about the existence and discoverability of other documents," which are insufficient to overcome the "presumption of good faith" that attaches to NARA's declarations on the adequacy of its search. *Ground Saucer Watch v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981). Moreover, these speculations are rebutted by NARA's General Counsel, who confirms that NARA searched all offices that "would likely be in possession of any responsive records." Supp. Stern Decl. ¶ 10.

[9] Plaintiff's claim that these descriptions of the documents do not provide sufficient "evidence . . . that the documents in fact contain legal discussion about legal obligations conducted by lawyers involved in the litigation," Pls. Opp. at 23, is plainly at odds with the record. As noted in text, these e-mails were sent from and to attorneys handling the litigation for the government – including attorneys from the Department of Justice, USSS, the Office of Counsel to the President, and NARA – and discuss document retention issues in light of that pending litigation.

CONCLUSION

For all of the foregoing reasons, this Court should grant Defendant's Motion for Summary Judgment and deny Plaintiff's Cross Motion for Summary Judgment.[10]

June 21, 2007

Respectfully submitted,

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[10] Pursuant to LCvR 7(h), Plaintiff's Cross-Motion for Summary Judgment is accompanied by a Statement of Material Facts that sets forth the procedural history of its FOIA request. Because none of the allegations contained in that Statement are "material facts as to which . . . there exists a genuine issue necessary to be litigated" – *i.e.*, they will not "affect the outcome of the suit" challenging NARA's withholdings, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) – LCvR 7(h) requires no response. However, if this Court were to deem any of the allegations in the Statement material, Defendant refers the Court to its Answer, in which it responded to all of the allegations contained in Plaintiff's Rule 7(h) Statement (which are, in turn, drawn from -- and include citations to -- Plaintiff's Complaint).

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June 2007, I caused the foregoing Defendant's Reply in Support of its Motion For Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment to be served on plaintiff's counsel of record electronically by means of the Court's ECF system.

/s/ Michael P. Abate