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 MOTION FOR SUMMARY JUDGMENT

Defendant National Archives and Records Administration ("NARA") respectfully moves for summary judgment pursuant to Fed. R. Civ. P. 56 on the claims of plaintiff Citizens for Responsibility and Ethics In Washington ("CREW"). As set forth herein, there is no genuine issue of material fact in dispute, and defendant is entitled to judgment as a matter of law. In support of this Motion, defendant respectfully refers the Court to the accompanying Memorandum of Points and Authorities, declaration of Gary M. Stern, General Counsel of the National Archives and Records Administration, and *Vaughn* Index. A proposed order is also attached.

Respectfully submitted,

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STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 7.1(h), defendant National Archives and Records Administration submits this statement of material facts as to which there is no genuine issue:

1. "WAVES" records are records created by the Workers and Visitors Entrance System employed at the White House Complex "when 'information is submitted by an authorized White House pass holder to the Secret Service about workers and visitors who need access to the White House [Complex].'" *Washington Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 64 (D.D.C. 2006) (quoting declaration of United States Secret Service official); *see also* Declaration of Gary M. Stern, NARA General Counsel ("Stern Decl.") ¶ 14.

2. "ACR" records are records created by the White House Access Control Records System, which includes "'records generated when a pass holder, worker, or visitor, swipes his or her pass over one of the electronic pass readers located at entrances to and exits from the White House Complex.'" *Washington Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d

61, 64 (D.D.C. 2006) (quoting declaration of United States Secret Service official).

3. On September 27, 2006, Plaintiff Citizens for Responsibility and Ethics In Washington ("CREW") submitted a FOIA request to defendant National Archives and Records Administration ("NARA") seeking:

(1) Any and all documents related to the request made by the National Archives and Records Administration ("NARA"), to the United States Secret Service, that the Secret Service retain its own copies of the Worker and Visitor Entrance System ("WAVES") records that it transferred to the White House.

(2) Any and all communications both internally and between the National Archives and Records Administration and any other government agency or government entity, referencing the practice of the United States Secret Service to erase copies of WAVES records that it transferred to the White House.

(3) Any and all documents referring to or relating to a practice by the Secret Service of deleting records from its computer system.

(4) Any and all documents and records referring or related to Judicial Watch v. United States Secret Service, Civ. Action No. 06-310 (United States District Court for the District of Columbia).

(5) Any and all documents and records referring or related to Democratic National Committee v. United States Secret Service, Civ. Action No. 06-842 (United States District Court for the District of Columbia).

(6) Any and all documents and records referring or related to Citizens for Responsibility and Ethics In Washington v. United States Department of Homeland Security, Civ. Action No. 06-883 (United States District Court for the District of Columbia).

See Stern Decl. ¶ 4 & Tab A.

4. CREW also sought expedited processing and a waiver of all fees associated with processing the FOIA request. *Id.*

5. NARA's FOIA Officer conducted a search for responsive documents by contacting key staff in offices that would have worked on issues related to WAVES records, including

the Office of the General Counsel, components of the Office of Records Services–Washington, D.C., and the Office of Presidential Libraries. *Id.* ¶ 5. Individual staff members reviewed paper and electronic files and forwarded any potentially relevant records to NARA's FOIA Officer for processing. *Id.*

6. NARA acknowledged CREW's FOIA request in a letter dated October 20, 2006 from NARA FOIA Officer Ramona Branch Oliver. *See Id.* Tab B. That letter informed the plaintiff that NARA agreed to expedite CREW's request, and to waive any processing fees associated therewith. *Id.*

7. NARA produced documents in response to CREW's FOIA request October 24, 2006. *See Id.* ¶ 6. A letter from the NARA FOIA Officer accompanying that document production notified CREW that NARA identified 336 pages of documents responsive to CREW's request. *Id*. NARA disclosed 31 of those pages in full and 11 in part. *Id.* NARA withheld in full an additional 294 pages of material pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5) (2000), pursuant to the deliberative process and attorney work product privileges. *Id.*

8. On October 25, 2006, plaintiff administratively appealed NARA's determination "insofar as CREW's request was denied." *Id.* ¶ 7.

9. In a letter dated November 28, 2006, NARA Deputy Archivist Lewis Bellardo responded to CREW's appeal. *Id.* ¶ 8. That letter informed CREW that NARA identified an additional 50 pages of responsive materials, of which it was releasing 28 pages in part. *Id.* That letter also informed CREW that NARA decided to release in full an additional 11 pages of responsive material originally withheld, and to release in part an additional 57

pages of documents originally withheld. *Id.* The Deputy Archivist otherwise sustained the determination that the materials were protected by the deliberative process and/or attorney work-product privileges. *See Id.* Tab F.

10. NARA continues to withhold 77 documents in full or in part pursuant to Exemption 5 of the FOIA, representing a total of 294 pages. *See* Stern Decl. ¶ 9 & n.1. Defendant's declaration and *Vaughn* Index, submitted along with this Motion, provide detailed explanations those withholdings.

Dated: May 7, 2007

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Freedom of Information Act ("FOIA") action is set against the backdrop of ongoing litigation in the U.S. District Court of the District of Columbia in which several plaintiffs (including the plaintiff in this case) have attempted to obtain, *inter alia*, copies of certain "WAVES" and "ACR" records from the United States Secret Service ("USSS"). "WAVES" records are the data generated by the Worker and Visitor Entrance System employed at the White House Complex. *See* Declaration of Gary M. Stern, NARA General Counsel ("Stern Decl.") ¶ 5. These records are created "when 'information is submitted by an authorized White House pass holder to the Secret Service about workers and visitors who need access to the White House.'" *Washington Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 64 (D.D.C. 2006) (hereinafter "*Washington Post*") (quoting declaration of USSS official). "ACR" records refer to data contained in the Access Control Records System, which includes "'records generated when a pass holder, worker, or visitor, swipes his or her pass over one of the electronic pass readers located at entrances to and exits from the White House Complex.'" *Id.* at 64-65 (quoting declaration of USSS official).

Although such WAVES and ACR records have been the subject of litigation[1] over whether these records are agency records within the meaning of FOIA, or, instead, are

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[1] Cases in which plaintiffs have sought or are seeking access to, *inter alia*, WAVES records include (current status of that litigation as of date of this filing noted in parentheses): *Washington Post v. Dep't of Homeland Sec.* (No. 06-1737) (voluntarily dismissed by plaintiff); *Democratic National Committee v. United States Secret Service* (No. 06-842) (dismissed pursuant to settlement agreement); *Judicial Watch v. United States Secret Service* (No. 06-310) ("*Judicial Watch*") (motion to dismiss pending); *Citizens for Responsibility and Ethics in Washington v. Dep't of Homeland Security* (No. 06-883) ("*CREW I*") (motion to dismiss pending); and *Citizens for Responsibility and Ethics in Washington v. Dep't of Homeland Security and Allen Weinstein, Archivist of the United States* (No. 06-1912) ("*CREW II*") (motion for summary judgment yet to be filed).

presidential records subject to the exclusive control of the White House, s*ee* 44 U.S.C. § 2204 (2000) (presidential records are subject to public access under FOIA only after the President leaves office and the records are transferred to the National Archives), these records are not directly at issue in this case. Instead, this case seeks, *inter alia*, communications between NARA and the USSS concerning these records, as well as documents related to several of the cases noted above.

In response to CREW's FOIA request, NARA identified 336 pages of responsive documents. NARA initially released 31 in full and another 11 pages in part, while withholding 294 pages under the deliberative process and/or attorney work-product privileges. After CREW appealed those withholdings, NARA subsequently released an additional 11 pages in full and 57 pages in part, but affirmed its decision that the remaining documents were properly redacted or withheld pursuant to FOIA exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2000). Additionally, NARA informed CREW at that time that it had located an additional 50 pages of responsive materials, 28 of which were released in part; the remainder of those new pages were withheld pursuant to FOIA Exemption 5. Along with the filing of this Motion, NARA is making a discretionary disclosure of an additional pages previously withheld in full or in part. This brings the total number of pages withheld in total or in part to 294. *See* Stern Decl ¶ 9 & n.1.

This case presents only two questions: (1) whether NARA properly invoked exemption 5 to withhold materials under the work-product doctrine and the deliberative process and attorney-client privileges; and (2) whether NARA's search for records was adequate. As demonstrated by

the declaration and *Vaughn* Index submitted along with this Motion, NARA is entitled to summary judgment on both of these issues. NARA conducted a reasonable search for responsive records, and each of the documents withheld pursuant to Exemption 5 is either (1) a deliberative communication among NARA staff, or between NARA employees and other representatives of the Executive Branch, on legal and policy matters, (2) attorney work-product created in anticipation of litigation over WAVES records, and/or (3) privileged attorney-client communications. Disclosure of these documents would materially impair the functioning of the agency's decisionmaking by chilling communication within NARA and between NARA and other federal agencies on important matters of law and policy.

BACKGROUND

On September 27, 2006, CREW submitted a FOIA request to NARA seeking:

1. Any and all documents related to the request made by the National Archives and Records Administration ("NARA"), to the United States Secret Service ("USSS"), that the Secret Service retain its own copies of the Worker and Visitor Entrance System ("WAVES") records that it transferred to the White House.

2. Any and all communications both internally and between the National Archives and Records Administration and any other government agency or government entity, referencing the practice of the United States Secret Service to erase copies of WAVES records that it transferred to the White House.

3. Any and all documents referring to or relating to a practice by the Secret Service of deleting records from its computer system.

4. Any and all documents and records referring or related to Judicial Watch v. United States Secret Service, Civ. Action No. 06-310 (United States District Court for the District of Columbia).

5. Any and all documents and records referring or related to Democratic National Committee v. United States Secret Service, Civ. Action No. 06-842 (United States District Court for the District of Columbia).

6. Any and all documents and records referring or related to Citizens for Responsibility and Ethics In Washington v. United States Department of Homeland Security, Civ. Action No. 06-883 (United States District Court for the District of Columbia).

See Stern Decl. ¶ 4 & Tab A. CREW also sought expedited processing of its request and a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) (2000). *Id.* NARA responded to this request on October 20, 2006 in a letter from NARA FOIA Officer Ramona Branch Oliver. *See Id.* Tab B. That letter informed the plaintiff that NARA agreed to expedite CREW's request, and to waive any processing fees. *Id.*

Four days later, on October 24, 2006, NARA produced documents in response to CREW's FOIA request. *See* Stern Decl. ¶ 6 & Tab B. In a letter accompanying that document production, NARA FOIA Officer Ramona Branch Oliver notified CREW that NARA had identified some 336 pages of documents responsive to CREW's request. *See Id.* NARA disclosed 31 of those pages in full. *Id.* NARA also released an additional 11 pages in part, redacting from those documents material that was protected by the deliberative process privilege. *Id.* NARA withheld in full pursuant to Exemption 5 another 294 pages of documents protected by the deliberative process and/or attorney work-product privilege. *Id.*

The following day, October 25, 2006, CREW administratively appealed NARA's determination that portions of these documents are protected by either the deliberative process or attorney work-product privilege. *Id.* ¶ 7. CREW's appeal also challenged the adequacy of the search conducted for responsive records. *Id.* Tab C. NARA Deputy Archivist Lewis Bellardo responded to CREW's appeal in a letter dated November 28, 2006. *Id.* ¶ 8 & Tab D. That letter assured CREW that NARA had performed an adequate search of all records "created and/or

maintained by NARA staff while conducting NARA business." *Id.* Tab D. That letter also noted that in the period since NARA initially responded to CREW's request, NARA staff in the Office of General Counsel and the Office of Presidential Libraries identified an additional 50 pages of responsive materials. *Id.* ¶ 8. NARA released 28 of those pages in part, and withheld the remaining pages under the deliberative process and/or attorney work-product privileges. *Id.* With regard to CREW's challenge to NARA's withholdings, the Deputy Archivist informed CREW that he decided to release in full 11 pages of responsive material, and to release in part an additional 57 pages of documents. *Id.* The Deputy Archivist otherwise sustained the determination that the materials were protected by the deliberative process and/or attorney work-product privileges. *Id.* Tab D. He provided detailed explanations for the basis of those withholdings, including that the majority of the pages withheld were drafts of briefs sent to NARA by Department of Justice attorneys representing NARA in litigation over access to certain WAVES records. *See id.*

On January 12, 2007, CREW served the Complaint in the present action upon the United States Attorney for the District of Columbia. Defendant NARA answered that complaint on February 12, 2007. The parties jointly moved this Court to enter a briefing schedule for this summary judgment motion. This Court granted that request on April 11, 2007.

ARGUMENT

I. STANDARDS FOR SUMMARY JUDGMENT IN FOIA CASES

Summary judgment is the procedural vehicle by which most FOIA actions are resolved. *See* Fed. R. Civ. P. 56(c); *see also, e.g.*, *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the

documents in issue are properly identified."). Summary judgment is to be freely granted where, as here, there are no material facts genuinely at issue, and the agency is entitled to judgment as a matter of law. *See Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 314-15 (D.C. Cir. 1988); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

Under the FOIA, the court conducts a *de novo* review to determine whether the government properly withheld records under any of the FOIA's nine statutory exemptions. *See* 5 U.S.C. § 552(a)(4)(B) (2000). The government bears the burden of justifying non-disclosure. *See Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 774 (D.C. Cir. 2002); *McCutchen v. United States Dep't of Health & Human Servs.*, 30 F.3d 183, 185 (D.C. Cir. 1994). It may satisfy that burden through submission of an agency declaration that describes the withheld material with reasonable specificity as well as the reasons for non-disclosure, and, if necessary, a *Vaughn* index. *See United States Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 753 (1989); *see Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984); *Hemenway v. Hughes*, 601 F. Supp. 1002, 1004 (D.D.C. 1985) (recognizing that in FOIA cases, summary judgment hinges not on the existence of genuine issue of material fact but rather on the sufficiency of agency affidavits). Such affidavits are to be "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Edmonds Institute v. U.S. Dep't of Interior*, 460 F. Supp. 2d 63, 68 (D.D.C. 2006) (citation and quotation marks omitted).

II. NARA PROPERLY WITHHELD DOCUMENTS UNDER EXEMPTION 5 OF THE FOIA

A. Privileges Protected by Exemption 5

The central issue in this litigation is whether NARA properly withheld documents

pursuant to Exemption 5 of the FOIA. Section 552(b)(5) of Title 5 of the United States Code exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5) (2000). In particular, it "exempts those documents . . . that are normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Three civil discovery protections are relevant to NARA's document production in this case: (1) the deliberative process privilege, the general purpose of which is to "'prevent injury to the quality of agency decisions,' and to encourage open, frank, uninhibited evaluation of issues by government employees," *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 151) (internal citation omitted); (2) the attorney work-product doctrine, which is "intended to preserve a zone of privacy in which lawyers can prepare and develop legal theories and strategy with an eye toward litigation free from unnecessary intrusion by an adversary," *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 75 (D.D.C. 2003) (citing *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)); and (3), the attorney-client privilege, which "helps improve the quality of agency decision making by safeguarding the free flow of information that is a necessary predicate for sound advice." *Judicial Watch, Inc. v. U.S. Dept. of Justice*, 306 F. Supp. 2d 58, 74 (D.D.C. 2004) (quoting *Murphy v. Tenn. Valley Auth.*, 571 F.Supp. 502, 506 (D.D.C. 1983)).

1. Deliberative Process Privilege

The deliberative process privilege is an "ancient [one] . . . predicated on the recognition 'that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.'" *Dow Jones & Co. v. DOJ*, 917 F.2d 571, 573 (D.C. Cir.

1990) (quoting *Wolfe v. HHS*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc)). Agencies may invoke the privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc), *overruled in part on other grounds by*, *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc).

For a document to be covered by the deliberative process privilege, that document must be both "predecisional" and "deliberative." *Wolfe*, 839 F.2d at 774 (citing *EPA v. Mink*, 410 U.S. 73, 88 (1973)). "Pre-decisional" documents are those that are "generated before the adoption of an agency policy." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also NLRB*, 421 U.S. at 151 n.18; *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). An agency need not "point to an agency final decision" to invoke the privilege, however; "[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." *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d at 35 (citing *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1223 (D.C. Cir. 1989)). In addition, "[t]here should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take – of the deliberative process – by which the decision itself is made.'" *Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Vaughn v.*

Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). The agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions . . . .'" *Id.* (quoting *NLRB*, 421 U.S. at 151).

To be "deliberative," a document must be "a direct part of the deliberative process," meaning that the document "makes recommendations or expresses opinions on legal or policy matters." *Vaughn*, 523 F.2d at 1143-44; *see also Wolfe*, 839 F.2d at 773-74; *City of Virginia Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (deliberative process "protects 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency'") (quoting *Coastal States Gas Corp.*, 617 F.2d at 866). The privilege also protects facts that reflect the agency's decision-making process. *See Montrose Chemical Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974). Facts are protected by the privilege if the "'manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are inextricably intertwined with the policymaking process.'" *Hamilton Securities Group v. HUD*, 106 F. Supp. 2d 23, 33 (D.D.C. 2000) (quoting *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980)); *see also Wolfe*, 839 F.2d at 774-76.[2]

[2] 5 U.S.C. § 552(b) does require an agency to disclose "[a]ny reasonably segregable portion" of a document being withheld pursuant to the deliberative process privilege. As demonstrated in the *Vaughn* Index, NARA has undertaken a segregability analysis with regard to each of the documents withheld and has released all segregable factual information. *See* Stern Decl. ¶ 12. NARA has made these disclosures – for example, the header information on e-mail communications – even though many of the documents are also protected by the attorney work-product information, which does not require agencies to segregate factual information. *See infra* at 10-11.

2. Attorney Work-Product Doctrine

The attorney work-product doctrine "protects from disclosure any materials prepared by or for a party or its attorney or by or for a party's representative in anticipation of litigation." *Hertzberg*, 273 F. Supp. 2d at 75 (citing Fed. R. Civ. P. 26(b)(3)). While the doctrine applies only to documents "initially prepared in contemplation of litigation, or in the course of preparing for trial," *Coastal States Gas Corp.*, 617 F.2d at 865, litigation need not actually be pending – or even certain – at the time of the document's creation for the protection to attach; so long as an "articulable claim, likely to lead to litigation . . . ha[d] arisen," a document prepared in anticipation of such litigation is shielded. *Id.*; *see also Hertzberg*, 273 F. Supp. 2d at 78 ("litigation need not be actual or imminent; it need only be 'fairly foreseeable.'" (quoting *Coastal States Gas Corp.*, 617 F.2d at 865)). "[T]he 'testing question' for the work product privilege . . . is whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *In re Sealed Case*, 146 F.3d 881, 884 (D.C.Cir.1998). "To meet this standard, 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*, 273 F. Supp. 2d at 79 (quoting *In re Sealed Case,* 146 F.3d at 884). Moreover, where this privilege applies, the entire document in question is exempt from disclosure; an agency need not comply with the segregability requirement of 5 U.S.C. § 552(b). *See Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 372 (D.C. Cir. 2005) ("[W]e hold that, because the emails at issue in this case are attorney work product, the entire contents of these documents – *i.e.*, facts, law, opinions, and analysis – are exempt from disclosure under FOIA.").

3. Attorney-Client Privilege

The attorney-client privilege is the "oldest of the evidentiary privileges." *Coastal States Gas Corp.*, 617 F.2d at 862. "Its purpose is to assure that a client's confidences to his or her attorney will be protected, and therefore encourage clients to be as open and honest as possible with attorneys." *Id.* That privilege extends not only to a client's communications to an attorney, but also to an attorney's written communication with the client: "While its purpose is to protect a client's disclosures to an attorney, the federal courts extend the privilege also to an attorney's written communications to a client, to ensure against inadvertent disclosure, either directly or by implication, of information which the client has previously confided to the attorney's trust." *Judicial Watch, Inc. v. U.S. Dept. of Justice*, 306 F. Supp. 2d at 73-74 (citing *Coastal States,* 617 F.2d at 862).

* * * * *

As amply demonstrated by the declaration and *Vaughn* Index submitted in support of this Motion, each document withheld in full or in part by NARA is protected by one or more of these three evidentiary protections. To assist the Court, these documents have been grouped into four separate categories that explain the deliberative and/or litigation context in which those documents were created: (1) Government deliberations on the disposition of WAVES records; (2) Inter- and intra- agency deliberations regarding the *Judicial Watch* litigation over WAVES records; (3) Deliberations on policies for retaining WAVES records occurring contemporaneously with ongoing litigation seeking access to those records; and (4) Communications between Department of Justice Attorneys and NARA concerning draft legal briefs in pending litigation. The basis for withholding each of these documents is set out below.

B. Government Deliberations on Disposition of WAVES Records

1. Deliberations on Proposed WAVES Records Schedules

Pursuant to the Federal Records Act, 44 U.S.C. § 3303a (2000) ("FRA"), federal agencies regularly submit to NARA draft "record schedules" concerning the proposed disposition of certain records. *See* Stern Decl. ¶ 14. NARA reviews these proposed schedules to make determinations about the proper disposition of such records, including what format the records must be in and how long they must be kept. *Id.* That review process routinely involves both internal communications among NARA archivists and inter-agency communications with the entity that submitted the proposed schedule. *Id.* If, after these preliminary communications, NARA believes a records schedule is warranted, it publishes a proposed schedule in the *Federal Register* seeking notice and comment from interested persons. *Id.*; *see also* 44 U.S.C. § 3303a(a) (2000).

In the early- to mid-1990s, the United States Secret Service submitted multiple proposed records schedules for its copies of the records generated by the WAVES entry system. *See* Stern Decl. ¶ 14. Proposed schedules submitted in January 1990, February 1993, and March 1996 were released in full to the plaintiff in response to its FOIA request. These proposed schedules – all of which were eventually withdrawn – gave rise to intra- and inter-agency discussions protected under the deliberative process privilege. *Id.*

While the proposed schedules were released in full, the deliberations that resulted from the schedules' submission, *see* Stern Decl. ¶ 15, *Vaughn* Index ## 1 - 11, were redacted in part

(while all of the header information[3] of the e-mails was released, the substance of the deliberations was withheld). Document 1 and Documents 4 - 11 are e-mail communications written by NARA lawyers and archivists between 1995 and 2000. These communications, which contain candid deliberations about the proposed records schedules, are both predecisional – in that they were part of ongoing deliberations about the proposed WAVES records schedule – and deliberative – in that they "ma[de] recommendations or expresse[d] opinions on legal or policy matters" related to the retention of WAVES records, *Vaughn*, 523 F.2d at 1144.[4]

In addition to these e-mails, NARA also identified as responsive two other documents created as part of the deliberations concerning the proposed WAVES records schedules. First, NARA identified a single page of notes taken by NARA archivist Richard Marcus. *See* Stern Decl. ¶ 16; *Vaughn* Index # 2. These notes are deliberative and pre-decisional because they represent thoughts of an individual NARA employee in connection with meetings held to work through legal and policy issues related to the record status and retention policies of WAVES records. *See Judicial Watch of Florida, Inc. v. Dep't of Justice*, 102 F. Supp. 2d 6, 14 (D.D.C.

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[3] As used throughout this brief, "header information" refers to the data that appears at the top of a printed e-mail communication, including: (1) the name of the sender and recipients of the message; (2) the date of the message; and (3) the "subject line" or title of the message.

[4] The fact that these deliberations occurred over e-mail does not deprive them of protection under the deliberative process privilege; if anything, that medium heightens the need to protect these communications. *See Hornbostel v. U.S. Dept. of Interior*, 305 F. Supp. 2d 21, 31 (D.D.C. 2003) ("[E]mails exchanging thoughts and opinions about various legal and policy decisions . . . . are all part of the group thinking and preliminary actions encompassed by the policy making process in an agency. Disclosure of such documents would risk causing an injury to the quality of this process, which is what Exemption 5 seeks to avoid."). Disclosure of the contents of e-mail messages would impede the day-to-day functioning of NARA because its attorneys and staff would no longer feel free to discuss their ideas and render opinions, recommendations, or advice using this powerful communication tool. *See* Stern Decl. ¶ 11.

2000) (finding that Attorney General's notes of a meeting were protected by the deliberative process privilege because they represent "distillations of issues that she believed were important at the time of their discussion and which she wished to memorialize for later reference") .

Second, NARA identified as responsive to the FOIA request an undated one-page cover memorandum entitled "U.S. Secret Service White House Division Workers and Visitors Entry System (WAVES), Job No. N1-87-93-03" from a NARA staffer commenting on (and attaching two copies of) the proposed records schedule. *See* Stern Decl. ¶ 17 *Vaughn* Index # 3. This internal memorandum discusses legal and policy positions of both NARA and the White House. *Id.* In the context of the ongoing discussions about the proposed records schedules, this internal memorandum is clearly deliberative and pre-decisional. *Id.*

Disclosure of these communications offering candid assessment and advice on the proposed records schedules would undermine the interests protected through the deliberative process privilege. *See* Stern Decl. ¶ 11. As noted, that privilege was designed to: (1) encourage open, frank discussions on matters of policy between subordinates and superiors; (2) protect against premature disclosure of proposed policies before they are finally adopted; and (3) protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *Russell*, 682 F.2d at 1048. Releasing these e-mails would undermine the first of these goals by discouraging frank communication among archivists, and between NARA and agencies submitting proposed records schedules, out of fear that any such communication – no matter how preliminary or informal – might be publicly disclosed. *See Jordan,* 591 F.2d at 772-73 (the deliberative process privilege "protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the

quality of agency policy decisions. . . . [I]t [also] protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided[,] not for matters they considered before making up their minds"). Moreover, disclosing these preliminary deliberations concerning draft WAVES records schedules would undermine the third goal of the deliberative process privilege by risking public confusion about the legal status of the records. As these records were never scheduled under the Federal Records Act – because they have in fact been determined to be Presidential Records not subject to the FRA, *see* Defendant's Answer ¶ 17 – releasing preliminary communications about unenacted schedules that proposed to treat WAVES as Federal Records poses a substantial risk of creating public confusion. *See, e.g.*, *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995) (deliberative communications about a policy "which the agency ultimately elected not to issue" pose a substantial risk of "creat[ing] public confusion regarding the agency's rationale" (citing *Russell*, 682 F.2d at 1048-49). That risk of confusion is heightened by the fact that NARA is not the final arbiter under the Presidential Records Act of whether a document qualifies as a presidential record. *See* Stern Decl. ¶ 31; 44 U.S.C. § 2203(a) (2000); *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991). Thus, the views of NARA counsel and archivists on these proposed records schedules by definition cannot represent the final views of the government with regard to these records' status.

In addition to being protected by the deliberative process privilege, these e-mail communications are protected by the attorney work-product doctrine, which "protects from disclosure any materials prepared by or for a party or its attorney or by or for a party's representative in anticipation of litigation." *Hertzberg*, 273 F. Supp 2d at 75. Specifically, the e-mails denoted as Documents 5 - 11 were written by NARA attorneys, or penned for NARA

attorneys by NARA archivists in response to specific questions counsel posed related to the legal status of WAVES records.[5] *See* Stern Decl. ¶ 23; *Vaughn* Index ## 5-11. Although no litigation was yet pending on the status of WAVES records at the time NARA employees composed these messages, that fact does not deprive the e-mails of protection under the attorney work-product doctrine. For that doctrine to apply, litigation need not be "actual or imminent"; "it need only be 'fairly foreseeable.'" *Hertzberg*, 273 F. Supp. 2d at 78 (quoting *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." *Id.* at 79 (quoting *In re Sealed Case*, 146 F.3d at 884). These inter- and intra-agency communications meet that "in anticipation of litigation" standard because NARA employees reasonably believed that the resolution of WAVES' status as either federal or presidential records would give rise to litigation. *See* Stern Decl. ¶ 23. NARA believed that many parties might wish to file FOIA requests seeking to obtain records containing information on individuals who visited the White House, and that these requests would in turn implicate the question of whether WAVES are agency records of the USSS (and are therefore subject to FOIA) or are presidential records, and thus not subject to FOIA during the incumbent Administration. *Id.* It was entirely reasonable for NARA to believe that the question of whether WAVES are agency records obtainable under FOIA would give rise to litigation – as it has in other instances. *See, e.g.*, *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996) (analyzing whether records are agency

[5] Unlike these e-mails, the internal memorandum commenting on the proposed records schedule discussed above (*Vaughn* Index # 3) is not protected by the attorney work-product doctrine. Nothing on the face of that document indicates that it was prepared by or for an attorney.

records); *United We Stand Am., Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004) (same). Indeed, NARA's belief that litigation was inevitable proved to be not merely reasonable, but correct; the status of WAVES records was or is at the heart of several different pieces of litigation, including *The Washington Post*, *Democratic National Committee, Judicial Watch*, *CREW I*, and *CREW II*.

2. Deliberations on 2001 WAVES Record Retention Memorandum

NARA identified several pre-decisional deliberative documents related to a policy proposal advanced immediately prior to the close of the Clinton administration concerning the management of WAVES records and the transfer of certain Clinton Administration WAVES records from USSS to the White House. On January 17, 2001, an Associate Counsel to the President and a representative of the United States Secret Service drafted a memorandum for NARA's General Counsel entitled "Disposition of certain Presidential Records created by the USSS." *See Vaughn* Index # 13; *see also* Stern Decl. ¶ 18. This memorandum made policy proposals concerning the management (in terms of their transfer of possession from the USSS to the White House) and disposition of WAVES and ACR records. *See* Stern Decl. ¶ 18; *Vaughn* Index # 13. NARA's General Counsel responded two days later with a letter commenting on the proposal submitted by the Associate Counsel to the President and the USSS. *See* Stern Decl. ¶ 18; *Vaughn* Index # 14. Also included in this set of deliberative documents are several communications related to this proposal, including: (1) a set of handwritten notes taken by NARA's General Counsel during a conversation with a USSS official prior to the receipt of – and concerning – the proposal forwarded to NARA, *see* Stern Decl. ¶ 18; *Vaughn* Index # 12; (2) two e-mails sent by NARA's General Counsel to NARA personnel shortly after receiving the proposal, in which the NARA attorney discusses the proposal for maintaining and transferring

WAVES and ACR records, s*ee* Stern Decl. ¶ 19; *Vaughn* Index ## 15-16; (3) two pages of notes written by a NARA archivist containing questions and comments on legal and recordkeeping issues raised by the proposal (Document # 13) and the NARA General Counsel's letter and emails in response thereto (Documents # 14-15), *see* Stern Decl ¶ 19; *Vaughn* Index # 15a; and (4) a facsimile in which NARA's General Counsel forwarded to another NARA employee the aforementioned proposal for records retention (document # 13) and the internal NARA e-mail communications concerning that proposal (document # 16), and recounted a conversation between NARA's General Counsel and an Associate Counsel to the President on a legal issue related to WAVES records, *see* Stern Decl. ¶ 19; *Vaughn* Index # 17.

Like the communications concerning the proposed records schedules, each of these documents is protected by both the deliberative process privilege and the attorney work-product doctrine. The communications were part of an ongoing inter-agency deliberation about the maintenance and disposition of WAVES records. Such documents, which "reflect[] the give-and-take of the consultative process" that occurs in formulating agency policy – in this instance, policy concerning the maintenance of WAVES records and methods for transferring them from the USSS to the White House – fall squarely within the deliberative process privilege. *Heartwood, Inc. v. U.S. Forest Service*, 431 F. Supp. 2d 28, 37 (D.D.C. 2006). Making public such policy proposals (or other employees' comments on those proposals) is undoubtedly "likely 'to stifle honest and frank communication within the agency.'" *Id.* (quoting *Coastal States Gas Corp.*, 617 F.2d at 866); *see also* Stern Decl. ¶ 11.

Moreover, as noted above, at the time of these communications NARA attorneys reasonably believed that any determination about the disposition of WAVES records would give

rise to litigation – which it has. *See* Stern Decl. ¶ 23. Thus, these communications about, *inter alia*, policies for retaining WAVES records, drafted by and for attorneys representing NARA and other agencies, constitute attorney work-product that is exempt from disclosure under FOIA Exemption 5. *Id.*

3. Deliberations on 2004 WAVES Record Retention Memorandum

In September 2004, an Associate Counsel to the President and a Special Assistant to the Director to the USSS conveyed to NARA an unsigned draft document dated July 29, 2004 and titled "Disposition of Certain Presidential Records Created by the USSS." *See* Stern Decl. ¶ 20; *Vaughn* Index # 18, 18a. This document, and the e-mail that conveyed it, informally advanced a proposal for the disposition of WAVES and ACR records. *See* Stern Decl. ¶ 20; *Vaughn* Index # 18, 18a. The receipt of this informal proposal resulted in three separate e-mail exchanges: (1) a discussion among NARA staff in response to the NARA General Counsel's request for comments on the proposal, *see Vaughn* Index ## 19-25; (2) an exchange between NARA's General Counsel, attorneys at the Department of Justice and Office of Counsel to the President, and officials at the USSS, commenting on the informal proposal and identifying issues to be addressed at subsequent inter-agency meetings, *see Vaughn* Index 27; and (3) e-mails from NARA General Counsel to other NARA staff discussing issues raised by the proposal and summarizing inter-agency deliberations, *see Vaughn* Index # 28-29. The receipt of this proposal also led to the creation of an unsigned internal NARA document discussing the July 2004 proposal. *See* Stern Decl. ¶ 20; *Vaughn* Index # 26. That two-page document is part of the ongoing discussion of the disposition of WAVES records that resulted when the USSS and White House Counsel submitted their 2004 memorandum, and is therefore pre-decisional and

deliberative. *Id.*

Like the communications regarding the 2001 proposal for the maintenance and disposition of WAVES and ACR records, these 2004 documents are part of intra- and inter-agency policy deliberations. The unsigned draft from the Office of Counsel to the President and the USSS is clearly deliberative because it was part of (indeed, the catalyst for) discussions about procedures for the disposition of WAVES and ACR records. Disclosing this unsigned, preliminary draft policy proposal risks confusing the public about the agencies' views on the appropriate procedures for the maintenance and disposition of WAVES and ACR records. *See Skull Valley Band of Goshute Indians v. Kempthorne*, No. 04-399, slip op. at 14 (D.D.C. Mar. 26, 2007) ("[D]isclosure of draft documents 'could lead to confusion of the public' because they might 'suggest 'as agency position that which is as yet only personal position.'' (quoting *Russell*, 682 F.2d at 1048)).

Similarly, the resulting e-mail communications concerning this proposal among NARA attorneys and staff, and between attorneys at NARA and other Executive Branch agencies, are also deliberative. Disclosing these personal, non-final, intra-agency discussions would seriously harm the ability of government employees to communicate openly and frankly on policy matters for fear that even their informal or preliminary comments might one day be publicly available for scrutiny. *See* Stern Decl. ¶ 11; *see also Heartwood*, 431 F. Supp. 2d at 37 (Exemption 5 protects documents that "reflect the personal opinions of the writer rather than the policy of the agency").

Finally, because these communications were authored by attorneys (or in direct response to inquiries made by attorneys), and because they concern the disposition of WAVES records – a subject NARA reasonably believed to be the subject of future litigation, *see* Stern Decl. ¶ 23 –

these documents are also protected by the attorney work-product doctrine.[6]

4. 2005 E-mail Between Associate Counsel to the President and NARA General Counsel

This category of deliberative documents discussing the disposition of WAVES records also contains a January 2005 e-mail from an Associate Counsel to the President and NARA's General Counsel, forwarding an e-mail discussion with a White House Office of Records Management employee about WAVES record retention issues. *See* Stern Decl. ¶ 20; *Vaughn* Index # 30. Because the e-mail contains policy recommendations on the retention of WAVES records and solicits feedback on that proposal, and because it was sent to (and from) an attorney who expected to be involved in litigation over the legal status of WAVES records, *see* Stern Decl. ¶ 23, this e-mail is covered by both the deliberative process privilege and the attorney work-product doctrine. Failure to shield this communication from disclosure "is likely in the future to stifle honest and frank communication" in agency decisionmaking, thereby harming the public interest. *Coastal States Gas Corp.*, 617 F.2d at 866; *see also* Stern Decl. ¶ 11.

5. *USSS Presentation to NARA Counsel and Counsel's Notes of that Meeting*

Finally, this first category of responsive documents also includes a copy of six pages of a presentation given in July 2005 by the USSS to NARA attorneys and staff, attorneys from the Department of Justice and the Office of Counsel to the President, and an employee from the White House Office of Records Management, in connection with ongoing legal and policy deliberations regarding the management and disposition of WAVES and ACR records. *See* Stern

[6] NARA does not assert the attorney work-product doctrine with regard to Document 26. Because that document is not addressed to any specific person and its author is unknown, see *Vaughn* Index # 26, NARA cannot represent that it was created by or for an attorney.

Decl. ¶ 21; *Vaughn* Index # 31. The document also contains marginalia consisting of hand-written annotations made by NARA's general counsel. *Id.* This presentation (and the accompanying marginalia), which contains specific policy proposals concerning records management, was part of an ongoing inter-agency deliberation about the appropriate management and disposition of WAVES and ACR records. As such, it is protected by the deliberative process privilege. *See* Stern Decl. ¶ 21. Releasing this presentation would chill inter-agency communication because it will make agencies less likely to seek input from other agencies on draft policy proposals, and in addition it will make any such communication less effective because agencies will become less willing to put any proposals into writing for fear that their preliminary suggestions might ultimately be disclosed. *See* Stern Decl. ¶ 11. Chilling this type of communication between NARA and federal agencies on record keeping issues is particularly dangerous because NARA possesses unique expertise within the federal government in working with records statutes such as the FRA and PRA.

This presentation is also protected by the attorney work-product doctrine. The presentation was created to inform attorneys from NARA, USSS, DOJ, and the Office of Counsel to the President about certain legal and policy matters concerning WAVES records. As the legal status of WAVES records was something that NARA reasonably believed would give rise to litigation, *see* Stern Decl. ¶ 23, this document constitutes a briefing prepared for an attorney in anticipation of the litigation. *See Hertzberg*, 273 F. Supp. 2d at 79 (work-product privilege covers documents "prepared in anticipation of foreseeable litigation, even if no specific claim is [yet] contemplated"). Moreover, because this document was prepared for attorneys in anticipation of litigation on the status of WAVES records – and, indeed, contains the attorney's

handwritten notes on the subject of that presentation – the work-product doctrine applies even if the author of the presentation was not an attorney. *See id.* at 76-77.

Also responsive to CREW's FOIA request are two separate sets of handwritten notes taken in connection with the aforementioned presentation. *See* Stern Decl. ¶ 21; *Vaughn* Index ## 32-33. These notes are protected by the deliberative process privilege because they reflect the NARA archivists' "distillations of issues that [they] believed were important at the time of [the] discussion and which [they] wished to memorialize for later reference." *Judicial Watch of Florida, Inc. v. Dep't of Justice*, 102 F. Supp. 2d 6, 14 (D.D.C. 2000); *see also* Stern Decl. ¶ 21.

C. DELIBERATIONS RELATED TO THE PENDING *JUDICIAL WATCH* LITIGATION

The second category of responsive documents withheld in part contains inter- and intra-agency communications responsive to paragraph 4 of CREW's FOIA request, which seeks "any and all documents and records referring or relating to *Judicial Watch v. United States Secret Service*, Civ. Action No. 06-310 (United States District Court for the District of Columbia)." In that litigation, brought under the FOIA, Judicial Watch attempted to obtain, *inter alia*, WAVES records detailing visits of lobbyist Jack Abramoff to the White House. NARA identified 11 documents (totaling 17 pages) responsive to this request. *See* Stern Decl. ¶ 24; *Vaughn* Index ## 34-44, 53. These documents were redacted in part.[7]

The first three documents that fall into this category are e-mails between NARA's General Counsel and an attorney at the Department of Justice, with copies to other DOJ attorneys as well as an Associate Counsel to the President and an official at the USSS. *See* Stern Decl. ¶

[7] Again, the header information for these e-mail communications was released (as well as some content, where noted), but the deliberative material contained in these messages was redacted.

24; *Vaughn* Index ## 34-37. These e-mails forward an AP news article discussing the filing of the *Judicial Watch* action and candidly discuss the pending lawsuit and the legal status of WAVES records. *See Id.* NARA has released header information for these e-mails, as well as the news story. NARA redacted the substantive discussions between NARA counsel and the DOJ attorney, however, because those portions of the e-mails are deliberative communications drafted by attorneys concerning a legal issue relevant to the ongoing litigation. Because the e-mails "express[] opinions on legal . . . matters," *Vaughn*, 523 F.2d at 1144, they are protected by the deliberative process privilege. Moreover, because they were drafted by Government attorneys and discuss a matter currently in litigation, these e-mails are undoubtedly shielded by the attorney work-product doctrine as well. *See, e.g.*, *Judicial Watch, Inc. v. Department of Justice*, 432 F.3d 366, 367 (D.C. Cir. 2005) (holding that e-mails among Department of Justice attorneys discussing whether to file an amicus brief in a pending case and what position to take in that litigation are protected in their entirety by the work-product doctrine and need not be disclosed).

Also included in this category of documents are e-mails between NARA lawyers and other NARA staffers regarding issues related to the *Judicial Watch* litigation. These e-mails candidly discuss legal issues involving the status of WAVES records in light of an AP story detailing the USSS's decision to release certain records in response to the *Judicial Watch* litigation. *See* Stern Decl. ¶ 24; *Vaughn* Index ## 38-44. The header information from these e-mails, as well as the AP story, has been released in response to CREW's FOIA request. The remaining, redacted material in all of these e-mails is protected by the deliberative process privilege because these types of candid, informal discussions of legal issues related to the

pending litigation are "deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975); *see also* Stern Decl. ¶ 11. Moreover, these internal NARA e-mails – with the exception of Documents 38 and 39[8] – are also protected by the attorney work-product doctrine because they represent the views of NARA's counsel, or contain responses to questions posed by NARA counsel to other NARA staff, on issues related to the pending *Judicial Watch* litigation. *See* Stern Decl. ¶ 25; *see also Hertzberg*, 273 F. Supp 2d at 75 (work-product privilege protects materials "prepared *by or for* a party or its attorney . . . in anticipation of litigation" (emphasis added)).

Finally, this category contains an additional e-mail authored by NARA's General Counsel and sent to several NARA employees. *See* Stern Decl. ¶ 24; *Vaughn* Index # 53. The majority of this document has been released, although NARA has withheld two lines of text containing the NARA General Counsel's characterization of a legal filing in the *Judicial Watch* litigation. That portion of the e-mail is protected not only by the deliberative process privilege – because it "expresses opinions on legal . . . matters," *Vaughn*, 523 F.2d at 1143 – but also by the work-product doctrine, because it contains "[m]aterial[] relating to mental impressions, opinions and legal theories of attorneys" on a matter in litigation. *Simmons, Inc. v. Bombardier, Inc.*, 221 F.R.D. 4, 7 (D.D.C. 2004).

Disclosing any of these communications about the pending *Judicial Watch* litigation or

[8] Unlike Documents 34-36, 39-43, and 52, these two messages from NARA archivists did not represent the legal opinions of NARA lawyers or responses to questions posed by lawyers bearing on a legal issue in that pending litigation; these messages represented the individual views of non-lawyers. Nevertheless, for the reasons noted above, these messages are still protected by the deliberative process privilege.

the USSS's decision to release certain documents as part of that litigation would have a detrimental impact on the agency decision-making process. Releasing e-mails that constitute collaborative legal and policy discussions is likely to chill the candor of agency employees who feel that their every move is subject to scrutiny. *See* Stern Decl. ¶ 11. "[T]he [deliberative process] privilege rests most fundamentally on the belief that were agencies forced to operate in a fishbowl . . . the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 (D.C. Cir. 1994).

Moreover, such a disclosure would also harm the adversarial process. These communications candidly discuss pending litigation. Disclosure of the personal thoughts of government attorneys analyzing a question in light of ongoing litigation (or their agents performing such an analysis at their behest) would discourage that kind of preparation and contemplation in future cases, thereby harming the effectiveness of that attorney's representation of its client. *See, e.g.*, *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) ("Without a strong work-product privilege, lawyers would keep their thoughts to themselves, avoid communicating with other lawyers, and hesitate to take notes."); *see also Hickman*, 329 U.S. at 510-11. Accordingly, this material was properly withheld under Exemption 5.

D. DELIBERATIONS ON STATUS AND DISPOSITION OF WAVES RECORDS CONTEMPORANEOUS WITH ONGOING LITIGATION

Also responsive to CREW's FOIA requests is a series of communications between NARA, the Department of Justice, the USSS, and the Office of Counsel to the President regarding the legal status and disposition of WAVES records. These communications – which

occurred against the backdrop of pending litigation seeking access to WAVES records – were withheld in full or in part under Exemption 5. For the reasons explained below, each of those withholdings was appropriate, as this material is protected by both the deliberative process privilege and/or the attorney work-product doctrine, and – in the case of a legal memorandum from the Department of Justice – the attorney-client privilege as well.

1. Draft Memorandum of Understanding Between USSS and White House Office of Records Management

On May 17, 2006, the White House Office of Records Management ("WHORM") and the USSS executed a Memorandum of Understanding ("MOU") that both documented past practice regarding WAVES and ACR records and formalized the legal status of those records and WHORM's management and custody of the WAVES and ACR records. The USSS made the final version of that MOU public in a filing in a related case seeking access to certain WAVES records.[9]

Included among the documents withheld under Exemption 5 in this litigation is a draft of that MOU submitted to NARA for its review prior to the document's execution. *See* Stern Decl. ¶ 26; *Vaughn* Index # 45. Drafts of final policy documents may be validly withheld under the deliberative process privilege, because these preliminary, unexecuted documents are necessarily pre-decisional. *See Hamilton Securities Group*, 106 F. Supp. 2d at 31-33 (citing *Coastal States Gas Corp.*, 617 F.2d at 866). Revealing the process by which such a draft proposal becomes final would intrude into the deliberative process. "[T]he disclosure of editorial judgments – for

[9] The USSS publicly filed a copy of that MOU as an attachment to the supplemental declaration of Paul S. Morrissey, Deputy Assistant Director of the USSS, in *The Washington Post v. US Dep't of Homeland Security*, No. 06-1737 (D.D.C) (*see* Docket Entry # 10-2).

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 Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987); *Russell*, 682 F.2d at 1048 (holding that draft agency report is protected from disclosure by the deliberative process privilege). Therefore, this draft of the Memorandum of Understanding was properly withheld under Exemption 5.

2. Nonpublic OLC Advice Memorandum

Also included among the documents withheld in full pursuant to Exemption 5 is a nonpublic advice memorandum authored by the Department of Justice's Office of Legal Counsel ("OLC"). This OLC advice memorandum contains legal discussion regarding WAVES records and was issued in connection with OLC's advisory function of providing legal advice to the Executive Branch. *See* Stern Decl. ¶ 28; *Vaughn* Index # 55. This advice memorandum and its drafts (*see Vaughn* Index ## 45, 50) address an issue at the heart of several pieces of litigation: the legal status of WAVES and ACR records. As noted, NARA counsel believed that litigation would result over a determination of WAVES' status as either Presidential or Federal Records. *See* Stern Decl. ¶ 23. That belief was ultimately proved true with the filing of several FOIA requests seeking access to WAVES records, and the litigation resulting therefrom – including *Judicial Watch*, *Democratic National Committee, Washington Post*, *CREW I*, and *CREW II*. Because this legal advice memorandum represents the most sensitive kind of deliberative analysis conducted by government attorneys, it is shielded from disclosure by multiple exemption 5 privileges.

First, the nonpublic OLC advice memorandum is shielded by the deliberative process privilege because it contains legal discussion regarding WAVES records. This document, which has been closely held and not circulated outside the Executive Branch, *see* Stern Decl. ¶ 28, arises out of OLC's advisory function of providing confidential legal advice to the Executive Branch. Courts have repeatedly found that this type of nonpublic, advisory OLC memorandum is exempt from disclosure under FOIA pursuant to the deliberative process privilege. *See National 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 like the one at issue here was both predecisional and deliberative, and therefore exempt from disclosure under Exemption 5); *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).[10]

Second, this nonpublic OLC advice memorandum is also protected by the attorney-client

[10]The fact that the PRA vests in the President the responsibility to determine whether a document is covered by that Act, *see* Stern Decl. ¶ 31; *Armstrong*, 924 F.2d at 290, only underscores the deliberative nature of this nonpublic OLC advice memorandum. *See, e.g., National Counsel of La Raza,* 339 F. Supp. 2d at 581 (noting the OLC advice memorandum was predecisional, in part, because OLC did not have the authority to formulate final agency policy on the question involved).

privilege. That privilege is "the oldest of the evidentiary privileges," whose purpose "is to assure that a client's confidences to his or her attorney will be protected, and therefore encourage clients to be as open and honest as possible with attorneys." *Coastal States Gas Corp.*, 617 F.2d at 862. The privilege applies not only to a client's communication with its lawyers but "extend[s] . . . also to an attorney's written communications to a client, to ensure against inadvertent disclosure, either directly or by implication, of information which the client has previously confided to the attorney's trust." *Id.* This nonpublic OLC advice memorandum, which has been closely held and not shared with anyone outside the Executive Branch, *see* Stern Decl. ¶ 28, must be protected in order to shield this important attorney-client relationship between the DOJ and other Executive Branch agencies.

Finally, the nonpublic OLC advice memorandum is also protected by the attorney work-product doctrine. That doctrine was designed to provide attorneys with "a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *Coastal States Gas Corp.*, 617 F.2d at 864. As the Supreme Court has recognized, that zone of privacy is essential to the functioning of the adversary system; without it, attorneys will shy away from conducting the kind of analysis that is necessary to aggressively evaluate a client's position and recommend the best course of action:

> Proper preparation of a client's case demands that [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be

poorly served.

Hickman, 329 U.S. at 511. Disclosure of this advice memorandum containing legal discussion would significantly impair the Department's ability to offer nonpublic legal advice to the Executive Branch about issues in or likely to lead to litigation, because it will create the specter that any advice committed to paper might be obtained by submitting a FOIA request to a client agency that received a copy of that legal analysis. *See* Stern Decl. ¶ 28.

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

The category of deliberative documents contemporaneous with ongoing litigation includes a series of communications between the Department of Justice, NARA, the USSS, and Office of Counsel to the President concerning the legal issues addressed by the drafts of the aforementioned drafts of the MOU and the DOJ memorandum. As noted, these draft documents were circulated to the relevant federal agencies by an Associate Counsel to the President on May 9, 2006. *See* Stern Decl. ¶ 26; *Vaughn* Index # 45. Thereafter, NARA's General Counsel, the Associate Counsel to the President, DOJ attorneys, and representatives from the USSS exchanged communications candidly discussing legal issues regarding WAVES records that were relevant to the draft documents. *See* Stern Decl. ¶ 26; *Vaughn* Index ## 46-52. The header information from all of these e-mail messages has been released, but the substance of the e-mails – which contains deliberative communications of government attorneys discussing the government's position on legal questions currently in litigation – was withheld.

Document 54 also relates to the draft MOU and DOJ memorandum circulated on May 9, 2006. That e-mail, from NARA General Counsel to NARA staff, discusses a FOIA request for

WAVES records submitted by the Washington Post. While the portion of the e-mail containing that FOIA request was released, NARA has redacted a portion of that message discussing issues surrounding WAVES recordkeeping that related to the draft MOU and DOJ memorandum. *See* Stern Decl. ¶ 27; *Vaughn* Index # 54.

The substance of these e-mails, which is protected by both the deliberative process privilege and attorney work-product doctrine, was validly withheld. These communications are protected by the deliberative process privilege because they reflect individual attorneys' comments on legal and policy matters related to the status of WAVES records and because they contain suggestions for revisions to draft documents. As such, these documents "reflect[] the give-and-take of the consultative process" and fall squarely within the deliberative process exemption, which "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp.*, 617 F.2d at 866. Moreover, as noted above, the deliberative process privilege is especially protective of the process by which draft agency policies become finalized. *See Dudman Communications Corp.*, 815 F.2d at 1569 ("[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.").

These e-mail communications are also protected by the attorney work-product privilege because they contain candid impressions of lawyers (and other officials) from the DOJ, USSS, NARA, and the Office of Counsel to the President on legal questions at issue in ongoing litigation against the Government. *See* Stern Decl. ¶ 26. These mental impressions of

government attorneys may be "properly withheld as attorney work product" because "they contain the 'mental impressions, conclusions, opinions or legal theories of an attorney'" on legal questions that were then the subject of ongoing litigation. *Dipietro v. Executive Office for U.S. Attorneys*, 357 F. Supp. 2d 177, 184 (D.D.C. 2004) (quoting Fed. R. Civ. P. 26(b)(3)).

4. Inter- and Intra-Agency Deliberations About the Transfer and Retention of WAVES and ACR Records in Light of One or More Pending Lawsuits

Finally, this category of documents contains communications between the Office of Counsel to the President, NARA, DOJ, and the USSS concerning the transfer and retention of WAVES and ACR records in light of pending litigation over their legal status. *See* Stern decl. ¶ 29; *Vaughn* Index ## 56-60. These deliberations resulted from an inquiry by an Associate Counsel to the President into the logistics of maintaining and transferring WAVES and ACR records in light of pending litigation. *See Vaughn* Index # 56 (describing e-mail sent to attorneys at NARA, DOJ, and the USSS). NARA's General Counsel and attorneys from the USSS also participated in deliberations over the maintenance of WAVES and ACR records during the pendency of litigation. Because these e-mails represent the informal give-and-take of inter-agency collaboration by which agency decisions are made, the substance of these e-mails is protected by the deliberative process privilege. *See Vaughn*, 523 F.2d at 1143-44; *Wolfe*, 839 F.2d at 773-74. Moreover, because these communications represented the opinions of lawyers on the need to maintain WAVES and ACR records during the pendency of ongoing litigation in which they were involved, these communications also represent attorney work-product. *See Hertzberg*, 273 F. Supp 2d at 75 (attorney work-product privilege protects a "zone of privacy" around legal theories and strategies prepared in anticipation of litigation). Failure to protect these

deliberative pieces of attorney work-product will chill future inter-agency collaboration and negatively impact the ability of government lawyers to represent their agencies. *See* Stern Decl. ¶ 11, 23.

E. COMMUNICATIONS BETWEEN DOJ'S FEDERAL PROGRAMS BRANCH AND NARA COUNSEL CONCERNING DRAFT DISTRICT COURT FILINGS IN RELATED *CREW* LITIGATION

The final – and largest – category of documents withheld pursuant to Exemption 5 of the FOIA contains drafts of legal briefs prepared by Justice Department attorneys representing the Government in *CREW I* – the litigation in which plaintiff seeks to obtain copies of certain WAVES records from the USSS. *See* Stern Decl. ¶ 30; *Vaughn* Index ## 61-75. These documents are responsive to paragraph 6 of plainitff's FOIA request, which sought "[a]ny and all documents and records referring or related to *Citizens for Responsibility and Ethics In Washington v. United States Department of Homeland Security*, Civ. Action No. 06-883 (United States District Court for the District of Columbia)." *See* Stern Decl. ¶ 4.

These communications are clearly exempt from disclosure under both the deliberative process privilege and attorney work-product doctrine. Several of these communications forward copies of draft pleadings that DOJ proposed to file in the *CREW I* litigation. *See Vaughn* Index ## 68,71, 75. Those drafts represent core work-product which CREW – the opposing party in that litigation – is not entitled to obtain. *See Hickman*, 329 U.S. at 511 (listing "briefs" among the core types of work product protected by the privilege); *Cf. Carey-Canada, Inc. v. California Union Ins. Co.*, 118 F.R.D. 242, 246 (D.D.C. 1986) ("Surely defendants would not argue that prior drafts of the pleadings it has submitted to this court and filed in the public record are not protected from disclosure by the work-product privilege."). Disclosure of those draft briefs,

which would reveal important aspects of the government's litigation strategy, would clearly undermine the adversary process. *See Hickman*, 329 U.S. at 511.

Additionally, this category of documents contains e-mail communications between DOJ and NARA attorneys (as well as NARA staff responding to the inquiries of NARA attorneys concerning the matter in litigation). *See* Stern Decl. ¶ 30; *Vaughn* Index ## 61-75. These e-mails contain impressions of the DOJ draft briefs and the pleadings filed by the opposing counsel in that litigation. These communications are protected by both the deliberative process privilege – as they are part of the deliberative process of articulating the United States' legal position in the case – and the work-product privilege, because they constitute the mental impressions of attorneys involved in ongoing litigation over WAVES records. Disclosure of these e-mail communications would chill the effective functioning of the agency by discouraging frank and open communication among federal employees, and would harm the United States by disclosing its litigation strategy. *See* Stern Decl. ¶ 11, 29. Accordingly, this material was properly withheld under Exemption 5.

III. NARA CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS

Finally, CREW cursorily asserts that NARA failed to conduct an adequate search for responsive records. *See* Compl. ¶ 32. NARA is entitled to summary judgment on this claim as well, because its search was reasonably calculated to uncover documents responsive to Plaintiff's FOIA request.

An agency can show that it has discharged its obligations under the FOIA and is entitled to summary judgment by "demonstrat[ing] that it has 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); *see also Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("In order to obtain summary judgment the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). The agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *Id.* Failure to uncover a responsive document does not mean the search was inadequate: "[T]he issue to be resolved is not whether there might exist any . . . documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg*, 745 F.2d at 1485 (internal citations omitted).

Agency affidavits are the appropriate supporting materials to show that an adequate search has been conducted. Affidavits should be "sufficiently detailed"; "[t]he standard, however, is not 'meticulous documentation [of] the details of an epic search.'" *Texas Independent Producers Legal Action Ass'n v. IRS*, 605 F. Supp. 538, 547 (D.D.C. 1984) (quoting *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982)). "Rather, the agency need only provide affidavits explaining in 'reasonable detail' the scope and method of the search, in absence of countervailing evidence." *Texas Independent Producers*, 605 F. Supp. at 547 (quoting *Perry*). Moreover, any such agency affidavits "enjoy a presumption of good faith, which will withstand purely speculative claims about the existence and discoverability of other documents." *Ground Saucer Watch v. CIA*, 692 F. 2d 770, 771 (D.C. Cir. 1981).

The affidavit submitted by NARA's General Counsel demonstrates that NARA's search for responsive records easily meets this standard. Upon receiving CREW's request, NARA contacted staff in various component offices that would have worked on issues related to

WAVES records, including the Office of the General Counsel, the Office of Records Services–Washington, D.C., and the Office of Presidential Libraries. *See* Stern Decl. ¶ 5. Staff in these offices searched both paper and electronic records (including e-mails, and word processing files) for any documents responsive to CREW's request. All files identified as responsive to the request were forwarded to NARA's FOIA Officer for processing. *Id.* Because the details of this search demonstrate that NARA "has conducted a search reasonably calculated to uncover all relevant documents," *Weisberg*, 745 F.2d at 1485 (internal quotations omitted), NARA is entitled to summary judgment on CREW's unsubstantiated allegation that the search was insufficient.

CONCLUSION

In light of the foregoing, NARA is entitled to summary judgment in this action.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May 2007, I caused the foregoing Defendant's Answer to be served on plaintiff's counsel of record electronically by means of the Court's ECF system.

/s/ Michael P. Abate