UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COLOR OF CHANGE AND CENTER FOR CONSTITUTIONAL RIGHTS, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendant.	:	Civil Action No. 16-CV-8215 (WHP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT GRANTING ACCESS TO DEFENDANT DEPARTMENT OF HOMELAND SECURITY "RACE PAPER"

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PRELIMINARY STATEMENT

Plaintiffs Color of Change ("COC") and Center for Constitutional Rights ("CCR") filed suit against Defendants Department of Homeland Security ("DHS") and Federal Bureau of Investigation ("FBI"), under the Freedom of Information Act ("FOIA") to obtain information that would inform the public about the federal government's surveillance and monitoring of the Movement for Black Lives ("MBL"). Transparency into Defendant DHS's actions is essential for public understanding of the government's apparent targeting of MBL and allied activists for their public criticism of police violence and calls for accountability. DHS, however, has blocked Plaintiffs' access to several responsive and highly concerning documents: namely successive versions of a report prepared by DHS's Intelligence and Analysis Office ("I&A") that DHS itself refers to as the "Race Paper" and a March 3, 2017 email discussing the analysis that document contains. DHS I&A's chosen terminology for its as yet entirely redacted report—the Race Paper—pointedly suggests law enforcement agencies' possible use of racial identity as a criteria for assessing security threats and raises the specter of particularly infamous episodes in federal law enforcement history. By any measure, this is a matter of pressing public importance. Given the potential for DHS embarrassment that scrutiny of the Race Paper might produce—but also the undeniable public value of the document—the Court should be all the more attuned to the possibility that the sweeping exemptions DHS claims are designed to conceal, rather than serve bona fide national security or intelligence interests.

Indeed, DHS has redacted every word of every version of the Race Paper, including the seventh, final iteration, claiming undifferentiated, blanket privilege under both FOIA exemptions (b)(3) and (b)(5) ("Exemption 3" and "Exemption 5"). At the same time, however, DHS has failed to meet FOIA's most basic demands by providing a reasonably detailed description of the

information contained in the Race Paper; indeed, it fails even to disclose the document's complete title.

Plaintiffs are entitled to information contained in the Race Paper, however. Even without a meaningful description, it is apparent that the Race Paper has been improperly concealed. DHS takes the position that none of the Race Papers contain any segregable information, but says nothing about how it arrived at that absolute position. Further, though it invokes Exemption 5 to withhold information through the "deliberative process" privilege, DHS has not demonstrated that the redacted iterations of the Race Papers are *both* pre-decisional and deliberative in nature, and similarly fails to identify the decision-making process, if any, to which the documents relate. Finally, while DHS leans on provisions of the National Security Act to invoke Exemption 3, its *Vaughn* lacks sufficient detail to permit either Plaintiffs or the Court to determine whether intelligence sources and methods genuinely would be implicated by partial or full disclosure of the Race Papers.

Because DHS has not met its burden to demonstrate that the claimed FOIA exemptions apply to the versions of the Race Paper and the redacted email, this Court should grant Plaintiffs summary judgment and order the release of (1) the seventh and final version of the Race Paper; (2) any segregable portions of the prior six versions of the Race Paper; and (3) the March 3, 2017 email discussing analysis of the Race Paper, as identified in the Declaration of Omar Farah, Esq., dated March 19, 2018 ("Farah Decl."), Ex. 1.

In the alternative, this Court should conclude that DHS failed to meet its burden to provide the Court, and Plaintiffs, with adequate descriptions of the versions of the Race Paper, to explain why Exemptions 3 and 5 apply specifically in this instance, or to meaningfully assess whether there are segregable portions of the Race Paper that must be disclosed to Plaintiffs

Exemptions 3 and 5 notwithstanding. On this basis—and in light of the document's highly suggestive—the Court should order (1) review *in camera* of each version of the Race Paper and the email; and (2) order the release of any segregable portions of the seven versions of the Race Paper and of the email.

FACTUAL BACKGROUND

I. Context for Plaintiffs' FOIA Action

The July 17, 2014 videotaped killing of Eric Garner by the New York City Police Department generated intense, nationwide media coverage, and galvanized activists, organizers, and concerned citizens to decry police violence. Roughly three weeks later, on August 9, 2014, 18-year-old Michael Brown was shot and killed by Ferguson, Missouri police officer, Darren Wilson.[1] A spate of high-profile police shootings over the course of the next year contributed to intense national debate about the use of police force against black individuals. The Movement for Black Lives, Plaintiff Color of Change and other social-justice organizations and activists spearheaded efforts to draw public attention to apparent racial disparities in the application of violent police force, to demand police accountability, and to advocate for policing reform and racial justice. Over 1000 MBL demonstrations were held in the United States from 2014 to 2016.

II. Records Produced to Plaintiffs Confirm Government Surveillance of Political Activity

As Plaintiffs outlined in their Complaint, publicly available information indicates that federal and local law enforcement, and specifically Defendant DHS, began surveilling MBL soon after the groundswell of protests erupted in 2014, for their nonviolent, albeit impassioned criticism of systemic law enforcement practices that lead to so many deaths and injuries to

[1] Daniel Funke and Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. Times (Jul. 12, 2016), http://lat.ms/2FXcjrw.

people of color in this country. Compl. ¶¶22-33. Responsive records produced to Plaintiffs under this Court's April 21, 2017 Scheduling Order, Dkt. 26, confirm in more depth and detail that DHS targeted MBL and other social-justice actors for surveillance and monitoring.

In one noteworthy example, DHS circulated emails asserting that "there is a threat of black supremacist extremists attempting to violently co-opt" the Democratic and Republican National Conventions. Farah Decl., Ex. 4. The designation "Black Supremacist Extremist," revealed in DHS's productions in this case, *see* Farah Decl., Ex. 3 at 2, fn. 2, mirrors the FBI's controversial use of the term "Black Identity Extremists" that was widely reported in the national press and roundly criticized for having no analytic or historical grounding, though it broadly stigmatizes black activists' First Amendment-protected political activity.[2] Attorney General Jeff Sessions was pointedly questioned about the apparent racial overtones of the designation at a House Judiciary Committee hearing on November 14, 2017.[3]

DHS documents produced to Plaintiffs also reveal that agency personnel circulated transparently specious, anti-Muslim reporting about imagined connections between black political activism and terrorism. One such article raised the specter of Islamic State-affiliated terrorists recruiting activists protesting the April 2015 police killing of Freddie Gray. The article

[2] Khaled A. Beydoun and Justin Hansford, *The F.B.I.'s Dangerous Crackdown on "Black Identity Extremists,"* N.Y. Times (Nov. 15, 2017) (calling the term "Black Identity Extremist" "invented" but also "dangerous," explaining that "Today entirely nonviolent black activists face violations of their civil liberties and even violence if they're deemed part of B.I.E."), http://nyti.ms/2z53bRx

[3] Cathleen Decker, *Atty. Gen. Sessions Fields Democrats' Questions on Treatment of African Americans at Department of Justice*, L.A. Times (Nov. 14, 2017), http://lat.ms/2I7zq34.

further warned that "it is not the first time the extremists have attempted to tempt disaffected black Americans to join them." Farah Decl., Ex.[4]

In November 2014, the Division Director, Uniformed Operations, of the NPPD circulated a Fox News article entitled, "Muslim Groups Seek to Co-Opt Ferguson Protests, Says Watchdog Group." Farah Decl., Ex. 6. The watchdog group in question, however, is the infamous Center for Security Policy that has been sharply criticized for its nakedly Islamophobic views.[5] That federal law enforcement agencies may conflate otherwise protected black political speech with extremism animates public interest in the information at issue here.[6]

III. DHS Has Revised and Circulated a Document It Titles the "Race Paper"

DHS I&A provides "predictive intelligence and analysis to operators and decision-makers" throughout the Intelligence Community and federal government as a whole.[7] Given the

[4] The article's sender's name is redacted under FOIA Exemption 6. Its recipients, however, includes a range of acronyms that suggest email and/or email lists that include senior officials within DHS, NPPD.

[5] Some of the works published by the Center for Security Policy ("CSP") are "Star Spangled Sharia, Civilization Jihad, and Muslim Colonization of America." Richard Cohen, president of the Southern Poverty Law Center which tracks the activities of hate-groups in the United States described CSP as an "an extremist think-tank" led by an "anti-Muslim conspiracist." Joel Gunter, *Trump's 'Muslim lockdown': What is the Center for Security Policy?*, BBC News (Dec. 8, 2015), http://bbc.in/1U0yVr4.

[6] DHS did not exclusively monitor MBL, however. Other documents reveal DHS social media surveillance expansive enough to bring within its scope even the most small-scale political activity. One document from National Protection and Programs Directorate appears to be a daily advisory "on protests in the United States" and includes a planned protest of the bathroom policy at a Rochester, New York Target store, where *one person* was expected to attend. Farah Decl., Ex. 2, at 3. Actions of concern also included an animal rights protest at a Nashville, Tennessee zoo where expected attendance was three persons and a gathering of ten members of Maine Citizens Against Puppy Mills in Oxford, Maine. Farah Decl., Ex. 2, at 4. The email nonetheless advises law enforcement personnel to be "vigilant . . . in the vicinity of the abovementioned locations." *Id*.

[7] The central goal of DHS Office of Intelligence and Analysis is to "provide a primary connection between DHS and the Intelligence Community as a whole; and to act as a primary source of information for state, local and private sector partners." Michael Chertoff, Former DHS Secretary, Remarks, Washington, D.C., Jul. 13, 2005, *available at* https://tinyurl.com/ycuqz9ss. I&A's reach is effectively the entire federal government; its analyses are received by, considered, and acted upon by entities from the

context of Plaintiffs' request, I&A's role in the apparent surveillance of Black political speech is of pressing national interest. Plaintiffs accordingly narrowed the scope of this litigation to one set of records from within I&A. Specifically, pursuant to this Court's April 28, 2017 Order, DHS produced a set of seven distinct emails circulated by I&A in Spring 2017 that each included subject lines with the words "Race Paper." Farah Decl. Ex. 7. All seven emails included Microsoft Word document attachments, often including the name "Race" and an indecipherable acronym suffix, as well as other designations that appear to indicate a specific level of review. *See Id.* From the limited information presently available to Plaintiffs, I&A appears to have expended considerable institutional effort producing the Race Paper, including possibly convening in-person meetings regarding the content of the document over a month-long period. Farah Decl., Ex. 7 Attachment D.

Some information about the content of the Race Paper, however, is discernable from accompanying emails that I&A produced. A March 8, 2017 email transmitted between I&A personnel explains that "[w]e have addressed most of your comments with the exception of a couple of places where you wanted to talk to us before writing (drivers, alternative analysis)." Farah Decl., Ex. 7, Attachment C. On March 20, 2017, another version of the Race Paper was transmitted; the accompanying email asked the recipient to "[l]et us know when you are available to sit down . . . and address some of the future drivers." Farah Decl., Ex. 7, Attachment D. And on March 22, 2017, another version of the Race Paper was transmitted within I&A that "included a section on drivers and indicators." Farah Decl., Ex. 7, Attachment F. What "drivers and indicators" means in the context of the Race Paper is unknowable without more information.

White House to local "fusion centers" throughout the country. *See* https://www.dhs.gov/office-intelligence-and-analysis-mission and https://fas.org/sgp/crs/homesec/R40602.pdf]

But in light of I&A's mandate to generate "predictive intelligence," this series of emails raises disquieting questions about I&A's view, if any, on the perceived relationship between racial identity and "drivers" of future behavior.

All of the emails accompanying the transmission of the Race Paper included redactions under Exemption 6, apparently to protect the identity of the emails' senders and recipients. But a March 3, 2017, email transmitting a version of the Race Paper is also partially redacted under Exemption 5. Farah Decl., Ex. 1, Attachment A. Unlike the other emails regarding the Race Paper, the March 3 email also redacted the *professional title* of the individual who sent the email under Exemption 6 in addition to their personal identity. *Id*. Of equal concern to Plaintiffs—and to a large extent what prompts this motion—is that DHS has redacted every word of the seven attached versions of the Race Paper, including the final version, claiming blanket, undifferentiated privilege under both Exemptions 3 and 5. See Farah Decl., Ex. 1, Attachments B-H.

At Plaintiff's request, DHS provided a *Vaughn* index that addresses the Race Paper. See Farah Decl., Ex. 8. But the *Vaughn*'s entries corresponding to the Race Paper and the March 3, 2017 email do little more than state what Plaintiffs already know from the redacted documents themselves—namely the claimed exemptions and their purpose under the FOIA statue. For example, the second itemized *Vaughn* entry regarding the Race Paper states that, "Information redacted under (b)(5) describes predecisional and deliberative internal discussions between DHS I&A officials addressing drafting, analytical, tradecraft, and writing issues in a draft product." Throughout, the *Vaughn* index recycles descriptions of the claimed exemption, raises the general concern of chilling "candid discussions" within I&A, but fails to reveal any information that would provide Plaintiffs even an abstract sense of what is in the Race Paper or an ability to

meaningfully evaluate those claims. DHS's *Vaughn* index does not even reveal the actual title of the Race Paper. Further, DHS takes the position is that is impossible to segregate any information contained in the Race Paper, but has not supported its conclusory assertion with an explanation of why exactly that is so in this context.

Plaintiffs are thus left to speculate, in the midst of a charged public debate regarding law enforcement's response to MBL's protected political activity, as to why DHS would prepare a document it refers to as the Race Paper and then closely guard its contents, even to the point of concealing its actual title and a basic description. Plaintiffs are also left to speculate why DHS would partially redact the March 3 email without a basic description for the redaction or revealing the professional title of the sender. The information available to Plaintiffs suggests troubling possibilities—including improper and embarrassing assessments based on race or other protected characteristics. Under the circumstances, Plaintiffs are compelled to seek the maximum transparency allowable under FOIA in order to understand and inform the public of the nature and extent of DHS's response to Black-led protests for police accountability.

PROCEDURAL BACKGROUND

On July 5, 2016, Plaintiffs submitted a FOIA request to Defendant DHS seeking records related to federal government surveillance and monitoring of protest activities related to MBL. *See* Exhibits to Complaint, Dkt. 1-1 Ex. 1. The FOIA request sought the disclosure of DHS's records related to the surveillance of MBL in order to determine whether its surveillance activities potentially infringed on activists' First and Fourth Amendment rights.

DHS did not respond appropriately to the FOIA request within the statutory time limit. Plaintiffs filed a Complaint in the U.S. District Court for the Southern District of New York on

October 20, 2016 to compel DHS to adequately search for and produce records responsive to Plaintiffs' request. *See* Complaint, ¶ 61.

On April 28, 2017, the Court issued an amended scheduling order, requiring that, among other things, DHS I&A process 500 pages of responsive documents on or before May 22, 2017 and all outstanding documents at a rate of 500 pages per month thereafter. *See* Dkt. 28, April 28, 2017 Amended Scheduling Order. In compliance with the Court's Scheduling Order, DHS produced the Race Paper to the Plaintiffs on June 19, 2017, but in entirely-redacted form. On January 9, 2018, at Plaintiffs' request, DHS produced a *Vaughn* index concerning seven versions of the Race Paper and related emails, setting out the asserted bases for nondisclosure, including FOIA Exemptions 3, 5, and 6. DHS claims in the *Vaughn* index that the Race Paper is predecisional and is statutorily exempted from disclosure under 6 U.S.C. § 121(d)(11) and 50 U.S.C. § 3024(i). *See* Farah Decl., Ex. 8, *Vaughn* index; *see infra* Section III-V. The parties engaged in pre-litigation negotiations in the months before this filing. Plaintiffs requested, among other things, that any publicly available sources that support the Race Paper's assessments be segregated. According to DHS, the Race Papers do not contain segregable information. Plaintiffs also requested that additional information about the Race Paper be included in the Vaughn for purposes of this litigation. DHS, however, declined that request.

ARGUMENT

I. Summary Judgment Standard Under FOIA

Movants are entitled to summary judgment where "there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56; *Gelb v. DHS*, No. 15-CV-6495, 2017 WL 4129636, at *3 (S.D.N.Y. Sep. 15, 2017). In a FOIA case, the burden rests on "the agency to defend its non-disclosure decisions." *Main Street Legal Servs. v. Nat'l Sec. Council*, 811 F.3d 542, 544 (2d Cir.

2016). Courts review those decisions *de novo*. *New York Times Co. v. Dep't of Labor*, 340 F. Supp. 2d 394, 401 (S.D.N.Y. 2004) (citing 5 U.S.C. §552(a)(4)(B)). And a defendant agency is not accorded any particular deference in its claim to FOIA exemptions. *See Bloomberg, L.P. v. Board of Governors of the Federal Reserve Sy*stem, 601 F.3d 143, 147 (2d Cir. 2010). Indeed, because the basic objective behind FOIA is disclosure, not secrecy, the exemptions are given "a narrow compass." *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011) (citing *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (2011)). Courts thus enforce a strong presumption in favor of disclosure. *See Associated Press v. DOD*, 554 F.3d 274, 283 (2d Cir. 2009).

Agencies may satisfy the burden of justifying claimed exemptions by submitting affidavits with "reasonably detailed" explanations of why any withheld documents fall within an exemption. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). Typically, agencies submit *Vaughn* indexes and declarations to satisfy this burden. *Halpern v. FBI*, 181 F.3d 279, 290 (2d Cir. 1999).

Defendant DHS has plainly not met its burden to demonstrate that the claimed FOIA exemptions apply to the Race Paper. Plaintiffs are thus entitled to judgment as a matter of law for several reasons: first, DHS's *Vaughn* index falls short of the specificity required under FOIA to assess its undifferentiated, blanket reliance on Exemptions 3 and 5 to conceal the seventh and final version of the Race Paper; second, DHS's sweeping position that nothing in the several pages that make up each Race Paper is segregable strains credulity and, at a minimum, requires searching judicial review; third, in the face of entirely-redacted Race Papers, DHS's *Vaughn* is insufficient to support its claim to Exemption 5; and fourth, the *Vaughn* prevents both Plaintiffs and the Court from even testing its reliance on Exemption 3 as required under FOIA.

II. Because DHS's Vaughn Index Does Not Meet FOIA's Requirement of Specificity the Court Should Order Disclosure or Alternatively *In Camera* Review

DHS invokes FOIA Exemptions 3 and 5 as if that were enough on its own to justify its interest in concealing the Race Paper in its entirety. The *Vaughn* provided, however, largely restates the black-letter definitions of Exemptions 3 and 5, recycling boilerplate language regarding the supposed risks associated with disclosure. *See* Farah Decl., Ex. 8. The *Vaughn* index does not provide the Race Paper's full title or even a limited description of its contents. This is inadequate—particularly given the exceedingly limited set of responsive records at issue here. Courts in this circuit and others routinely require defendant agencies to provide much more. *See ACLU v. NSA*, No. 13-CV-9198, 2017 WL 1155910, at *5 (S.D.N.Y. Mar. 27, 2017) ("However, Vaughn submissions are insufficient where "the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping'" (internal citations omitted)).

Failing to provide titles and descriptions of the Race Paper thwarts the very objective of a *Vaughn* index. "The purpose of a *Vaughn* index is to afford a FOIA plaintiff an opportunity to decide which of the listed documents it wants and to determine whether it believes it has a basis to defeat the Government's claim of a FOIA exemption. Titles and descriptions serve that purpose." *New York Times Co. v. U.S. Dep't of Justice*, 762 F.3d 233, 237 (2d Cir. 2014) (ordering disclosure of titles and descriptions of documents); *King v. Dep't of Justice*, 830 F.2d 210, 218-19 (D.C. Cir. 1987). The *Vaughn* index should enable "the court system effectively and efficiently to evaluate the factual nature of disputed information." *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973); *see also Ferguson v. F.B.I.*, 729 F. Supp. 1009, 1011–12 (S.D.N.Y. 1990) (noting purposes of index).

DHS has effectively frustrated the *Vaughn* index's primary purpose of permitting Plaintiffs to subject its claims to Exemptions 3 and 5 to appropriate evaluation and adversarial testing. *New York Times*, 762 F.3d at 237; *King*, 830 F.2d at 219. By failing to produce a *Vaughn* that includes sufficiently detailed justifications for its redactions in the Race Paper—or the document's title or even a generic description—DHS prevents Plaintiffs and the Court from evaluating whether its reliance on Exemptions 3 or 5 is justified. In effect, DHS asks for unchecked discretion to withhold responsive records it deems exempt. This is exactly the sort of deference FOIA prohibits. *See Bloomberg, L.P.*, 601 F.3d at 147. The Court should therefore order disclosure.

Alternatively, it is within the Court's power to order *in camera* review of the Race Paper. 5 U.S.C. § 552(a)(4)(B); *New York Times Co. v. U.S. Dep't of Justice*, 872 F.Supp.2d 309, 315 (S.D.N.Y. 2012); *Halpern*, 181 F.3d at 292 (permitting *in camera* review under FOIA where, among other justifications, "the record showed the reasons for withholding were vague or where the claims to withhold were too sweeping"). Courts order *in camera* review for reasons that are significant here, including to compensate for the informational disadvantage between the government and the requester, *Vaughn*, 484 F.2d at 825, and when there is a strong public interest in disclosure. *Nat'l Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 811 F.Supp. 2d 713, 738 (S.D.N.Y. 2011) (citing *See, e.g., Allen v. CIA*, 636 F.2d 1287, 1299 (D.C. Cir. 1980)); *see also Ferguson v. F.B.I.*, 752 F.Supp. 634, 636 (S.D.N.Y. 1990).

In camera review is particularly appropriate where, as here, "the government seeks to exempt entire documents but provides only vague or sweeping claims as to why those documents should be withheld." *Assoc. Press v. U.S. Dep't of Justice*, 549 F.3d 62, 67 (S.D.N.Y. 2008)

(quoting *Local 3, Int'l Bhd. of Elec. Workers v. Nat'l Labor Relations Bd.,* 845 F.2d 1177, 1179-80 (S.D.N.Y. 1988)); *PHE, Inc. v. DOJ*, 983 F.2d 248, 252 (D.C. Cir. 1993). This Court has itself declined to accept at face value the government's segregability determinations over documents it sought to withhold and instead determined *in camera* review was warranted. *ACLU v. F.B.I.*, No. 11-CV-7562, 2015 WL 1566775, at *1 (S.D.N.Y. Mar. 31, 2015); *Lawyers' Comm. for Human Rights v. I.N.S.*, 721 F. Supp. 552, 566 (S.D.N.Y. 1989) (ordering FBI to submit documents for *in camera* review due to deficient explanations).

The Court should order *in camera* review in this instance as well. DHS's reasons for withholding the Race Paper are vague; the *Vaughn* says next to nothing about the Race Paper's contents beyond, for example, calling it an "intelligence product"—a description so nebulous as to be meaningless. If the Court is unwilling to order disclosure, and in the absence of a reasonably-detailed *Vaughn*, the Court should satisfy itself that DHS's reliance on Exemptions 3 and 5 is well-founded and—of no less importance—that all segregable information is nonetheless disclosed to Plaintiffs as required by FOIA.

III. DHS's Blanket Claim to Exemptions 3 and 5 Defies FOIA's Requirement That Segregable Information Be Disclosed.

DHS takes the position that of the several pages that constitute each successive version of the Race Paper (seven distinct attachments), not a word is segregable. *See* EFarah Decl., Ex. 1, Attachments B-H. The claim is unpersuasive. First, it is for the Court to make specific findings of segregability before approving the application of any given FOIA exemption. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007). And, even if the Court were to determine that both Exemptions 3 and 5 apply to the Race Paper, neither exemption permits DHS to withhold portions of the document that contain segregable information. Under FOIA, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions

which are exempt." 5 U.S.C. § 552(b). As this Court has explained, "nonexempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *ACLU v. FBI*, 2015 WL 1566775, at *2.

Here, the government has withheld roughly 63 pages of the Race Paper in their entirety by asserting, for example, that "sources of information" would be revealed or that "terrorist actors" might exploit I&A's intelligence assessments if the Race Paper is disclosed. Farah Decl., Ex. 8. Despite their apparent seriousness, DHS's assertions are summary, sweeping, and unsupported. In order for the Court to make informed, specific findings of segregability, however, agencies must provide a detailed justification for non-segregability and a description of what proportion of the information is non-exempt and how that material is dispersed throughout the document. *Sussman*, 494 F.3d at 1116; *Mead Data Central Inc. v. Dep't of the Air Force*, 566 F. 2d 242, 261 (D.C. Cir. 1977).

DHS has not met its burden of justifying the claimed exemptions. Instead of providing the "reasons behind their conclusions," the agency has thus far relied on impermissible conclusory assertions that it has complied with its statutory obligation to segregate and release non-exempt material. *See Mead*, 566 F.2d at 261 (admonishing government to "provide a more detailed justification than the conclusory statements" that segregability is impossible). For example, DHS repeatedly states that the information in the Race Paper is exempt because it would reveal "intelligence sources and methods," Farah Decl., Ex. 8 at 3., but fails to explain which *specific* portions of the Race Paper are withheld under Exemption 3 and why, and whether those portions are inextricably intertwined with intelligence sources and methods. *See id*. This Court cannot assess whether the agency's withholdings are proper on the strength of DHS's mere assertions alone. DHS's categorical position that no information in the Race Paper is segregable

is precisely the kind of unsupported claim that courts have rejected under FOIA. *See Mead*, 566 F.2d at 261; *see also ACLU v. FBI*, 59 F.Supp. 3d 584, 592 (S.D.N.Y. 2014) (this Court expressing "little faith in the Government's segregability determinations" and ordering *in camera* review).

Additionally, on the face of DHS's *Vaughn* index, the Court has insufficient information to determine whether it is logical and plausible to assert that withholding the Race Paper in its entirety is necessary to protect intelligence sources and methods from exploitation by terrorist actors. *See* Farah Decl., Ex. 8 at 4; *see also N.Y. Times Co. v. DOJ*, 756 F.3d 100, 119 (2d Cir. 2014) (citing *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (holding that, in protecting intelligence sources and methods from foreign discovery, justifications must be logical and plausible)). In *Gardels*, the D.C. Circuit noted that the government rightfully withheld documents because the justification it provided was specific, fleshed out as much as it could be publicly, and was far from being merely conclusory. 689 F.2d at 1105. Here, DHS has provided no such justification for its blanket withholdings and therefore the Court cannot deem them logical or plausible.

Moreover, although the *Vaughn* makes clear that the Race Paper includes "publicly available resources," DHS has categorically withheld the roughly 63 pages of documents that comprise the Race Papers in their entirety. *See* Farah Decl., Ex. 8 at 1, 3-4. An agency cannot avoid FOIA's strong presumption in favor of disclosure by pointing to the existence of *some* exempt material. *See Mead*, 566 F.2d at 261 (instructing agencies, that, in addition to a statement of its reasons, agencies should also describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document) (emphasis added). The Court should therefore require DHS to properly assess the Race Paper's contents consistent with

FOIA's segregability requirement, to describe which parts are non-exempt, and then to either disclose them to Plaintiffs or provide adequate justification for their continued withholding for the Court to assess. *See Mead*, 566 F.2d at 261. That much is minimally required by FOIA.

IV. DHS's Vaughn Does Not Support Its Claim to Withholding Under Exemption 5

To qualify for Exemption 5, a document must be both "predecisional" and "deliberative." *Nat'l Council of La Raza (NCLR) v. Dep't of Justice,* 411 F.3d 350, 356 (2d Cir. 2005). A document is predecisional if it was "'prepared in order to assist an agency decisionmaker in arriving at his decision.'" *Id.* (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir.1999)). A document is deliberative if it is "'actually . . . related to the process by which policies are formulated.'" *NCLR*, 411 F.3d at 356 (quoting *Grand Cent. P'ship*, 166 F.3d at 482). "To determine whether a document is deliberative, courts have looked to factors such as whether the document formed an essential link in a specified consultative process, reflects the personal opinions of the writer rather than the policy of the agency, and if released, would inaccurately reflect or prematurely disclose the views of the agency." *New York Times Co. v. Dep't of Defense* 499 F. Supp. 2d 501, 514 (S.D.N.Y. 2007) (internal quotation marks omitted) (quoting *Grand Cent. P'ship, Inc.*, 166 F.3d at 482). To satisfy its burden to justify withholding under Exemption 5, DHS should also identify the individuals involved in a decision and their relative positions. Because higher ranked officials have more decision-making authority, messages sent from superior to inferior staff are less likely to be deliberative and more likely to contain explanations of previously-made decisions. *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 (D.C. Cir. 1987).

The exemption does not extend to "purely factual material" or documents later adopted or incorporated into a final agency opinion. *NCLR*, 411 F.3d at 356 (quoting *Grand Cent. P'ship,*

166 F.3d at 482). Even if a document falls within the protection of Exemption 5, the defendant agency must disclose "[a]ny reasonably segregable portion of a record . . . after deletion of the portions [that] are exempt." 5 U.S.C. § 552(b); *see Oglesby v. Dep't of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996); *see also Donovan v. FBI*, 806 F.2d 55, 58 (2d Cir. 1986); *F.B.I. v. Abramson*, 456 U.S. 615, 626, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982); *accord Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007).

DHS fails to support its Exemption 5 claim for the seventh and final version of the Race Paper and the March 3, 2017 email because it does not pinpoint an agency decision or policy to which Race Paper or the March 3 email contributed. Instead, DHS mostly invokes boilerplate language regarding the statutory standard. These types of "general and conclusory statements" do not provide this Court or Plaintiffs with the information needed for an Exemption 5 analysis, such as the issue or policy that is the subject of deliberation or the relative positions of agency officials involved. *See Lykins v. Dep't of Justice*, 725 F.2d 1455, 1464 (D.C. Cir. 1984) (stating general and conclusory statements cannot justify nondisclosure). For example, the first *Vaughn* index entry corresponding to a Race Paper states: "Information redacted under (b)(5) describes predecisional and deliberative internal discussions between DHS/I&A officials addressing drafting, analytical, tradecraft, and writing issues in a draft product." Farah Decl., Ex 8 at 4. Never does the description identify a policy or decision, if there was one, to which the undisclosed information relates. *Id*.

DHS has improperly claimed Exemption 5 over the entirety of the final version of the Race Paper apparently because it is marked "DRAFT." While the demarcation of a document as a draft may be a factor in determining whether information is deliberative and exempt, the label "draft" in itself is not sufficient to satisfy the Exemption 5 analysis. *Nat'l Day Laborer*, 811

F.Supp. 2d at 74 ("[S]omething is labeled a draft, or reflects discussions among agency personnel, is not enough to render it privileged.'") (internal citations omitted). *See also Arthur Andersen & Co. v. IRS,* 679 F.2d 254, 257 (D.C. Cir. 1982) ("Even if a document is a 'draft of what will become a final document,' the court must also ascertain 'whether the document is deliberative in nature.'" (quoting *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980)). Here, there is no indication that, draft or not, the Race Paper contains deliberative discussions or the personal opinion of the writer rather than the policy of the agency. "[T]he privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Grand Cent. P'Ship,* 166 F.3d at 482 (internal quotation marks and citation omitted).

> Indeed, a document marked "draft" may in fact function as a final document or policy.
>
> In assessing whether a document has been adopted as policy, the Second Circuit has rejected a "bright-line test-whereby a document may be deemed expressly adopted or incorporated only in the event that an agency, in essence, uses specific, explicit language of adoption or incorporation." Instead, "courts must examine *all* the relevant facts and circumstances in determining whether express adoption or incorporation by reference has occurred."

ACLU v. Dep't of Defense, No. 15-CV-9317, 2017 WL 4326524, at *6 (Sept. 23, 2017) (quoting *NCLR,* 411 F.3d at 357 n.5).

Here, DHS has provided no indication that the seventh and final version of the Race Paper is not functionally the final iteration of I&A's report. In fact, the *Vaughn* itself refers to the Race Paper as a "finished" product. No subsequent version of the Race Paper has been disclosed or identified. "In situations such as this, where no final version of a draft document exists, shielding the draft from disclosure does not serve the purpose of the deliberative process privilege because the public cannot scrutinize the draft against its final version." *ACLU v. Dep't of Defense*, 2017 WL 4326524, at *7 (ordering disclosure). Indeed, it would subvert FOIA's

disclosure requirements if federal agencies could claim Exemption 5 for documents that are functionally and effectively final merely by labeling them "drafts" that were never formally adopted.

In the absence of any indication that it is predecisional or deliberative, the seventh and final version of the Race Paper must be disclosed.

V. DHS's Vaughn Does Not Support Its Claim to Withholding Under Exemption 3

Exemption 3 allows for the withholding of information prohibited from disclosure by another federal statute only if the statute either: "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A)(i)(ii) (2016). Once the statute meets either subpart of Exemption 3, an agency must then establish that the records in question fall within the withholding provision of the nondisclosure statute. *See CIA v. Sims*, 471 U.S. 159, 167 (1985).

Here, DHS relies heavily on the statutory framework of 6 U.S.C. § 121(d)(11) and 50 U.S.C. § 3024(i) to conceal the Race Paper under Exemption 3. Section 121(d)(11)(a) and (b) explain that it is the job of the I&A Under-Secretary to ensure that "any intelligence information under this chapter is shared, retained, and disseminated consistent with the authority of the Director of National Intelligence." Section 3024(i) further specifies that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." Read together, the statutes prescribe the DHS I&A Under-Secretary's responsibilities regarding the management of intelligence-related information. This Court and others have held that Exemption 3 applies to 50 U.S.C. § 3024(i). *See e.g., ACLU v. F.B.I.*, 2015 WL 1566775 at *3 (internal citations omitted); *New York Times Co. v. U.S. Dept. of Justice*, 872 F.Supp.2d 309

(S.D.N.Y. 2012). But despite the latitude afforded the government to conceal information it contends implicates national intelligence, *see Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003), the burden remains on the government to show that the exemptions its claims do in fact concern "intelligence sources and methods". *Elec. Privacy Info. Ctr. v. Nat'l Sec. Agency*, 678 F.3d 926, 932 (D.C. Cir. 2012) ("The agency bears the burden of proving that the withheld information falls within the exemption it invokes." (internal citations omitted)).

DHS cannot demonstrate that its claim to withholding under Exemption 3 is proper on the strength of its *Vaughn*. The *Vaughn* asserts that disclosing any of the Race Papers would "reveal intelligence sources and methods utilized by I&A" to, for example, "form [] analytical assessments" the documents contain. Farah Decl., Ex. 8 at 3. However, even under the permissive standard courts have set for determining what might constitute "sources and methods," *see Gardels v. C. I.A.*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (internal quotations omitted), the accuracy of DHS's assertions with respect to the Race Paper cannot be judged without an affidavit that is considerably more revealing and specific than the *Vaughn*. *Larson v. Department of State*, 565 F.3d 857, 864 (D.C.Cir.2009)(observing that "conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not, standing alone, carry the government's burden") (citing *Hayden v. v. Nat'l Sec. Agency/Cent. Sec. Serv*, 608 F.2d 1381, 1387 (D.C. Cir. 1979); *id.* at 865 (requiring that "statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption"). And as this Court held in *ACLU v. F.B.I.*, the proper way for DHS to demonstrate that the Race Paper satisfies Exemption 3 would be to "'state[] as much

detail publicly . . . as it reasonably could'" and to "'present[] further specifics *in camera*.'" 2015 WL 1566775 at *3 (quoting *Hayden*, 608 F.2d at 1390–91).

DHS has failed to meet its burden here. Beyond the rote assertion that the Race Papers are "part of a finished intelligence product" and passing references to "domestic terrorism," the *Vaughn* lacks meaningful detail and thus precludes informed judicial assessment of whether or how any intelligence sources and methods might be implicated by full or partial disclosure. Indeed, at this stage, even a threshold determination of whether redacted information in the Race Papers constitutes intelligence sources and methods at all is impossible to test. And this says nothing of whether any non-exempt information could still be segregated for purposes of disclosure, a particularly important assessment where, as here, the *Vaughn* makes clear that certain redacted information in the Race Paper is already in the public domain. The Court should thus not rely on the *Vaughn* in determining whether the Race Papers come within 6 U.S.C. § 121(d)(11) and 50 U.S.C. § 3024(i) justifying its withholding under Exemption 3—certainly not in the absence of *in camera* review. *See* supra Section II.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs summary judgment and order Defendant DHS to release all responsive records, specifically (1) the seventh and final version of the Race Paper; (2) any segregable portions of the preceding six versions of the Race Paper; and (3) the March 3, 2017 email. Alternatively, this Court should (1) review the various Race Paper versions and email *in camera*; and (2) order release of any segregable portions of the Race Paper versions and email.

Respectfully submitted,

_/s/ Omar Farah_____
Omar Farah (OF-8886)

Stephanie Llanes (SL-1944)
Ghita Schwarz (GS-9554)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 11201
(212) 614-6427
ofarah@ccrjustice.org

_/s/ Avidan Y. Cover_____
Avidan Y. Cover (AC-6478)
Anthony Cirranello, Jr.*
Krithika Rajkumar*
MILTON A. KRAMER LAW CLINIC CENTER
Case Western Reserve University School of Law
11075 East Boulevard
Cleveland, OH 44106
(216) 368-2766
ayc30@case.edu
**Law Student Intern*

Attorneys for Plaintiffs