

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

THE PROTECT DEMOCRACY PROJECT,	)	
	)	
	)	
	<i>Plaintiff,</i>	
	)	Case No. 1:17-CV-00792 (RDM)
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
	<i>Defendant.</i>	
	)	

**THE PROTECT DEMOCRACY PROJECT’S RENEWED CROSS MOTION  
FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff The Protect Democracy Project respectfully moves for summary judgment as to Defendant’s failure to comply with the Freedom of Information Act and improper withholding of information under the claimed applicability of FOIA Exemptions. There are no genuine issues of material fact with respect to these issues. The accompanying Memorandum sets forth more fully the reasons that support Plaintiff’s motion.

Date: New York, NY  
October 29, 2020

Respectfully submitted,

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*Plaintiff,*

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*Defendant.*

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
THE PROTECT DEMOCRACY PROJECT’S RENEWED CROSS MOTION FOR  
SUMMARY JUDGMENT AND IN OPPOSITION TO HHS’S RENEWED MOTION FOR  
SUMMARY JUDGMENT**

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## **INTRODUCTION**

Immediately after President Donald J. Trump's inauguration in January 2017, his administration canceled over \$4 million of the Obama Administration's planned advertisements for the critical final weeks of the Affordable Care Act open-enrollment period. Documents now revealed in this FOIA case have confirmed that the ad cancellation was intended to harm the ACA, and in fact did so—1.6 million fewer Americans enrolled in ACA plans in 2017 than expected. The documents additionally show the ad cancellations were dictated by the White House and President Trump's transition team. The documents reveal that the clear "bottom line" communicated to the Centers for Medicare & Medicaid Services, the agency within HHS tasked with ACA outreach, was to "not spend[] additional money on marketing for this open-enrollment period." Rather than faithfully execute the law, President Trump began his term undermining it.

While the documents produced thus far shed light on the Administration's objectives and decisionmaking, Defendant HHS is still improperly withholding documents responsive to the request largely on the basis of deliberative-process privilege. Notably, HHS still refuses to disclose the full extent of cancelled ACA outreach and the full financial impact of HHS's final decision, even though the related decisions were final. Plaintiff Protect Democracy Project continues to insist that the government comply with its obligations under FOIA, and that the public be given access to the documents to which it is entitled. Twenty-three document withholdings remain in dispute.

## **BACKGROUND**

### **I. President Trump Immediately Cancels ACA Advertising Upon Taking Office; Protect Democracy Files a FOIA Request and This Action.**

On January 27, 2017, news publications reported that the Trump Administration "halted up to \$5 million worth of Obamacare advertising in the crucial days ahead of the final enrollment

deadline on Jan. 31.”<sup>1</sup> The publicly stated rationale was, “[w]e aren’t going to continue spending millions of taxpayers’ dollars promoting a failed government program.” *Id.* (quoting a Health and Human Services Department spokesman).

Plaintiff Protect Democracy Project (“Protect Democracy”)—a non-profit organization with the mission of preventing the United States from declining into a more authoritarian form of government—filed a Freedom of Information Act (“FOIA”) request to the U.S. Department of Health and Human Services (“HHS” or “the Department”) and the Centers for Medicare & Medicaid Services (“CMS”) on February 15, 2017 for documents relating to the ad cancellation. (Sandler Decl., Ex. 5 at 23–26, Jan. 23, 2018, ECF No. 20-1.)<sup>2</sup> Protect Democracy filed the FOIA request out of a concern that the new administration was seeking to undermine a duly enacted law because it disagreed with the underlying policy, thereby ignoring its constitutional obligation to faithfully execute the law.

When the agencies failed to respond by the statutory deadline, Protect Democracy filed suit against the Department on April 28, 2017 to ensure that relevant documents did not remain hidden from the public. (Compl., Apr. 28, 2017, ECF No. 1.) HHS moved for summary judgment, and Protect Democracy opposed and cross-moved, challenging the adequacy of the search and numerous redactions. (Protect Democracy’s Mem., Jan. 23, 2018, ECF No. 20.) On the eve of HHS’s deadline to answer the complaint, HHS and CMS instead produced more documents to Protect Democracy. (Marquis Decl. Dec. 15, 2017, ECF No. 18-2, at \*73-75 (stating HHS was removing redactions on six pages of previously-released documents); Gilmore

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<sup>1</sup> MJ Lee & Tami Luhby, *Trump pulls Obamacare ads days ahead of enrollment deadline*, CNN.com, Jan. 27, 2017, <https://money.cnn.com/2017/01/27/news/economy/obamacare-ads-trump/?iid=EL>.

<sup>2</sup> Pin citations are to ECF pagination.

Decl. Dec. 15, 2017, ECF No. 18-3, at \*267-69 (stating CMS was removing redactions on five pages of previously-released documents, and releasing four additional pages).) Later, after opening summary judgment briefs were filed, HHS and CMS offered to stay the briefing to conduct a supplemental search; Protect Democracy consented, and later withdrew its challenge to the search's adequacy. (Protect Democracy's Reply at 1, Apr. 20, 2018, ECF No. 27.)

In the Court's decision on the initial summary judgment motions, it ruled in part for Protect Democracy and in part for HHS. It concluded that the Department's attorney-client privilege withholdings were appropriate, but that its *Vaughn* indices provided insufficient information to justify numerous deliberative-process privilege redactions and withholdings. *Protect Democracy Project, Inc. v. U.S. Dep't of HHS*, 370 F. Supp. 3d 159, 165 (D.D.C. 2019) (ECF No. 29).

HHS has since made another supplemental production, disclosing revised versions of 12 documents that remain in dispute, with narrower redactions from the Department's Office of the Secretary ("OS") and CMS. (Forbes Decl., Ex. 1, Ex. 2 ("OS Final Release"), Ex. 3 ("CMS Final Release"), Mar. 27, 2020, ECF No. 39-1.)

Earlier this year, the parties submitted notices of anticipated renewed motions for summary-judgment pursuant to the Court's February 19, 2020 minute order. (Notice of Anticipated Renewed Mot. for Summ. J., Mar. 13, 2020, ECF No. 38.); Notice of Anticipated Renewed Cross-Mot. for Summ. J., Mar. 27, 2020, ECF No. 39.) On October 9, 2020, HHS filed a renewed motion for summary judgment with its third revised *Vaughn* index. (Renewed Mot. for Summ. J., Oct. 9, 2020, ECF No. 43.)

## **II. Disclosed Documents Indicate the White House Directed the Ad Cancellation.**

The documents produced to Protect Democracy in response to its FOIA request reveal that the White House directed the ACA ad cancellation. From January 25 to 26, 2017, the



Trump transition team and White House caused HHS and CMS to plan a full stoppage of ACA outreach advertising, only to reverse course and slightly limit the scope of cancellation after the potential public backlash and the irrational financial consequences became apparent.

On January 24, 2017, a staff member in the Office of Communications at CMS sent an email to Mary Wallace, CMS's Acting Director of Communications, attaching a compilation of all of CMS's planned open-enrollment "[c]ommunications [a]ctivities." (Gilmore Decl. 1, ECF No. 18-3, at \*57-66, 270) (describing planned substantial email and direct-contact phone outreach to promote enrollment in ACA health care plans).

On January 25, 2017, Mark Weber, HHS's Deputy Assistant Secretary for Public Affairs, emailed his colleagues reporting on his meeting with Wallace about open-enrollment activities in the ACA's fourth and final enrollment period. He reported that Wallace told him that she was "on board and stands ready to help" with Weber's plan and that he "conveyed appreciation" to Wallace for "what must be hard to do and the work to be done." (Marquis Decl., 1 ECF No. 18-2, at \*54-56; Gilmore Decl. 1, ECF No. 18-3, at \*35-37 (reflecting that in a "package" sent by Wallace to Weber before the call, Wallace communicated "what [outreach] could be changed and by when").

The same evening, two CMS staffers emailed each other. One staffer stated, "tonight we were asked for . . . [c]ontract and outreach details including what we could stop and modify." She wrote, "Mary [Wallace] noted that direct response could be modified or stopped as needed." The other staffer replied, "Thanks," but "[w]e will never be in the room for the conversation, that is what I am guessing." (Gilmore Decl. 1, ECF No. 18-3, at \*263.) Later that night, Wallace received an email of "the numbers" analyzing the "[f]inancial [i]mplications of [p]ulling

[a]dvertising.” (Gilmore Decl. 1, ECF No. 18-3, p. 68-69, 83-84.) (redacting the final analysis of the financial impact of pulling advertising).

The next day, CMS sent partial termination letters to marketing contactors instructing them to “immediately stop work on *all external marketing services*” for the open-enrollment period. (CMS Final Release, at \*1 (emphasis added).) Politico reporter Paul Demko learned of CMS’s actions and emailed the Office of Communications: “Hearing there’s a memo circulating in HHS calling for all enrollment ads to be cancelled immediately. Do you know if this is true? If so, can you provide memo?” (Gilmore Decl. 2, ECF 26-2, at \*31.); *see also* (Marquis Decl. 1, ECF No. 18-2, at \*66-67; Bell Decl. 1, ECF No. 26-1, at \*102-103, 125, 177, 188 (collection of other media inquiries on January 26, 2017).)

After this significant media interest, HHS officials reported later that evening that White House Liaison Tim Clark—formerly the California chairman of then-candidate Trump’s 2016 presidential campaign—told them on the phone that “[a] portion (but not all) of the ad funding had been pulled back.” (OS Final Release at \*1; CMS Final Release at \*10.) At 10:53pm, Wallace communicated the final decision to her staff: “[b]ottom line: The focus is on not spending additional money on marketing for this open-enrollment period. . . [f]or the paid media – if we can stop something and get the funds back (some of which we already did today) we will do that.” (CMS Final Release at \*5.)

On January 27, 2017, the Trump administration implemented its plan to cancel all ads that could be canceled for costs savings, cutting between \$4 and \$5 million of radio and television ad buys. MJ Lee & Tami Luhby, *Trump pulls Obamacare ads days ahead of enrollment deadline, supra*. In the wake of this decision, HHS enrollment numbers decreased

0.5 million from 2016, and 1.6 million from what the Obama Administration expected for 2017 open-enrollment.<sup>3</sup>

### **LEGAL STANDARDS**

Summary judgment is appropriate when the record as a whole demonstrates that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). FOIA cases are typically resolved on cross-motions for summary judgment. *Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 3d 155, 161 (D.D.C. 2017).

FOIA is “a means for citizens to know what their Government is up to” and “a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004). The Government must disclose responsive information to a FOIA requester unless the information falls into one of the statute’s specifically delineated and “narrowly construed” exemptions. *Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011).

To resolve challenges to an agency’s invocation of FOIA exemptions to withhold or redact material, courts review the matter *de novo*, 5 U.S.C. § 552(a)(4)(B), and the Government “bears the burden of establishing the applicability of the claimed exemption,” *Assassination Archives & Res. Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003). “This burden does not shift even when the requester files a cross-motion for summary judgment because ‘the Government ultimately [has] the onus of proving that the [documents] are exempt from disclosure, while the burden upon the requester is merely to establish the absence of material factual issues before a

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<sup>3</sup> Tami Luhby, *12.2 Million People Signed Up For Obamacare For 2017 Amid GOP Repeal Efforts*, CNN.com, Mar. 15, 2017, <https://money.cnn.com/2017/03/15/news/economy/obamacare-enrollment-repeal/index.html>.

summary disposition of the case could permissibly occur.” *Hardy*, 243 F. Supp. 3d at 162 (quoting *Pub. Citizen Health Research Grp. v. FDA.*, 185 F.3d 898, 904-905 (D.C. Cir. 1999)).

To sustain its burden, the Government must provide specific, non-conclusory information justifying its withholdings that is not called into question by contradictory evidence on the record or agency bad faith. *Aguilar v. DEA*, 865 F.3d 730, 734–35 (D.C. Cir. 2017). The Department’s standard burden is not alleviated in this case because no national security concerns are present, unlike *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). All “underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.” *BuzzFeed, Inc. v. U.S. Dep’t of Justice*, 419 F. Supp. 3d 69, 74 (D.D.C. 2019).

### **ARGUMENT**

Protect Democracy is entitled to partial summary judgment because (i) HHS continues to improperly withhold material in six specific instances of factual, post-decisional, or non-deliberative information; and (ii) HHS continues to withhold without basis the identity of White House staff directly relevant to the cancellation of ACA advertisements. The Department’s justifications set forth in its *Vaughn* index are contradicted by non-redacted information it has produced in responses to Protect Democracy’s FOIA request. All segregable factual, post-decisional, non-deliberative information must be released in full. In what has become a pattern of conduct, HHS provides “bare assertions” that factual information is not segregable which “will not do where it is the agency’s burden to show that it has complied with its FOIA obligation.” *Democracy Forward Found. v. Centers for Medicare & Medicaid Servs.*, Case cv-18-635(JDB), 2019 WL 6344935, at \*4-5 (D.D.C. Nov. 27, 2019) (observing that *Vaughn* index was “silent on segregability, and the declarations contain nothing more than conclusory assertions that no portions of the attachments are reasonably segregable.”).

#### **I. HHS Continues to Redact Materials Not Properly Subject to FOIA Exemption 5.**

Under Exemption 5, the deliberative-process privilege only permits the withholding of information that is *both* pre-decisional *and* deliberative. *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 847 F.3d 735, 739 (D.C. Cir. 2017) (“documents are ‘predecisional’ if they are ‘generated before the adoption of an agency policy,’ and ‘deliberative’ if they ‘reflect[ ] the give-and-take of the consultative process’”).

The privilege applies narrowly to specific circumstances where the material reflects “personal opinions” and is “so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.” *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). As much as HHS may wish, there is no categorical carve-out for e-mail communication. (Oct. 9, 2020, ECF No. 43, at \*10).<sup>4</sup> Any “[f]actual material that does not reveal the deliberative process is not protected.” *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983), *vacated in part on other grounds after r'g*, 724 F.2d 201 (D.C. Cir. 1984)).

To meet its weighty burden under FOIA, the agency must provide sufficient information specifically identifying ‘(1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document’s author and recipient.’” *Protect Democracy Project, Inc.*, 370 F. Supp. 3d at 165 (quoting *Nat’l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 188 (D.D.C. 2013)).

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<sup>4</sup> Deliberative-process challenges often turn on the specific facts and record before the court, and the cases HHS cites addressed significantly different facts. *In re Apollo Group, Inc. Secs. Litig.*, 251 F.R.D. 12, 32 (D.D.C. 2008) (plaintiff only offered “speculation” and did not rely on specific evidence on the record); *People for the Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007) (agency produced segregable information from internal drafts); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995) (agency redacted internal “initial thoughts” on final documents, but released in full the underlying factual documents).

On its third attempt, the Department's revised *Vaughn* index (Oct. 9, 2020, ECF No. 43-3) still fails to provide descriptions sufficient to show the withheld information "logically falls within" an exemption; and the invocation of the privilege is still "controverted by contrary evidence in the record." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Protect Democracy challenges the following withholdings on the basis that they do not fall within the protection of FOIA's deliberative process privilege. Like HHS, in discussing these withholdings, Plaintiff refers to the documents by their number in HHS's revised *Vaughn* index, ECF No. 43-3.

***A. Documents Detailing the Prior Administration's Advertising Plans. Documents 1, 2a-2b, 4, 11-12, 15, 19-21.***

The three documents on these two pages contain redactions of a list of planned open-enrollment activities that, given the disclosed text, appear to constitute final decisions made by the previous Administration. The revised *Vaughn* implicitly concedes this material is non-deliberative and post-decisional, characterizing it as factual information about planned outreach activities. (*See, e.g.*, Renewed Mot. for Summ. J., Oct. 9, 2020, ECF No. 43-3, Entry 19.)

The final decisions made by the previous Administration cannot retroactively be characterized as deliberative merely by virtue of the current Administration's desire to revisit them. *Cf. Ctr. for Nat'l Sec. Studies v. I.N.S.*, No. CIV. A. 87-2068(RCL), 1990 WL 236133, at \*4 (D.D.C. Dec. 19, 1990) (upholding deliberative process withholdings where documents were "not final plans intended for implementation" and "none of the plans . . . was ever adopted by a decisionmaking body for dissemination or execution"). The Department stretches the deliberative-process exemption to its breaking point, arguing that revealing *any* factual information about the topics considered by an agency would necessarily "reveal the substance and structure of protected agency deliberations, because it is the 'foundation' of the agency's

deliberative ‘discussion.’” (Renewed Mot. for Summ. J., Oct. 9, 2020, ECF No. 43-1 at 12.) But revealing an agenda item does not reveal the deliberative content of the meeting and thus concerns about inhibiting “frank discussion of legal or policy matters in writing” are inapposite. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *see also Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001) (describing animating purposes of deliberative-process privilege exemption).<sup>5</sup>

In any event, HHS has already disclosed in detail the prior Administration’s advertising outreach plans in this FOIA action, undercutting its own arguments. *See* Gilmore Decl. 1, ECF No. 18-3, p. 57-67 (detailing planned outreach activities as of January 24, 2017). All information regarding the prior Administration’s decisions should be segregated and released.

Post-decisional factual material from the prior Administration also appears to be included in Entry 1 (terms of contract executed by prior administration); Entries 2a and 2b (referring to “tactics” used with existing marketing contractor); Entry 4 (containing information on pre-existing aspects of outreach “package”); Entries 11-12, 15 (similar).

***B. Emails Containing Data, Numbers, and Details of the Prior’s Administration Decisions, Document 7.***

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<sup>5</sup> The cases on which HHS relies to argue to the contrary involve different circumstances that are not applicable here. *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 513-14 (D.C. Cir. 2011) (addressing factual *summary* rather than bare facts, that was created through exercise of judgment regarding facts “culled from” a much larger “universe of facts.”); *Playboy Enters., Inc. v. Dep’t of Justice*, 677 F.2d 931, 936 (D.C. Cir. 1982) (holding that “inextricability” rationale stemmed from prior case regarding *analytic summaries* of underlying facts to inform adjudicator’s decision in adjudicatory hearing that was inapplicable to the dispute before the court); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (addressing presidential privilege for deliberative communications outside the FOIA context)

Document 7 with the subject line “Financial Implications of Pulling Advertising” states, “Mary – here are the numbers.” The remainder of the email is covered by a large block redaction. On this document’s face, given the reference to “numbers,” the email includes non-deliberative data and factual information regarding “numbers” that could be segregated and disclosed. *See Hardy*, 243 F. Supp. 3d at 171–73, 175–76 (holding that “survey results” and “final survey data” were not protected by deliberative process). The email also includes post-decisional material from the prior Administration; the revised *Vaughn* states that the redactions cover descriptions of “possible outreach discontinuation of certain “planned” actions. (Renewed Mot. for Summ. J., Oct. 9, 2020, ECF No. 43-3, Entry 7).

HHS does not argue, like it does for Entries 19 through 21, that any of the information in these documents is “inextricably intertwined” with deliberative pre-decisional material. Segregable information should therefore be released. *See Democracy Forward Found.*, 2019 WL 6344935, at \*4 (finding CMS’ conclusory statement that “data analytics and analysis” regarding open-enrollment could not be segregated was insufficient and ordering agency to reassess documents to identify all reasonably segregable “recommendations that the agency later adopted” as well as portions of factual information that “would not provide meaningful insight into [CMS’s] judgment or the deliberative process.”).

***C. Email Chain with Summary and Clarifying Question Regarding Final But Not Yet Acted Upon Decision, Documents 5-6, 8-9, 23.***

This document is an email with reply text including a series of previous emails regarding an “Outreach Update.” One email in the chain is from CMS’s Mary Wallace to undisclosed recipients and appears to include text describing a final decision that is redacted, with Wallace then stating “[l]et me know if anyone wants to discuss.” Patrick Conway of CMS responds, “[t]o confirm” and asks a redacted clarifying question that is apparently directed to Wallace’s final



decision. Wallace’s final decision and Conway’s clarification should be released. The revised *Vaughn* states that redactions have been applied to clarifications and interpretations of a planned but *not yet acted upon* action related to discontinuation of outreach activities (as opposed to other entries that describe deliberations over planned but *not yet final* actions). (Renewed Mot. for Summ. J., Oct. 9, 2020, ECF No. 43-3, Entries 6, 23.).<sup>6</sup> A planned and finally decided course of action is still final even if it has not yet been acted upon. *See Defs. of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp. 2d 1, 20 (D.D.C. 2004) (suggesting that “final decisions just waiting to be implemented” are post-decisional and not exempt). By this same logic, clarifications of the Department’s final ad cancellation decisions should not be withheld. *See* Documents 5, 8, 9.

## **II. HHS Continues to Redact Materials Not Properly Subject to FOIA Exemption 6**

Exemption 6 permits the Government to redact information related to “personal privacy,” *Morley*, 508 F.3d at 1128, but does not allow the withholding of government-employee names in public documents except to protect a significant privacy interest, like protection from violence, *see Judicial Watch, Inc. v. FDA.*, 449 F.3d 141, 153 (D.C. Cir. 2006) (approving withholding of names due to risk of abortion-related violence). Protect Democracy challenges one email-transmittal of a final talking point, with an improper redaction of a White House recipient, on the basis that the redaction does not fit within the protection of FOIA’s personal privacy exemption. Document 17a.

This document contains redactions that are improper under Exemptions 5 and 6. In this document, HHS’s Timothy Clark emails an individual at the White House whose name and email address have been redacted. This redaction is not justified; either the redaction should be

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<sup>6</sup> HHS is not consistent in its description of the same withheld material and appears to reveal a non-substantive redacted line from the email chain that should have been disclosed to Plaintiff. *Contrast* Entries 6 and 23 with 3 (planned but “not yet acted upon” v. planned but “not yet final.” Entry 3 referring to a line not present on the produced document: “We have decided X”).

removed, or the *Vaughn* should disclose the individual's name. *See Am. Oversight v. G.S.A.*, 311 F. Supp. 3d 327, 349 (D.D.C. 2018) (ordering disclosure of identities of presidential transition team members). The propriety of this withholding is further undermined by the use of the recipient's first name in the email body: "Hello, Katy."

Regarding Exemption 5, the substantive information in the email appears to be post-decisional and not deliberative. The redacted email text appears to include a final copy of an HHS sample talking point sent to the White House. Whether the White House chose to take a different route than HHS in its actual press responses is immaterial to whether HHS's decision was final. *See Judicial Watch, Inc. v. U.S. Dep't of State*, 349 F. Supp. 3d 1, 10 (D.D.C. 2018) (holding that State talking points were not exempt from withholding because they "represent[ed] the final, settled 'party line'"). The case *American Center for Law and Justice v. U.S. Dep't of Justice*, 325 F. Supp. 3d 162 (D.D.C. 2018) does not require a different conclusion, because the "final" talking points in that case were prepared by a subordinate for a superior within the same agency. *Id.* at 172–74. By contrast, these talking points appear to be the Department's final word on its public position on the issue.

The revised *Vaughn* does not suggest the talking point was prepared for the White House, as opposed to prepared and finalized within HHS, and then merely shared with the White House. (Renewed Mot. for Summ. J., Oct. 9, 2020, ECF No. 43-3, Entry 17a.) For clarity, Protect Democracy is challenging only documents containing the Department's final talking points, not earlier drafts. *See, e.g.*, Documents 16, 17a; 18, 22.

### **III. *In Camera* Review and Segregability Analysis is Warranted.**

In the event any ambiguity exists on the record regarding the propriety of the Department's withholdings, *in camera* review of the discrete set of 23 documents in dispute is warranted. 5 U.S.C. § 552(a) (granting courts broad discretion to conduct *in camera* review of

agency records); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980), *abrogated on other grounds by Founding Church of Scientology v. Smith*, 721 F.2d 828, 830 (D.C. Cir. 1983). To conclude that an agency’s “withholding of information is lawful under FOIA in the face of possible redaction, ‘the district court must make specific findings of segregability regarding the documents to be withheld.’” *Waterman v. IRS*, 755 F. App’x 26, 28 (D.C. Cir. 2019) (quoting *Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008)).

Given the small number of documents in dispute and the specific arguments by the parties about the contents of the documents, *in camera* review is a particularly appropriate tool for this case. *Dillon v. U.S. Dep’t of Justice*, No. CV 17-1716 (RC), 2019 WL 249580, at \*8 (D.D.C. Jan. 17, 2019) (ordering *in camera* review of deliberative process privilege because “[t]he documents at issue are relatively short in length—just thirty-eight pages—and the parties’ dispute. . . centers on the actual contents of the document[s]”).

**CONCLUSION**

HHS remains in violation of FOIA, 5 U.S.C. § 552(b), by improperly asserting exemptions over material that belongs to the public. HHS should be ordered to remove improper redactions and produce corrected versions of the documents Protect Democracy identifies in this memorandum, or in the alternative, the Department's redactions should be reviewed *in camera* for inappropriately redacted text.

Date: New York, NY  
October 29, 2020

/s/ Benjamin L. Berwick

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

THE PROTECT DEMOCRACY PROJECT,

*Plaintiff,*

V.

UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

*Defendant.*

Case No. 1:17-CV-00792

## THE PROTECT DEMOCRACY PROJECT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Civil Rule 7(h)(1), Plaintiff The Protect Democracy Project (“PDP”) hereby submits the following statement of material facts as to which there is no genuine issue, in support of PDP’s Cross Motion for Summary Judgment.

**I. Protect Democracy’s Statement of Undisputed Statements of Fact in Support of its Cross Motion for Summary Judgment**

1. On or around January 26, 2017, HHS cancelled advertising and outreach efforts to promote enrollment in health insurance through the Affordable Care Act health insurance exchanges. (Sandler Decl., Ex. 1, Jan. 23, 2018, ECF No. 20-1 (Paul Demko, *Trump White House abruptly halts Obamacare ads*, POLITICO, <https://www.politico.com/story/2017/01/trump-white-house-obamacare-ads-234245> (Jan. 26, 2017)).)

2. On or around January 27, 2017, in response to press inquiries and public outcry, HHS revisited the decision, but still cancelled much of the advertising and outreach campaign. (*Id.*, Ex. 2 (Rachana Pradhan & Paul Demko, *Reversing course, Trump administration will continue*

*Obamacare outreach*, POLITICO, <https://www.politico.com/story/2017/01/obamacare-message-healthcare-gov-trump-234278> (Jan. 27, 2017)).

3. PDP submitted a Freedom of Information request to Defendant U.S. Department of Health and Human Services (“HHS,” or “the Department”) on February 15, 2017. (*Id.*, Ex. 5, at \*1.)

4. PDP’s request seeks:

(1) All formal and informal documents, including but not limited to email communications and memoranda, between and among employees of the Department of Health and Human Services (“HHS”) Office of the Secretary and/or Office of Public Affairs and/or the Centers for Medicare and Medicaid Services (“CMS”) Office of the Administrator and/or Office of Communications concerning the decision to discontinue advertising for healthcare.gov and/or enrollment in healthcare coverage. The timeframe for this request is January 20, 2017 through February 1, 2017.

(2) All formal and informal documents, including but not limited to email communications and memoranda, between the HHS and/or CMS transition teams and the White House concerning the decision to discontinue advertising for healthcare.gov and/or enrollment in healthcare coverage. The timeframe for this request is January 20, 2017 through February 1, 2017.

(3) All formal and informal documents, including but not limited to email communications and memoranda, between and among employees of the HHS Office of the Secretary and/or HHS Office of Public Affairs and/or CMS Office of the Administrator and/or CMS Office of Communications concerning the effect of the Trump Administration’s decision to discontinue the advertising detailed above on enrollment numbers. The timeframe for this request is January 20, 2017 through February 1, 2017.

(4) All formal and informal documents, including but not limited to email communications and memoranda, between and among employees of the HHS Office of Public Affairs and/or CMS Offices of Communications concerning the article published by *Politico* on January 26, 2017 entitled, “Trump White House Abruptly Halts Obamacare Ads.”

(5) All formal and informal documents, including but not limited to email communications and memoranda, between and among employees in the HHS Office of the Secretary and/or HHS Office of Public Affairs and/or CMS Office of the Administrator and/or CMS Office of Communications concerning the number of people who enrolled in healthcare coverage after President Trump took office, which CMS made public on February 3, 2017. CMS reported that approximately 200,000 Americans signed up for coverage in the final two weeks of the open enrollment period. The time-frame for this request is January 20, 2017 through February 6, 2017.

(6) All formal and informal documents, including but not limited to email communications and memoranda, between HHS and/or CMS employees and the White House concerning the number of people who enrolled in healthcare coverage after President Trump took office, which CMS made public on February 3, 2017. CMS reported that approximately 200,000 Americans signed up for coverage in the final two weeks of the open enrollment period. The time-frame for this request is January 20, 2017 through February 6, 2017.

(*Id.* at \*1-2.)

5. HHS received PDP's request on February 27, 2017. (Marquis Decl., Dec. 18, 2017, ECF No. 18-2 at \*16.)

6. HHS and CMS did not determine whether to comply with PDP's request and notify PDP of such determination and the reasons therefor within 20 days of receipt, *i.e.*, by March 19, 2017. (*See id.* ¶ 15; Gilmore Decl., Dec. 18, 2017, ECF No. 18-3, ¶ 12.)

7. PDP filed this Action on April 28, 2017. (Compl. at 5, April 28, 2017, ECF No. 1.)

8. The Department initially produced 274 pages of responsive records. (Marquis Decl. at \*76-108; Gilmore Decl. at \*29-265, \*270-78.) 141 of those 274 pages contained redactions. (Marquis Decl. at \*35, \*74; Gilmore Decl. at \*26, 268.) Another 13 pages of responsive records were withheld in their entirety. (Gilmore Decl. at \*26.) HHS and CMS each prepared *Vaughn* indexes describing their redactions and withholding. (Marquis Decl. at \*110-13; Gilmore Decl. at \*11-23.)

9. In response to PDP's brief in support of its cross-motion for summary judgment, the Department conducted a supplemental search—tracking the search deficiencies that PDP identified—and produced 236 pages of responsive records to PDP. (Bell Decl., Apr. 20, 2018, ECF No. 26-1 at \*7; Second Gilmore Decl., Apr. 20, 2018, ECF No. 26-2 at \*5.) 109 of those 236 pages contained redactions. (*Id.*) Another 20 pages of responsive records were withheld in their entirety. (Bell Decl. at \*7.) The Department also submitted revised *Vaughn* indexes describing redacted and withheld documents. (Bell Decl. at \*245-255; Second Gilmore Decl. at \*40-42.)

10. On February 27, 2019, the Court issued an Order and Memorandum Opinion granting each party's summary judgment motion in part, and denying each party's summary judgment motion in part. (ECF No. 29.)

11. On March 13, 2020, the Department produced a set of re-processed documents, removing certain redactions. (Forbes Decl., Mar. 27, 2020, ECF No. 39-1.)

12. The Department's withholding of material from twenty-three documents on the basis of FOIA's exemption for deliberative-process privilege are all that remain in dispute. (Notice of Anticipated Renewed Mot. for Summ. J., Mar. 13, 2020, ECF No. 38.); Notice of Anticipated Renewed Cross-Mot. for Summ. J., Mar. 27, 2020, ECF No. 39.)

13. On October 9, 2020, HHS filed a renewed motion for summary judgment with its third revised *Vaughn* index. (Renewed Mot. for Summ. J., Oct. 9, 2020, ECF No. 43.)

Date: New York, NY  
October 29, 2020

/s/ Benjamin L. Berwick

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
THE PROTECT DEMOCRACY PROJECT,	)	
	)	
<i>Plaintiff,</i>	)	
	)	Case No. 1:17-CV-00792 (RDM)
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
<i>Defendant.</i>	)	
_____	)	

**[PROPOSED] ORDER**

Upon consideration of Defendant U.S. Department of Health and Human Services' Renewed Motion for Summary Judgment (ECF. No. 43) and Plaintiff The Protect Democracy Project's Renewed Cross Motion for Summary Judgment (ECF No. 44 ), as well as the entire record, it is hereby **ORDERED** that

Defendant's Renewed Motion for Summary Judgment is **DENIED**, and

Plaintiff's Renewed Cross Motion for Summary Judgment is **GRANTED**.

It is further **ORDERED** that Defendant shall produce in full the remaining documents in dispute.

**SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
THE HONORABLE RANDOLPH D. MOSS  
United States District Judge