IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION,)
)
Plaintiff,)
) Case No.: 1:13-cv-920-ABJ
v.)
)
INTERNAL REVENUE SERVICE,)
)
Defendant.)
)

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

INTRODUCTION

Plaintiff Cause of Action filed a Freedom of Information Act (FOIA) request with Defendant Internal Revenue Service (IRS) on October 9, 2012, seeking, *inter alia*, records pertaining to FOIA requests and lawsuits relating to Section 6103 of the Internal Revenue Code and to requests from the Executive Office of the President (EOP) for taxpayer return information. Responsive records may reveal abuses of executive branch authority and agency complicity in the unauthorized access of taxpayer return information.

Defendant claims that the FOIA does not permit disclosure of these records, and relies on an overbroad interpretation of Section 6103 to block public knowledge of potential wrongdoing. But this claim offends both the plain language of and the Congressional intent behind Section 6103 and the FOIA. Section 6103 was designed to prevent executive branch agents' unfettered access to taxpayer information, not to block the disinfecting sunlight of government transparency in exposing such access.

Furthermore, Defendant's reliance upon Exemptions 6 and 7(C) of the FOIA is misplaced because Defendant fails to establish the existence of cognizable privacy interests. Plaintiff does not seek information regarding any particular individual, but rather information concerning the EOP's efforts to obtain access to taxpayer return information. Even assuming the existence of individual privacy interests, Defendant cannot demonstrate that those interests outweigh the overriding public interest in disclosure.

Defendant's reliance on Exemption 5 is similarly misplaced because the attorney work-product and attorney-client privileges do not protect information related to the development of Defendant's media response in the wake of Plaintiff's taxpayer advocacy. Moreover, Defendant's coordination of a media response does not pertain to tax administration or reveal deliberations on a substantive policy matter, and thus does not fall within the deliberative process privilege.

Finally, Defendant failed to conduct an adequate search, failed to explain with sufficient detail how the various offices tasked with searching for responsive records conducted their searches, and failed to identify particular records known to exist. In addition, Defendant's search was not reasonably calculated to uncover all documents responsive to Plaintiff's FOIA request.

Defendant has failed to meet its burden to demonstrate that it properly withheld records responsive to Plaintiff's FOIA request. Therefore, Plaintiff requests that this Court deny Defendant's motion for summary judgment and grant Plaintiff's cross-motion for summary judgment.

PROCEDURAL BACKGROUND

Plaintiff incorporates by reference its Statement of Undisputed Material Facts, which it submits with this cross-motion for summary judgment.

On October 9, 2012, Plaintiff submitted a FOIA request to Defendant that sought eight categories of records. Compl. ¶ 7, Ex. 1, ECF No. 1. Of these items, the first six are relevant:

> 1) All documents, including but not limited to emails, letters, and telephone logs or other telephone records, constituting communications to and/or from any employee of the IRS concerning any FOIA request or lawsuit that relates to I.R.C. § 6103(g);
>
> 2) All documents, including notes and emails, referring or relating to any communication described in request #1;
>
> 3) Any communications by or from anyone in the Executive Office of the President constituting requests for taxpayer or "return information" within the meaning of § 6103(a) that were not made pursuant to § 6103(g);
>
> 4) All documents, including notes and emails, referring or relating to any communication described in request #3;
>
> 5) All requests for disclosure by any agency pursuant to IRC §§§ 6103(i)(1), (i)(2), and (i)(3)(A);
>
> 6) All documents, including communications not limited to notes, emails, letters, memoranda and telephone logs or other telephone records, referring or relating to records described in request #5[.]

Id.[1]

Defendant acknowledged receipt of Plaintiff's FOIA request by letter dated October 31, 2012. *Id.* ¶ 8, Ex. 2. An interim response addressing items three through eight was provided on December 11, 2012. *Id.* ¶ 9, Ex. 3. For items three and four, Defendant stated that the only

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[1] Items seven and eight of the request are not at issue in the present case. Item seven, which sought records pertaining to the Treasury Inspector General for Tax Administration's investigations into unauthorized disclosure of Section 6103 "return information" to EOP, is the subject of another FOIA case pending before this Court. *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C.). Any claims regarding item eight of the request have been dismissed. *See* Order, ECF No. 9.

requests that EOP personnel had made under Section 6103(g) of the Internal Revenue Code were "tax checks" made for the purpose of employment screening. *Id.* Defendant withheld an unspecified number of records under Exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with Section 6103(a). Compl. ¶ 9, Ex. 3. With respect to items five and six, Defendant similarly withheld an unspecified number of records under Exemption 3 in conjunction with Section 6103(a). *Id.*

Defendant issued a final response to Plaintiff's FOIA request on March 4, 2013. *Id.* ¶ 11, Ex. 5. Defendant stated that it located a total of 796 pages in response to items one and two. *Id.* Of these, Defendant withheld six pages in full and 289 pages in part, releasing the remaining 501 pages in full. *Id.* The withheld material was purportedly protected from disclosure under Exemptions 5 and 6, 5 U.S.C. §§ 552(b)(5), (b)(6). Compl. ¶ 9, Ex. 5. Defendant also withheld, in part, an unspecified portion of records that were allegedly "outside the scope" of Plaintiff's FOIA request. *Id.*

Plaintiff timely appealed on April 8, 2013, disputing the adequacy of the search and the propriety of Defendant's withholdings. *Id.* ¶ 15, Ex. 6. Defendant denied the appeal on May 6, 2014. *Id.* ¶ 22, Ex. 8. Plaintiff sued here on June 19, 2013. Compl. at 1. Defendant answered on November 15, 2013. Answer, ECF No. 10. Defendant then moved for Rule 56 summary judgment on April 14, 2014. Def.'s Mot. Summ. J., ECF No. 16. On the same date, Defendant sent to Plaintiff a supplemental production of records that previously had been withheld. *See* Br. in Support of Internal Revenue Serv.'s Mot. Summ. J. at 4, ECF No. 16-1 (Def.'s Br.).

STANDARD OF REVIEW

Congress enacted the FOIA "to introduce transparency into government activities." *Quick v. Dep't of Commerce*, 775 F. Supp. 2d 174, 179 (D.D.C. 2011). It is a "means for

citizens to know 'what the Government is up to'" and "defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (citation omitted); *see also Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (stating that the FOIA ensures "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed").

Agency denials are reviewed *de novo*. 5 U.S.C. § 552(a)(4)(B). "Consistent with congressional intent tilting the scales in favor of full disclosure," *Elec. Frontier Found. v. Dep't of Justice*, 826 F. Supp. 2d 157, 164 (D.D.C. 2011), Defendant has the substantial burden of describing "the documents and the justifications for nondisclosure with reasonably specific detail" and in "demonstrat[ing] that the information withheld logically falls within the claimed exemption." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Exemptions must be "narrowly construed" and "conclusory and generalized allegations of exemptions are unacceptable." *Elec. Frontier Found.*, 826 F. Supp. 2d at 164.

Summary judgment should be granted if the movant shows 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). In determining whether a genuine issue of material fact exists, "all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester; as such, only after an agency proves that it has fully discharged its FOIA obligations is summary judgment appropriate." *Judicial Watch, Inc. v. Consumer Fin. Prot. Bureau*, No. 12-931, 2013 U.S. Dist. LEXIS 140455, at *5 (D.D.C. Sept. 30, 2013), *vacated on other grounds*, 2014 U.S. Dist. LEXIS 40820 (D.C. Cir. Mar. 27, 2014).

ARGUMENT

I. SECTION 6103 AND EXEMPTION 3 DO NOT SHIELD DEFENDANT FROM DISCLOSURE.

Section 6103 and FOIA Exemption 3 protect the confidentiality of taxpayer "returns" and "return information." I.R.C. § 6103(a). But a FOIA-requested document does not fall *entirely* within the ambit of Section 6103 merely because a *portion* of that document contains taxpayer return information. *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 611 (D.C. Cir. 1997) (IRS has a duty to "delete[] exempt matters, including [Section] 6103 return information," before releasing records).

Defendant contends that any records responsive to items three through six of Plaintiff's FOIA request are exempt *per se* from disclosure because they constitute confidential taxpayer return information. *See* Def's Br. at 1. Defendant's argument fails for four reasons. First, Defendant's current interpretation of Section 6103 is inconsistent with its past practice of releasing records concerning tax delinquent accounts. Second, Defendant adopts an overbroad interpretation that conflicts with the rule requiring narrow construction of Section 6103. Third, Defendant relies upon inapposite case law. Fourth, this Court has previously recognized that records sought by Plaintiff are outside the reach of Section 6103.

A. Defendant's Current Interpretation Of Section 6103 Is Inconsistent With Its Past Practice.

Defendant contends that "any records responsive to items three through six of the plaintiff's October 9, 2012, request would be return information, and exempt from disclosure" under Section 6103 and Exemption 3. Def.'s Br. at 11. Specifically, Defendant states that "'tax checks,' which are requests for the return information of individuals under consideration for employment within the Executive Branch or appointment by the President," would be "taxpayer

specific and, by necessity would identify the subject of the request (the 'taxpayer's identity')." *Id.* at 18 n.5. Thus, in Defendant's view tax checks "would be protected from disclosure under Exemption (b)(3) and Section 6103(a)." *Id.* As a result of this determination, Defendant did not search for tax checks in response to Plaintiff's FOIA request. *Id.*

Defendant, however, has previously released copies of substantially similar records—namely, tax checks for credit worthiness under I.R.C. § 6103(l)(3)—with the identifying information redacted under Exemption 3 and Section 6103. Decl. of Allan Blutstein ¶¶ 7-8, Exs. 3-4 (Blutstein Decl.). This example illustrates Defendant's inconsistent interpretation of Section 6103 and undermines Defendant's blanket assertion that any records responsive to Plaintiff's FOIA request are protected from disclosure. *See Landmark Legal Found. v. Internal Revenue Serv.*, 267 F.3d 1132, 1138 (D.C. Cir. 2001) (noting that IRS's "inconsistency" in interpreting Section 6103 factored against the agency's Exemption 3 withholdings).

As detailed in the attached declaration, Plaintiff submitted a FOIA request to the Department of Energy (DOE) on June 12, 2012, requesting copies of all requests made from the DOE to Defendant under Section 6103(l)(3), which pertains to whether an applicant for a DOE loan program has a tax delinquent account. Blutstein Decl. ¶ 5. The DOE referred 142 pages of records responsive to this request to Defendant for processing and final response. *Id.* ¶ 6. Defendant provided a final response to Plaintiff's FOIA request on January 22, 2013, releasing 142 pages in whole or in part. *Id.* ¶ 7. The entirety of this production consisted of individual letters providing tax delinquency determinations—effectively, "tax checks." *Id.* ¶ 8, Ex. 4.

While Defendant redacted all identifying information and statements concerning an entity's credit worthiness under Exemption 3 and Section 6103, the records *as a whole* were still produced. By implication then, Defendant's previous actions support Plaintiff's interpretation of

Section 6103, namely, that the mere presence of return information does not transform the entirety of a record into taxpayer confidential information. Instead, the records Plaintiff received in response to its June 12, 2012 request to the DOE demonstrate that the records at issue in the instant case can be produced once identifying information and other return information has been reasonably segregated and redacted. *See* 5 U.S.C. § 552(b); *Tax* Analysts, 117 at 611 (IRS has a duty to "delete[] exempt matters, including [Section] 6103 return information," before releasing records).

B. Defendant's Interpretation Of Section 6103 Is Overbroad.

Defendant also construes the term "return information" under Section 6103 too expansively. Section 6103 does not define "return information" so broadly as to capture any and all records responsive to items three through six of Plaintiff's FOIA request. Instead, the statutory definition of "return information" is limited to:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence or possible existence, of liability . . . of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

I.R.C. § 6103(b)(2)(A).

As a preliminary matter, Defendant's interpretation of Section 6103 in this case is not entitled to *Chevron* deference because it is not the product of notice-and-comment rulemaking, formal agency adjudication, or some other procedure meeting the prerequisites for *Chevron* deference. *Landmark Legal Found.*, 267 F.3d at 1135-36. Accordingly, Defendant's

interpretation is given weight only to the extent that is has the "power to persuade." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Defendant's vague and overbroad interpretation of Section 6103, however, is unpersuasive. A plain reading of Section 6103 reveals that "data" constituting "return information" must be related to the "*determination* of the existence . . . of liability." I.R.C. § 6103(a) (emphasis added); *see Pa. Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990) (relying on "the fundamental canon that statutory interpretation begins with the language of the statute itself"). Accordingly, Section 6103 would not protect data unrelated to a determination of liability, whether potential or actual. Data and other information, then, which are tangentially related to return information and which cannot be linked to a determination of liability, should not be withheld under Exemption 3.

This interpretative approach is consistent with the D.C. Circuit's recognition that not all information contained in IRS files constitutes return information. *Church of Scientology v. Internal Revenue Serv.*, 792 F.2d 146, 151 (D.C. Cir. 1986) ("Congress would not have adopted such a detailed definition of return information in Section 6103 if it had simply intended the term to cover all information in IRS files[.]"), *aff'd* 792 F.2d 153 (D.C. Cir. 1986) , *aff'd* 484 U.S. 9 (1987). Courts have reached the same conclusion time and time again. *Tax Analysts*, 117 F.3d at 607 (D.C. Cir. 1997) (excluding Field Service Memoranda); *Tax Analysts & Advocates v. Internal Revenue Serv.*, 505 F.2d 350 (D.C. Cir. 1974) (excluding letter rulings); *Arthur Anderson, Inc. v. Internal Revenue Serv.*, 514 F. Supp. 1173 (D.D.C. 1983) (excluding Technical Advice memoranda concerning Revenue Rulings); *Stephenson v. Internal Revenue Serv.*, 629 F.2d 1140, 1145 (5th Cir. 1980) (excluding copies of deposit clips and checks); *Fruehauf Corp.*

v. Internal Revenue Serv., 566 F.2d 574 (6th Cir. 1977) (excluding letter rulings and background files of those rulings).

Indeed, in this regard, Defendant fails to appreciate the U.S. Supreme Court's decision in *Church of Scientology v. Internal Revenue Service*, 484 U.S. 9 (1987). There the Court determined that return information did not lose its protected character even if identifying information were withheld. *Id.* at 14-16. However, insofar as a document might contain *more than just return information*—regardless of whether it is identifying or not—then redaction and production would not be precluded by the Supreme Court's decision. In other words, the mere presence of return information within a record does not transform the entire record into return information.

While certain records (*e.g.*, a tax return form) might constitute return information in their entirety, regardless of the presence or redaction of personally identifying information, other records such as those at issue in the present case would not because they contain only *portions* of return information. *Non-return* information can be reasonably segregated and released. *See Tax Analysts*, 117 F.3d at 611 (IRS has a duty to "delete[] exempt matters, including [Section] 6103 return information," before releasing records). To the extent that non-return information exists and is contained in records responsive to Plaintiff's FOIA request, Defendant cannot offer a "blanket assertion that all information responsive to [Plaintiff's] request . . . was exempt from disclosure." *Church of Scientology*, 792 F.2d at 152.

As the D.C. Circuit emphasized in *Tax Analysts*, agencies must attend to the taxpayer-specific nature of return information when analyzing Section 6103. 117 F.3d at 614.

> Each of the specific items mentioned in the beginning of § 6103(b)(2)(A) is not only factual but *unique to the particular taxpayer*. And each of the more general items in § 6103(b)(2)(A)—"any other data, received by, prepared by, furnish to, or collected by the Secretary with respect to a return" or the liability "of any

> persons"—*is of the same character, that is, unique to a particular taxpayer*. The IRS has itself drawn this very distinction in propounding its view of what constitutes return information.

Id. (emphasis added).

According to *Tax Analysts*, information is less likely to be considered "return information" if it relates to a group or class of taxpayers. *Id.*; *see also Landmark Legal Found.*, 267 F.3d at 1138 (stating that the taxpayer specific character of information is an indication that it is "data" under the definition of return information). As the court stated when refusing to protect from disclosure certain legal memoranda lacking *any* relation to a specified taxpayer, "[w]hy [Section] 6103 should protect such non-taxpayer-specific information is a mystery the IRS has not offered to solve." *Tax Analysts*, 117 F.3d at 615.

In this case, Plaintiff does not seek records of agency communications that are *per se* taxpayer specific. For example, Plaintiff does not seek correspondence between the EOP and Defendant constituting a request for taxpayer or return information with a *particular individual or entity* in mind. Instead, Plaintiff seeks records of any such requests, records of all responses provided to the EOP, and any documents referring or relating to any such communications. *See* Compl. ¶ 7(3)-(6). Defendant has failed to establish how such agency records would constitute return information, as defined by Section 6103. *Cf. Landmark Legal Found.*, 267 F.3d at 1137 ("Conceivably a court could order redaction of the identities of taxpayers and third parties, and of all assertions of empirical propositions, leaving only the non-cognitive portions to be released.").

C. Defendant Relies On Inapposite Case Law.

To support its overbroad interpretation of "return information," Defendant chiefly relies on *Hull v. Internal Revenue Service*, 656 F.3d 1174 (10th Cir. 2011). But *Hull* actually supports

Plaintiff's position that Section 6103 protects information that is "unique to a particular taxpayer," *Tax Analysts*, 117 F.3d at 614, and that is related to the "determination of the existence . . . or possible existence . . . of liability." I.R.C. § 6103(a).

Although the court in *Hull* understood "return information" to include material related to the "*possible existence*" of tax liabilities, *Hull*, 656 F.3d at 1186, it did not reject the requirement that such information still be "provided or . . . prepared . . . with regard to an existing return or to calculate an imposed deduction or liability." *Id.* at 1187. Insofar as material does not relate to a tax liability—whether actual or potential—then it should not be withheld pursuant to Section 6103. Moreover, it is important to note that the requester in *Hull* sought the "full . . . dated submission made" to the IRS by U.S. West, Inc. *Id.* at 1186. In this case, Plaintiff does not *principally* seek materials related to actual or potential tax liabilities. Plaintiff instead seeks records of correspondence between the EOP and Defendant concerning different aspects of Section 6103, as well as requests for return information originating in the EOP. Further, Plaintiff does not seek records of named individuals.

Defendant's reliance on *First Heights Bank v. United States*, 46 Fed. Cl. 827 (Fed. Cl. 2000), to illustrate the scope of return information protected by Section 6103 is similarly misplaced. *See* Def.'s Br. at 15-16. Defendant suggests that the court in *First Heights* considered whether "'revenue estimates prepared by [] Treasury officials in connection with' evaluating a proposed change to certain deductions" constituted return information. *Id.* at 16 (citing *First Heights*, 46 Fed. Cl. at 831). Defendant further suggests that the court determined "'IRS estimates of *hypothetical future deductions*' [to be] return information because they 'dealt with the potential tax liability of particular taxpayers.'" Def.'s Br. at 15-16 (citations omitted). At the end of the day, Defendant would have this court recognize that even "hypothetical-

scenario data," upon which the IRS could not have "relied in making any determination about anyone's tax liability," *id.*, constitute return information.

The court in *First Heights*, however, took a more limited approach and determined that Treasury revenue estimates were return information *only* "to the extent that they identif[ied] *particular* amounts of revenue that could potentially be collected from *particular* taxpayers." *First Heights*, 46 Fed. Cl. at 832 (emphasis added). Moreover, the court specified that "aggregate numbers representing the total estimated revenue that could potentially be collected from taxpayers within a particular group"—the "hypothetical-scenario data" described by Defendant—were *not* included within the ambit of Section 6103 because they could not identify particular taxpayers and were therefore properly left unredacted. *Id.*

Here, Plaintiff seeks information that can be reasonably segregated such that non-personally identifying information could be disclosed. *See* 5 U.S.C. § 552(b); *Tax Analysts*, 117 F.3d at 611 (IRS has a duty to "delete[] exempt matters, including [Section] 6103 return information," before releasing records). Instead, Defendant relies on an incorrect and overly broad interpretation of Section 6103 to deny Plaintiff access to information pertaining to correspondence between the EOP and Defendant concerning tax-related matters.

Finally, Defendant inaptly relies on *Lehrfeld v. Richardson*, 132 F.3d 1463 (D.C. Cir. 1998), to defend the proposition that "the Service was not required to undertake a search for responsive records." Def.'s Br. at 11. In *Lehrfeld*, the D.C. Circuit determined that the IRS's failure to conduct a search for documents was "reasonable because those documents were not subject to disclosure." 132 F.3d at 1465. But the documents at issue in *Lehrfeld* and the present case are clearly distinguishable. The court in *Lehrfeld* considered a FOIA requester's access to third-party submissions to the IRS in support of an organization's application for tax-exempt

status. *Id.* at 1464-65. The court held that the records were protected from disclosure by Section 6103 because the IRS had received them "with respect to the determination of the existence, or possible existence, of [income tax] liability." *Id.* at 1467. Moreover, these records were clearly related to an identifiable entity known to the requester before he submitted his request. *See id.* at 1464.

In the present case, Plaintiff does not seek records with similar specificity. Plaintiff's FOIA request neither identified a particular entity or person as the subject of a search, nor did Plaintiff request a singular category of records as did the requester in *Lehrfeld*, who sought third-party "papers" based on a particular statutory interpretation of Section 6104(a)(1)(A) of the Internal Revenue Code. Instead, Plaintiff seeks a wide variety of records pertaining to *any* communications relating to multiple aspects of Section 6103, as well as requests for taxpayer return information originating in the EOP. *See* Compl. ¶ 7(1)-(6). Thus, the reasoning adopted by the court in *Lehrfeld* does not apply here.

D. Persuasive Precedent Holds That Section 6103 Does Not Block Disclosure.

This Court has previously determined that records similar to those sought by Plaintiff in this litigation—*i.e.*, requests for taxpayer return information by the EOP to the IRS—were not protected by Section 6103 and, therefore, disclosable by Defendant. In *Tax Reform Research Group v. Internal Revenue Service*, a FOIA requester sought requests by President Nixon's special counsel for status reports on pending IRS investigations of taxpayers. 419 F. Supp. 415, 419 (D.D.C. 1976). The Court found that Section 6103 did not apply to the requested records, although it upheld the redaction of identifying data under Exemption 7(C). *Id.* at 420.

Importantly, the Court noted that while the IRS has "traditionally guaranteed the privacy of its transactions with taxpayers," and that "in normal circumstances that privacy is protected by

statutes, difficulties arise where . . . the activities involved are not part of the normal and proper operations of the agency, in relation to which taxpayer privacy is normally protected, but are rather connected with serious abuses of an essentially political nature, which—not being contemplated by [Section 6103]—may therefore not be protected from disclosure." *Id.* at 418.

In the instant case, disclosure of records reflecting communications between the EOP and Defendant likewise could shed light on improper politicization without implicating the privacy interests of individuals whose information is collected, received, or otherwise obtained by Defendant in the course of "normal and proper operations." *Id.* Insofar as records responsive to Plaintiff's FOIA request may reflect the EOP's impropriety, or Defendant's complicity therewith, Section 6103 should not be available to shield illegal activity or to obstruct government transparency. *See id.* ("[T]he basic purpose of [the FOIA] is to open to public scrutiny the actions of the various government agencies without unnecessarily invading individuals' personal privacy[.]").

Although Section 6103 was amended subsequent to the decision in *Tax Reform Research Group*, the holding remains applicable. The 1976 amendments did not change the general character of Section 6103, but rather targeted *specific* problems "such as whether the executive branch should have unfettered access to return information and whether the IRS should supply return information to other Government agencies for uses unrelated to tax administration." Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 Kan. L. Rev. 1065, 1096 (2003).

Aside from these specific changes, Congress did not intend in the wake of the Watergate scandal to limit the public's access to records reflecting government wrongdoing. Rather, Congress was instead interested in protecting taxpayer information from *government* misuse and abuse. *See, e.g.*, *Stokwitz v. United States*, 831 F.2d 893, 894 (9th Cir. 1987) ("Congress was

concerned that IRS had become a 'lending library' to other government agencies of tax information filed with the IRS, and feared the public's confidence in the privacy of returns filed with the IRS would suffer" (citing 122 Cong. Rec. 24013 (1976) (remarks of Sen. Weicker))). As the Joint Committee on Taxation more recently reported:

> The IRS was at risk of becoming the Federal government's central information clearinghouse. A question arose as to whether the virtually unfettered access to returns and return information unnecessarily intrude into the privacy of taxpayers. . . . Prior law [before the 1976 amendments] afforded the President broad discretion to determine who had access to returns and return information.

Joint Committee on Taxation, Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions As Required By Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, Vol. 1, 127 (Jan. 28, 2000), *available at* https://www.jct.gov/publications.html?func=startdown&id=2554.

Disclosure of the requested records at issue in the present litigation could significantly contribute to the public's understanding of the nature of the relationship between the EOP and Defendant, and might expose impropriety in the EOP's attempts, if any, to access taxpayers' return information. These sorts of "serious abuses of an essentially political nature" are not protected from disclosure simply because they might contain portions of return information. *Tax Reform Research Group*, 419 F. Supp. at 418. Instead, with reasonable segregation and redaction, the confidentiality protections of Section 6103 are served, as well as the public interest in disclosure of possible malfeasance in the Federal government.

II. DEFENDANT IMPROPERLY INVOKED EXEMPTIONS 6 AND 7(C).

Defendant alternatively relies on Exemptions 6 and 7(C) to withhold records responsive to items three through six of Plaintiff's FOIA request. Def.'s Br. at 21. However, Defendant has failed to establish cognizable substantial privacy interests. Moreover, even assuming such

privacy interests exist, Defendant has failed to demonstrate that they outweigh the strong public interest in disclosure.

A. Defendant Failed To Identify Cognizable Privacy Interests That Implicate Exemption 7(C).

Exemption 7(C) bars disclosure of personal information in law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). It exempts only those records pertaining to investigations undertaken by an agency for "law enforcement purposes," that is, for those investigations that focus "directly on specifically alleged illegal acts, illegal acts of particular identified officials, [those] which could, if proved, result in civil or criminal sanctions." *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 849 F. Supp. 2d 13, 27 (D.D.C. 2010) (citations omitted). Exemption 7(C) is triggered whenever potentially responsive records "relate to anything that can fairly be characterized as an enforcement proceeding." *Id.*

In determining the applicability of Exemption 7(C), courts must balance the public interest in disclosure against any alleged privacy interests. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989). The Exemption 7(C) balancing test is similar to, but "not coterminous" with, the balancing test undertaken for an Exemption 6 analysis. *Schoenman v. Fed. Bureau of Investigation*, 575 F. Supp. 2d 136, 159 (D.D.C. 2008). Nevertheless, because Exemption 7(C) "provides protection for a somewhat broader range of privacy interests than Exemption 6," the Court should first consider the application of Exemption 7(C). *Stern v. Fed. Bureau of Investigation*, 737 F.2d 84, 91 (D.C. Cir. 1984).

Plaintiff does not contest the fact that records responsive to items five and six of its FOIA request might relate to "law enforcement purposes," *Nat'l Whistleblower Ctr.*, 849 F. Supp. 2d at 27 (citation omitted). As Defendant correctly suggests, records released under Section

6103(i)(1), (2), and (3) would be used in the course of criminal investigations, grand jury proceedings, or other administrative or judicial proceedings regarding the enforcement of Federal law. Def.'s Br. at 22; *see Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 624 (1982) ("[T]he threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared[.]").

However, Defendant has failed to sufficiently demonstrate on the public record how any particular *individual* privacy interests would be implicated by the release of non-personal identifying information. In fact, Defendant fails even to *attempt* to identify *any* privacy interests; it ostensibly assumes the existence of such interests, but does not argue why the mere presence of information protected by Exemption 7(C) would justify the withholding of responsive records *in their entirety*. *See* Decl. of Francis McCormick In Support of Def.'s Mot. Summ. J. ¶ 23, ECF No. 16-4 (McCormick Decl.). As the U.S. Supreme Court has recognized, the deletion of names and identifying characteristics of individuals would still protect individual privacy interests, while also satisfying the purpose of the FOIA. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 375 (1976). Defendant fails to address how the redaction of identifying information from records responsive to Plaintiff's FOIA request could adequately protect the privacy interests of third parties. *See* McCormick Decl. ¶ 23.

Contrary to the picture that Defendant paints, Plaintiff does not seek information pertaining to any named individual who is the subject, or potential subject, of a criminal or civil investigation. Rather, Plaintiff seeks information concerning the EOP and its attempts, if any, to obtain taxpayer return information. It is difficult to imagine how such records—when properly redacted of personal identifying information—would require the wholesale and unjustified application of Exemption 7(C). *See Rosenberg v. Dep't of Immigration & Customs Enforcement*,

No. 12-452, 2014 U.S. Dist. LEXIS 12817, at *26-30 (D.D.C. Feb. 3, 2014) (ordering FBI to revise redactions withholding information that did not identify third parties).

B. Defendant Failed To Identify Cognizable Privacy Interests That Implicate Exemption 6.

Where, as here, an agency fails to meets its burden as to Exemption 7(C)—which requires an agency to show that disclosure "could reasonably be expected to" constitute an unwarranted invasion of privacy, 5 U.S.C. § 552(b)(7)(C)—it rarely meets the stricter standard of Exemption 6, which applies only if disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The U.S. Supreme Court has held that Exemption 6 applies "[w]hen disclosure of information that applies to a *particular individual* is sought from Government records." *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982) (emphasis added). Plaintiff, however, does not seek records of a *named* individual, nor does it seek records—to the extent they pertain to an individual whose privacy interests are at stake—that contain unredacted personal identifying information.

Defendant makes a conclusory claim that any responsive records would be "inherently taxpayer specific" and therefore all records are protected from disclosure in their entirety. McCormick Decl. ¶¶ 21-22. The responsive records in this case are unlikely to be so personal or uniquely identifying as to warrant withholding them in full. *See Rashid v. Dep't of Justice*, No. 99-2461, 2001 U.S. Dist. LEXIS 26353, at *19 (D.D.C. June 12, 2001) (records may be withheld in full when "individual identities may become apparent from the specific details set forth these documents"). Therefore, Defendant should redact any personal identifying information and release the remaining records to Plaintiff.[2] 5 U.S.C. § 552(b); *see Rose*, 425 U.S. at 375.

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[2] Plaintiff does not contest the withholding of Defendant's employees' personal telephone numbers. Def.'s Br. at 37-38. It is well-established that this information falls within the scope

Defendant further contends that Exemption 6 protects "tax checks" from disclosure because "they are part of the job application and presidential appointment process, and release of any 'tax checks' from the EOP would invade the significant privacy interests of the individuals subject to the 'tax checks.'" Def.'s Br. at 28; *see* McCormick Decl. ¶ 21(b). This argument is meritless for two reasons. First, Defendant incorrectly contends that it cannot release tax checks, even if it redacted personally identifying information. *See* Def.'s Br. at 26-28; *see also* 5 U.S.C. § 552(b); *Rose*, 425 U.S. at 375. Second, as Plaintiff has previously pointed out, Defendant has released copies of substantially similar records that Defendant now claims would fall within the scope of both Exemptions 3 and 6. *See supra* pp. 6-8; *see also* Blutstein Decl. ¶¶ 8, Ex. 4. Thus, Defendant has implicitly acknowledged that records responsive to items three through six can be released absent personal identifying information.

C. The Public Interest In Disclosure Outweighs Any Alleged Privacy Concerns.

Even assuming Defendant had satisfactorily identified cognizable individual privacy interests, Defendant's reliance on Exemptions 6 and 7(C) still fails because the public interest in the requested records outweighs the putative privacy interests.

Exemptions 6 and 7(C) require a balancing analysis that requires Defendant to demonstrate how disclosure "'would compromise a substantial, as opposed to a *de minimis* privacy interest,' because '[i]f no significant privacy interest is implicated . . . [the] FOIA demands disclosure.'" *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008) (alterations in original). If Defendant meets its burden by identifying a substantial privacy interest, the requester must then establish a "sufficient reason for disclosure" by showing that

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of Exemption 6 and is protected from disclosure. *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283 (D.D.C. 2011).

"the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake." *Favish*, 541 U.S. at 172 (2004). If the requester can assert a public interest justifying disclosure, the court proceeds to weigh the third-party privacy interests against the public interest in disclosure. *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 840 F. Supp. 2d 226, 230-31 (D.D.C. 2012).

1. Any implicated privacy interests are too insubstantial to justify withholding records in full.

Under Exemption 6, a substantial privacy interest would likely exist in "avoiding embarrassment, retaliation, or harassment and intense scrutiny by the media." *Judicial Watch, Inc. v. Dep't of State*, 875 F. Supp. 2d 37, 46 (D.D.C. 2012). Under Exemption 7(C), "[i]ndividuals involved in law-enforcement investigations . . . have a privacy interest in the non-disclosure of their names and identifying information," *Nat'l Whistleblower Ctr.*, 849 F. Supp. 2d at 28, and have a "strong interest in not being associated unwarrantedly with alleged criminal activity." *Stern*, 737 F.2d at 91-92.

Defendant has failed to identify with any level of specificity the substantive quality of the individual privacy rights at stake in this litigation, instead suggesting that the records in question are "inherently taxpayer specific," and therefore protected from disclosure. McCormick Decl. ¶¶ 21-22. As Plaintiff has argued, and as courts have recognized, such information can be redacted before disclosure. 5 U.S.C. § 552(b); *see Rose*, 425 U.S. at 375. Defendant has simply failed to establish beyond "mere *speculation*" how individual privacy interests would be invaded by disclosure of records that have had names and personally identifying information withheld, as it is obligated to do. *See Nat'l Ass'n of Retired Emps. v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989) (emphasis added).

2. The public interest in disclosure outweighs any conceivable individual privacy interests.

The relevant inquiry regarding the public interest is based on the "core purpose of the FOIA as 'contribut[ing] significantly to public understanding *of the operations or activities of the government*." *Reporters Comm.*, 489 U.S. at 775 (alteration in original). Plaintiff seeks the requested records for the purposes of government accountability, a recognized purpose served by the FOIA. *See Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001) ("[O]btaining information to act as a 'watchdog' of the government is a well-recognized public interest in the FOIA."); *see also Ctr. to Prevent Handgun Violence v. Dep't of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) ("This self-appointed watchdog role is recognized in our system."). Further, Plaintiff's FOIA request pertains to activities of the government—specifically, interaction between the EOP and Defendant concerning disclosure of taxpayer return information. Thus, the requested records could reveal: (1) the extent to which the EOP has sought taxpayer return and return information; (2) whether the EOP abused its authority in making such requests; and, (3) whether IRS officials have acted complicity with any abuse of presidential authority.

Records pertaining to these important issues would not merely serve an interest in obtaining "information for its own sake," *Favish*, 541 U.S. at 172, but would inform the general public to the EOP's relationship with Defendant, the frequency and nature of its attempts to obtain taxpayer information—whether properly or otherwise—and the possibility that taxpayer information was illegally accessed at the highest levels of government.

III. DEFENDANT IMPROPERLY WITHHELD RECORDS UNDER EXEMPTION 5.

Exemption 5 protects 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."[3] 5 U.S.C. § 552(b)(5). This exemption has been construed by the courts to "exempt those documents, *and only those documents* that are normally privileged in the civil discovery context." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added). While Exemption 5 encompasses statutory and common law privileges, *see United States v. Weber Aircraft Corp*, 465 U.S. 792, 800-01 (1984), perhaps the most commonly invoked privileges—all of which are implicated in this case—are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. *See Sears*, 421 U.S. at 149.

In the present case, Defendant has failed to justify with adequate specificity its reliance on the underlying Exemption 5 privileges. First, Defendant incorrectly applies the attorney work-product and attorney-client privileges to non-legal materials that were not prepared in anticipation of litigation or during the course of trial preparation, or which do not consist of communications containing solicited legal advice. Second, Defendant fails to articulate satisfactorily how information it withheld under the deliberative process privilege exhibits a deliberative character. Accordingly, this Court should conduct an *in camera* inspection of the materials redacted by Defendant to ensure the proper application of Exemption 5.

A. Defendant Misapplied The Attorney Work-Product And Attorney-Client Privileges.

The attorney work-product privilege may be invoked "to protect records reflecting 'such matters as trial preparation, trial strategy, interpretations, and personal evaluations and

[3] The threshold consideration for whether Exemption 5 has been properly applied is whether a record constitutes an "inter-agency or intra-agency memorandum[] or letter[]." 5 U.S.C. § 552(b)(5). Plaintiff does not contest that Defendant constitutes an "agency" for the purposes of the FOIA, nor does it contest whether the withheld materials are "'inter-agency or intra-agency memorandums or letters,' as that phrase has been interpreted by the judiciary." Def.'s Br. at 29-30.

opinions.'" *Adionser v. Dep't of Justice*, 811 F. Supp. 2d 284, 297 (D.D.C. 2011) (citation omitted); *see also* Fed. R. Civ. P. 26(b)(3) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative[.]"). The privilege attaches once "some articulable claim, likely to lead to litigation" arises. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980). Defendant, however, attempts to extend the reach of the privilege to work-product originating with its attorneys, yet pertaining to *non-legal matters*—namely, Defendant's press strategy and its response to Plaintiff's media outreach. Def.'s Br. at 36 ("The information redacted . . . was either written by an attorney or conveyed attorney advice regarding the development of [Defendant's] responses to [Plaintiff's] lawsuit and press release.").[4] In each instance, Defendant has explicitly stated that the redacted material reflects "strategic advice (not involving legal analysis) . . . during the development of the IRS media response." *E.g.*, McCormick Decl. ¶ 18(a)(i).

The attorney work-product privilege only protects records if they relate to *legal* matters, and not simply because they originate with an attorney. *See Wolfson v. United States*, 672 F. Supp. 2d 20, 30 (D.D.C. 2009) (stating that the privilege extends to records "prepared in advance of trial and in anticipation of litigation . . . [which] would reveal the attorneys' thought process and litigation strategy and would reveal the agency's deliberations prior to [a decision to request continued wiretapping]"); *Miller v. Dep't of Justice*, 562 F. Supp. 2d 82, 115 (D.D.C. 2008) (privilege extends to documents that "'reflect such matters as trial preparation, trial strategy, interpretation, personal evaluations and opinions pertinent to . . . [a] case'"). Further,

[4] Defendant's proffered justifications for the redaction of non-legal media advice can be found at Def.'s Statement of Undisputed Material Facts ¶¶ 48(a)(i), 48(b), 48(c), 48(e), 48(f), 48(h), 48(l), 48(n), 48(o), 48(p), 48(q), 48(r), ECF No. 16-2 (SUMF); McCormick Decl. ¶¶ 18(a)(i), 18(b), 18(c), 18(e), 18(f), 18(h), 18(l), 18(n), 18(o), 18(p), 18(q), 18(r).

Rule 26, which is the source of the attorney-work product privilege, clearly expresses the necessity of some connection to *trial preparation*. Fed. R. Civ. P. 26(b)(3) ("[A] party may not discover documents and tangible things that are prepared in anticipation of litigation . . ."). In this case, Defendant has failed to demonstrate how "strategic advice (not involving legal analysis)," *e.g.*, McCormick Decl. ¶ 18(a)(i), is related to any legal decision-making process or trial preparation. Thus, it cannot rely on the attorney work-product privilege.

Similarly, Defendant has failed to justify its reliance on the attorney-client privilege, which it defends only briefly in a footnote. Def.'s Br. at 36 n.11. Defendant's application of the privilege is improper because the records in question do not reflect confidential communications related to a legal matter. Instead, as Defendant concedes, they reflect "strategic advice (not involving legal analysis)."[5] *E.g.*, McCormick Decl. ¶ 18(a)(i).

The attorney-client privilege concerns "confidential communications between an attorney and his client relating to a *legal matter* for which the client has sought professional advice." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (emphasis added). While the privilege is "not limited to communications made in the context of litigation or even a specific dispute," it must nevertheless reflect a client's request for his "attorney's counsel . . . on a legal matter." *Coastal States Gas Corp.*, 617 F.2d at 862. As Defendant explicitly admits, however, the "advice" in question concerns media strategy, and does not involve "legal analysis." *E.g.*, McCormick Decl. ¶ 18(a)(i). Thus, Defendant cannot use the attorney-client privilege to withhold the underlying email communications.

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[5] Defendant invokes the attorney-client privilege for the same records it seeks to withhold under the attorney work-product privilege. Def.'s Br. at 36 n.11.

B. Defendant Misapplied The Deliberative Process Privilege.

To invoke the deliberative process privilege, an agency must establish that the withheld material is both "predecisional" and "deliberative." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991). A record is "deliberative" insofar as it forms a "direct part of the deliberative process" by which agencies "make[] recommendations or express[] opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). An agency bears the burden of demonstrating whether withheld documents are properly exempt from disclosure. *Am. Civil Liberties Union v. Dep't of Justice*, 655 F.3d 1, 5 (D.C. Cir. 2011). It must provide "specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA," and thereby injure the deliberative processes of the agency. *Mead*, 566 F.2d at 258; *see also Coastal States Gas Corp.*, 617 F.2d at 868. In the absence of this specificity, an agency may not rely the privilege. *Senate of P.R. ex rel. Judiciary Comm. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (rejecting agency's use of the deliberative process privilege when its justification "consist[ed] almost entirely of each document's issue date, its author and intended recipient, and the briefest of references to its subject matter").

Defendant has failed to articulate with any specificity the *deliberative* nature of the redacted records at issue in this case. *Coastal States Gas Corp.*, 617 F.2d at 866 (defining "deliberative" as "reflect[ing] the give-and-take of the consultative process"). In discussing the deliberative nature of information contained in an email pertaining to the development of its media response to Plaintiff's complaint, Defendant suggests that the release of the redacted material would "discourage candid discussions and undermine [Defendant's] ability to perform [its] function of tax administration." Def.'s Statement of Undisputed Material Facts ¶ 48(a)(i), ECF No. 16-2 (Def.'s SUMF); McCormick Decl. ¶ 18(a)(i). Further redactions under the

deliberative process privilege were similarly defended. *See* Def.'s SUMF ¶¶ 48(b), 48(c), 48(e), 48(f), 48(h), 48(l), 48(n), 48(o), 48(p), 48(q), 48(r); McCormick Decl. ¶¶ 18(b), 18(c), 18(e), 18(f), 18(h), 18(l), 18(n), 18(o), 18(p), 18(q), 18(r).

It is far from apparent, however, that Defendant's drafting of a press release or mere coordination of a media response implicates its core mission of tax administration. Records of such decision-making processes would not appear to "reveal the status of internal agency deliberations on *substantive policy matters*," but only concern "'how best to present [an agency's] position'" or image. *Fox News Network, LLC v. Dep't of the Treasury*, 911 F. Supp. 2d 261, 276-77 (S.D.N.Y. 2012) (finding that "the deliberative process privilege was inapplicable to e-mails concerning press releases that 'consist[ed] entirely of . . . advice regarding messaging, or related to the massaging of [the entity's] public image'") (citations omitted and emphasis added).

The deliberative process privilege exists to protect decision-making processes that "bear on the formulation or exercise of agency policy-oriented *judgment*," and nothing else. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). It does not protect information, such an intra-agency discussions of press strategy, which "could not reasonably be said to reveal an agency's . . . mode of formulating or exercising policy-implicating judgment[s]." *Id.* (citing *Playboy Enters. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982)).

In sum, Defendant has withheld records under the deliberative process privilege without sufficiently demonstrating with satisfactory specificity that the records in question are, indeed, deliberative. *See Coastal States Gas Corp.*, 617 F.2d at 866. Defendant must demonstrate that the redacted material in question reflects the "give-and-take" of the decision-making process. *Id.*

Further, it must demonstrate that this decision-making relates to the "formulation or exercise of agency policy-oriented *judgment*." *Petroleum Info. Corp.*, 976 F.2d at 1435. Defendant has done none of this.

C. *In Camera* Review Of The Redacted Materials Is Appropriate.

The FOIA authorizes this Court to conduct an *in camera* inspection of Defendant's withholdings in order to determine whether Defendant has met its burden in justifying its application of the FOIA exemptions. 5 U.S.C. § 552(a)(4)(B). Based on the foregoing discussion of Defendant's inapt reliance on Exemption 5, it would be appropriate for this Court to conduct such an inspection. *See Loving v. Dep't of Def.*, 550 F.3d 32, 41 (D.C. Cir. 2008) ("[D]istrict courts have 'broad discretion' to decide whether *in camera* review is necessary to determine whether the government has met its burden[.]" (citation omitted)).

In camera review is particularly appropriate in this case because Defendant has neither proffered a satisfactory justification for applying the attorney work-product and attorney-client privileges to non-legal communications, nor has it provided sufficiently detailed justifications for the deliberative nature of certain communications. *See Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 997 (D.C. Cir. 1998) ("If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a *de novo* determination of the agency's claims of exemption, the district court then has several options, including inspecting the documents *in camera*."); *see also Quiñon v. Fed. Bureau of Investigation*, 86 F.3d 1222, 1229 (D.C. Cir. 1996) ("[W]here an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure, an *in camera* review is necessary."). Moreover, given the relatively modest 289 pages that Defendant has attempted to withhold under Exemption 5, *in camera* review would not be onerous. *Id.* at 1228 (the number of records to be inspected is "another . . . factor to be

considered" when determining whether in camera review is appropriate); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 307 (D.D.C. 2007) ("*In camera* review may be appropriate when . . . 'the number of records involved is relatively small[.]'" (citation omitted)).

IV. DEFENDANT FAILED TO CONDUCT AN ADEQUATE SEARCH.

Defendant relies on the declaration of Ms. Denise Higley, Decl. of Denise Higley in Support of Def.'s Mot. Summ. J., ECF No. 16-3 (Higley Decl.), to support its claim that it conducted an adequate search for records responsive to Plaintiff's FOIA request. Def.'s Br. at 6. Defendant's argument fails for three reasons. First, the Higley Declaration fails to describe the search methods used to locate records responsive to items one through four. Second, the Higley Declaration fails to account for existing records that were not found through Defendant's search for records responsive to items one and two. And third, the Higley Declaration demonstrates that Defendant improperly limited the scope of its search for documents responsive to items three and four. Accordingly, the Court should find that Defendant's search for responsive records was inadequate.

In a motion for summary judgment challenging the adequacy of a search, an 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." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citation omitted). To satisfy this burden, the agency may submit "a reasonably detailed affidavit, setting forth the search terms and the type of search performed." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) ("The court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure[.]" (citation omitted)).

This affidavit or declaration must be detailed enough to "afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment." *Oglesby*, 920 F.2d at 68. While the court may rely on the agency's affidavit or declaration in determining the adequacy of the agency's search, *Founding Church of Scientology, Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979), "such reliance is only appropriate when the agency's supporting affidavits are 'relatively detailed' and nonconclusory." *Morley*, 508 F.3d at 1116 (quoting *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 352 (D.C. Cir. 1978)).

Defendant's explanation of its search fails to meet the foregoing standards because the Higley Declaration does not reasonably detail Defendant's search methodology. For instance, as to items one and two of Plaintiff's FOIA request, Ms. Higley stated that she "obtained . . . all records associated with the March 2012 FOIA request." Higley Decl. ¶ 7. However, Ms. Higley did not identify what search terms, if any, she used to find all "associated" records. Thus, it is unclear whether her search was reasonably calculated to produce all communications, including notes and emails, regarding the March 2012 FOIA request. In fact, Ms. Higley never indicated whether she searched all files likely to contain relevant documents, contrary to the requirements of this Court. *See Am. Immigration Council v. Dep't of Homeland Sec.*, No. 12-856, 2014 U.S. Dist. LEXIS 27737, at *12 (D.D.C. Mar. 5, 2014) (stating that the agency "would, at a minimum, have to aver that it has searched all files likely to contain relevant documents" (citation omitted)).

In addition to her own search, Ms. Higley stated that she directed numerous individuals in the Office of Privacy, Governmental Liaison and Disclosure, the IRS Media Relations Office, the IRS Office of Appeals, and the Office of Privacy, Governmental Liaison and Disclosure to

"conduct a search for responsive records in their possession" for items one and two of Plaintiff's FOIA request. Higley Decl. ¶¶ 11-13. Similarly, as to items three and four, Ms. Higley stated that she issued memoranda to the Office of Legislative Affairs, Services and Enforcement, the IRS Media Relations Office, and the Office of Commissioner, directing them to search for responsive records. *Id.* ¶ 20. The Higley Declaration does not explain how those offices conducted their searches, including what search terms were used or what databases were searched. Nor does it reveal what instructions Ms. Higley's search memoranda contained. Without this information, it is impossible to judge the reasonableness of Defendant's search.

This Court has previously held that an agency declaration must detail how individual offices conducted searches in response to a FOIA request. For example, in *Hooker v. Department of Health & Human Services*, the agency's declaration explained that the FOIA request was sent to various offices for processing "because '[t]hese offices were the reasonably likely locations of the records sought.'" 887 F. Supp. 2d 40, 51 (D.D.C. 2012). This Court found that the agency's description was "too cursory" because it "fail[ed] to explain either why those offices were the reasonably likely locations of the records sought or describe with specificity the search methodology used, including what records were searched, by whom, and using what process or search terms." *Id.*; *see also Schoenman v. Fed. Bureau of Investigation*, No. 04-2202, 2009 U.S. Dist. LEXIS 22060, at *45-46 (D.D.C. Mar. 19, 2009) (holding that the agency's declaration failed to indicate how each component conducted its search); *Antonelli v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 04-1180, 2005 U.S. Dist. LEXIS 17089, at *37 (D.D.C. Aug. 16, 2005) (rejecting the agency's declaration that merely stated which offices were "contacted in an attempt to locate any responsive documents" but that did not "describe the searches undertaken").

As in *Hooker*, Defendant's declaration in this case fails to explain how the various offices selected for searches were reasonably likely to possess responsive records. Higley Decl. ¶¶ 11-13. It also fails to describe what records these offices searched, what processes were used, or what records were produced as a result of each office's search. *See Morley*, 508 F.3d at 1121-22 (finding the agency's declaration inadequate because it did not "provide any indication of what each directorate's search specifically yielded"). Instead, Ms. Higley merely stated that she "directed [the offices] to conduct a search for responsive records in their possession," without explaining how the offices actually conducted their search. Higley Decl. ¶¶ 11-13. The D.C. Circuit has held that a "reasonably detailed" declaration must "set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 68. While Defendant is not required to submit a declaration "set forth with meticulous documentation," it should at least describe "what records were searched, by whom, and through what processes." *Murray v. Bureau of Prisons*, 741 F. Supp. 2d 156, 163 (D.D.C. 2010) (citation omitted).

Further, the existence of a 2012 FOIA request from Citizens for Responsibility and Ethics in Washington (CREW) also suggests that Defendant did not conduct an adequate search. Compl. ¶ 19, Ex. 6 at 5 n.27. After reviewing the responsive records, Ms. Higley concluded that "[P]laintiff's prior March 2012 FOIA request . . . was the *only* FOIA request that the IRS received related to 26 U.S.C. § 6103(g), from January 1, 2009, to October 9, 2012." Higley Decl. ¶ 15 (emphasis added). In Plaintiff's administrative appeal, however, Plaintiff explained that Defendant had failed to produce a FOIA request related to Section 6103(g) submitted by CREW in 2012. Compl. ¶ 15, Ex. 6. Plaintiff again asserted this argument in its Complaint. *Id.* ¶ 19. Defendant has consistently failed to address why it did not produce records pertaining

to the CREW request, which should have been included in response to items one and two of Plaintiff's FOIA request. *See Boyd v. U.S. Marshal Serv.*, No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *4 (D.D.C. 2002 Mar. 15, 2002) (stating that an agency's declaration should have explained why a particular report, which was known to exist, was not located, and requiring the agency to "explain its failure to locate this report in a future motion").

As to item four, Defendant conducted an unreasonably narrow search by improperly construing Plaintiff's FOIA request to include *only* statutorily authorized requests. The Higley Declaration states that Defendant limited its search to requests for "tax checks" under Section 6103(c). *See* Higley Decl. ¶ 23. If Plaintiff had sought tax checks under this section, it would have requested that specific information. Instead, Plaintiff's FOIA request was intentionally drafted more broadly and contemplated *all* presidential requests for tax return information—whether through a specific statutory mechanism or any other means. Agencies have a "duty to construe a FOIA request liberally." *Nation Magazine*, 71 F.3d at 890 (citing *Truitt v. Dep't of State*, 897 F.2d 540, 544-45 (D.C. Cir. 1990)). While Plaintiff explicitly clarified the scope of its request in its administrative appeal and Complaint, Defendant has completely ignored it.

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court deny Defendant's motion for summary judgment and grant Plaintiff's cross-motion as Plaintiff has demonstrated there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

Date: June 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on June 9, 2014, they filed Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and In Support of Plaintiff's Cross-Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will serve notice of this filing on all parties registered to receive such notice, including Defendant's counsel.

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