UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, Plaintiff, v. OFFICE OF SCIENCE AND TECHNOLOGY POLICY, Defendant.	)	Civil Action No. 11-1583-RJL

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Office of Science and Technology Policy ("OSTP" or "Defendant") hereby moves the Court to enter summary judgment in its favor and dismiss Plaintiff's complaint in its entirety with prejudice. In support, OSTP relies on the attached memorandum, the declaration of OSTP Chief FOIA Officer Rachael Leonard and attached exhibits, including the *Vaughn* Index, and the declaration of Biotechnology Industry Organization General Counsel Thomas Dilenge.

Dated: January 20, 2012

Respectfully submitted,

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DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Public Employees for Environmental Responsibility ("PEER" or "Plaintiff") has sued Defendant Office of Science and Technology Policy ("OSTP" or "Defendant") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), for certain communications relating to the cultivation of genetically-modified crops on national wildlife refuges and certain records relating to an inter-agency working group on agricultural biotechnology. Because OSTP has conducted an adequate search for records, and produced all responsive documents that are not exempt from release under FOIA, summary judgment should be granted in Defendant's favor.

FACTUAL AND PROCEDURAL BACKGROUND

1. Background on OSTP and the Agricultural Biotechnology Working Group

The Office of Science and Technology Policy (OSTP) is charged by Congress to identify areas in which science and technology can be used effectively in addressing national and international problems. Leonard Decl. ¶ 2; *see also* 42 U.S.C. § 6614(a). To carry out its mission, OSTP seeks to coordinate science and technology policy across the Executive Branch,

and "work[s] in close consultation and cooperation" with the federal departments and agencies. 42 U.S.C. § 6617(a)(1); *see also* Leonard Decl. ¶ 2.

One of the interagency collaborations in which OSTP serves in a convening capacity is the Agricultural Biotechnology Working Group (the "Working Group"). Leonard Decl. ¶ 3. The Working Group is an informal group without a defined roster or written charter. *Id.* at ¶¶ 3-4. It meets as needed, in person or by teleconference, to share information related to the science, technology, and regulation of agricultural biotechnologies with staff of relevant Federal agencies. *Id.* at ¶ 3. The Working Group does not keep minutes or other notes from its meetings, and it generally does not issue formal reports. *Id.* at ¶ 3. The Working Group is solely an intra-governmental group, and it "does not meet with or solicit input from outside entities." *Id*. at ¶ 4.

2. Plaintiff's FOIA Requests and Subsequent Litigation

PEER filed two requests at issue in this litigation. On April 18, 2011, PEER requested two categories of communications regarding the cultivation of genetically engineered or genetically modified crops on national wildlife refuges:

> 1. All communications to and from outside (non-federal) entities, including corporations, or individuals concerning cultivation of GE crops of national wildlife refuges; and
>
> 2. All communications to and from other federal agencies, including the U.S. Fish and Wildlife Service and the Department of the Interior, concerning cultivation of GE crops on national wildlife refuges.

Def.'s Stmt of Material Facts ("LCivR 7(h) Stmt.") ¶ 1 (quoting Leonard Decl., Ex. A). This request was assigned number 11-18. OSTP produced all records on May 13, 2011, except those which it referred to five agencies with equities in the records. All of these agencies have produced the referred records to the Plaintiff.

On June 13, 2011, PEER filed a second request, assigned number 11-32. This request sought three categories of records "concerning the mission and activities of the Ag. Biotech Working Group":

> 1. All documents, including communications, which reflect the mission, nature and/or scope of activities of the Ag. Biotech Working Group or any similarly named organization in which OSTP is a member or otherwise involved;
>
> 2. All communications that OSTP has had with industry or industry representative organizations, such as the Biotechnology Industry Organization (BIO), from January 1, 2010 to present concerning the Ag. Biotech Working Group or any similarly named organization; and
>
> 3. Records reflecting any other industry-promotion or partnership arrangements in which OSTP is currently participating.

LCivR 7(h) Stmt. ¶ 2 (quoting Leonard Decl., Ex. B). As explained in greater detail below, OSTP conducted a person-by-person search of all staff members who were likely to have responsive records. LCivR 7(h) Stmt. ¶¶ 3-8. OSTP produced responsive records to PEER on August 15, 2011, and re-transmitted these documents through counsel on October 3, 2011. Leonard Decl. ¶ 16.

PEER filed the present lawsuit on September 1, 2011. Since that time, attorneys for the parties have communicated on multiple occasions regarding the issues in the case. Through these discussions, the parties have narrowed the issues in dispute to the adequacy of the search regarding items number 1 and 2 of Request Number 11-32, the Exemption 4 redactions on document 11-18.12, and the Exemption 5 withholdings on several documents. LCivR 7(h) Stmt. ¶ 9.[1] OSTP now moves for summary judgment on all remaining issues.

[1] PEER has indicated that it only disputes the Exemption 5 redactions on documents 11-32.10, 11-32.13, 11-32.15, 11-32.16, 11-32.17, 11-32.18, 11-32.20, 11-32.21, 11-32.25, 11-32.26, 11-32.27, 11-32.28, 11-32.29, 11-32.30, 11-32.31, 11-32.32, 11-32.33, 11-32.34, and 11-32.35.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). FOIA actions are typically resolved on summary judgment. *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). A court reviews an agency's response to a FOIA request de novo. *See* 5 U.S.C. § 552(a)(4)(B).

ARGUMENT

I. OSTP CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE DOCUMENTS

On summary judgment in a FOIA case, the agency must demonstrate that it has conducted an adequate search. To do so, it must explain the "scope and method of the search" in "reasonable detail[,]" but need not provide "meticulous documentation [of] the details of an epic search." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). The agency must show "that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "There is no requirement that an agency search every record system." *Id*. Moreover, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *see also Yelder v. Dep't of Defense*, 577 F. Supp. 2d 342, 354-46 (D.D.C. 2008). "[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). Courts accord agency affidavits "a presumption of good faith, which cannot be rebutted by 'purely speculative claims

about the existence and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)). Here, OSTP conducted a search that was "reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68.

As a relatively small agency with fewer than 100 staff members, Leonard Decl. ¶ 20, OSTP's FOIA staff is able to accurately identify those individuals who might have responsive records and ask those individuals to conduct a person-by-person search for responsive records. PEER's Request No. 11-18 requested two categories of communications regarding the cultivation of genetically engineered or modified crops on national wildlife refuges. LCivR 7(h) Stmt. ¶ 1. OSTP identified nine individuals who had worked on issues relevant to this request or who might otherwise have responsive records, and asked them to conduct a search for responsive records. LCivR 7(h) Stmt. ¶ 3 (citing Leonard Decl. ¶ 20). OSTP also confirmed with the individuals initially identified that they were unaware of any other potential records custodians. *Id.*

A similar process was used to conduct the search in response to Request No. 11-32. The request sought three specific categories of documents "concerning the mission and activities of the Ag. Biotech Working Group," LCivR 7(h) Stmt. ¶ 2, so OSTP instructed those staff members who worked on issues related to the Agricultural Biotechnology Working Group or otherwise might have responsive records related to the Working Group to search their records. LCivR 7(h) Stmt. ¶ 5 (citing Leonard Decl. ¶ 23). For example, one of the individuals asked to search for records was the lead OSTP staff contact for the Working Group. LCivR 7(h) Stmt. ¶ 7 (citing Leonard Decl. ¶ 24). "Because of his leadership role in the Working Group, this staff person's records were the most likely to contain records responsive to the request, and did in fact contain

records responsive to the request." LCivR 7(h) Stmt. ¶ 7 (quoting Leonard Decl. ¶ 24). These individuals then conducted a search for paper and electronic records. LCivR 7(h) Stmt. ¶ 5 (citing Leonard Decl. ¶ 23). As with Request No. 11-18, OSTP also confirmed with these individuals that they were not aware of anyone else to ask for the requested records. LCivR 7(h) Stmt. ¶ 6 (citing Leonard Decl. ¶ 23).

For both searches, all potentially responsive records identified by the custodians were individually reviewed by a FOIA staff person to determine whether the records were responsive to the request, and whether the records were subject to release under FOIA or exempt from disclosure. Leonard Decl. ¶¶ 22, 25. Through the search processes, OSTP identified several hundred records responsive to PEER's requests.

These person-by-person searches of the custodians most likely to have responsive records were reasonably calculated to locate responsive records. *See Citizens for Responsibility and Ethics in Washington v. DOJ*, 535 F. Supp. 2d 157, 162 (D.D.C. 2008) (finding agency's search reasonable when it searched files of custodians likely to have responsive records); *see also* LCivR Stmt. ¶¶ 5, 8. Indeed, in the experience of OSTP's Chief FOIA Officer, the search procedure used "is one of the most effective methods to locate responsive records." Leonard Decl. ¶ 23. OSTP should be granted summary judgment on the adequacy of the search.

II. OSTP PROPERLY WITHHELD EXEMPT MATERIAL

OSTP carefully reviewed each page responsive to PEER's request, and found that one document contained confidential commercial information submitted by a third party that is exempt from disclosure under Exemption 4. *See* 5 U.S.C. § 552(b)(4). In addition, OSTP discovered that several documents contained deliberative process material that is exempt from

disclosure under Exemption 5. *See* 5 U.S.C. § 552(b)(5).[2] Agency personnel reviewed and redacted those portions of the records that were exempt from disclosure on a line-by-line basis. Some records were withheld in full because they contained no reasonably segregable, non-exempt information responsive to PEER's request. The single Exemption 4 withholding and the Exemption 5 withholdings in contested documents are fully and accurately described in the *Vaughn* Index attached as Exhibit D to the Leonard Declaration. LCivR 7(h) Stmt. ¶ 10 (citing Leonard Decl. ¶ 28). This *Vaughn* Index and the Leonard and Dilenge Declarations establish that OSTP is entitled to summary judgment because all non-exempt responsive material has been released.

A. OSTP PROPERLY WITHHELD CONFIDENTIAL COMMERCIAL INFORMATION UNDER EXEMPTION 4

OSTP withheld four lines from a single email sent by a non-government employee pursuant to FOIA Exemption 4, which protects records from disclosure that contain "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption covers two distinct categories of information. One is "trade secrets," which the D.C. Circuit has defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). In this case, OSTP has withheld a few lines of information pursuant to the second category of information specified in § 552(b)(4): information that is "(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential." *Id.* at

[2] Additionally, OSTP redacted information under Exemption 6. PEER has agreed not to challenge these withholdings.

1290. The paragraph at issue consists of a private organization's "internal strategic discussions," LCivR 7(h) Stmt. ¶ 12 (quoting Dilenge Decl. ¶ 8), that was mistakenly submitted to OSTP and would cause competitive injury to the submitter if released.

1. The redacted information was obtained from a person

To begin, the information withheld under Exemption 4 was provided to OSTP by a "person." FOIA defines "person" very broadly, to include, inter alia, a "corporation" and "public or private organization." 5 U.S.C. § 551(2); *Allnet Communication Services, Inc. v. FCC*, 800 F. Supp. 984, 988 (D.D.C. 1992) (noting that "'person' refers to a wide range of entities including corporations, associations and public or private organizations other than agencies"). The submitter of the confidential information, Biotechnology Industry Organization (BIO), is a trade association, not a federal agency. LCvR 7(h) Stmt. ¶ 11 (citing Dilenge Decl. ¶ 1)); *see also Critical Mass Energy Project v. Nuclear Regulatory Com'n*, 975 F.2d 871, 874, 879 (D.C. Cir. 1992) (en banc) (applying Exemption 4 to industry group organized as a nonprofit corporation). Thus, both the individual who e-mailed the document and the private organization she represents are "person[s]" within the meaning of Exemption 4.

2. The redacted information is commercial

Second, the information is commercial. LCvR 7(h) Stmt. ¶ 13 (citing Dilenge Decl. ¶¶ 5-6). Records are commercial so long as the submitter has a "commercial interest" in them. *Pub. Citizen*, 704 F.2d at 1290; *see also Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006) (defining "commercial" broadly to include not only "records that reveal basic commercial operations or relate to the income-producing aspects of a business" but also situations "when the provider of the information has a commercial interest in the information submitted to the agency" (internal quotations omitted)). BIO undoubtedly has a "commercial

interest" in the strategy developed by its employee to further one of the organization's--and, by extension, its members'--goals. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Treasury*, --- F. Supp. 2d ----, 2011 WL 3582152, at *17 (D.D.C. 2011) (finding that "private, confidential materials related to corporate strategy" was commercial); *ICM Registry v. U.S. Dep't of Commerce,* No. 06-0949, 2007 WL 1020748, at *7 (D.D.C. Mar. 29. 2007) ("Information reflecting the professional insights of a telecommunications consultant is, as the government submits, obviously commercial . . ."); *Judicial Watch, Inc. v. DOE*, 310 F. Supp. 2d 271, 308 (D.D.C. 2004) (holding that reports that "constitute work done for clients" are commercial), *aff'd in part & rev'd in part on other grounds*, 412 F.3d 125 (D.C. Cir. 2005).[3]

3. The redacted information is confidential

Finally, the information is "confidential." Different tests for confidentiality apply depending on how the commercial information is obtained by the government. If private commercial information is provided to the government voluntarily, it is confidential for purposes

[3] The fact that BIO is an organization that does not itself operate for a profit is irrelevant. "[I]nformation may qualify as "commercial" even if the provider's . . . interest in gathering, processing, and reporting the information is noncommercial." *Critical Mass Energy Project v. Nuclear Regulatory Com'n*, 830 F.2d 278, 281 (D.C. Cir. 1987), *aff'd in part and rev'd in part, Critical Mass*, 975 F.2d at 880 (agreeing that an industry trade group organized as a nonprofit corporation had a commercial interest in "safety reports" it generated); *see also American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978) ("Evidently the district court thought, and American argues, that the information sought is not commercial or financial because the IBT does not have profit as its primary aim. This interpretation gives much too narrow a construction to the phrase in question."); *Gov't Accountability Project v. Dep't of State*, 699 F. Supp. 2d 97, 102-03 (D.D.C. 2010) (Leon, J.) (finding submitter foundation had commercial interest in material, rejecting requester's argument that foundation had "no logical connection to making a profit"). Additionally, BIO's member entities are undoubtedly engaged in commerce, and BIO's successes would further these commercial interests with its activities. *See Critical Mass*, 830 F.2d at 281 (panel decision) (emphasizing that material was commercial because "the commercial fortunes of [submitter's] member utilities, and the vendors whose products are appraised in the [submitter's] reports, could be materially affected"). Further, BIO itself is engaging in commerce when it hires and retains an employee, and it therefore has a commercial interest in the valuable strategic insights that the employee develops. *Cf. Judicial Watch*, 310 F. Supp. 2d at 308.

of Exemption 4 "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass*, 975 F.2d at 879. Private commercial information that has been submitted to the government under compulsion is confidential for purposes of Exemption 4 if disclosure is likely either (1) "to cause substantial harm to the competitive position of the person from whom the information was obtained" or (2) "to impair the Government's ability to obtain necessary information in the future." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted); *see also Critical Mass*, 975 F.2d at 879 (holding that National Parks test applies when a person is required to provide private commercial information to the government).

OSTP properly withheld the contested information under Exemption 4 because it was of a kind typically not released to the public and it was mistakenly submitted. *See* Dilenge Decl. ¶¶ 4-8. However, in the alternative, even if the paragraph is instead analyzed under the more stringent test for information submitted under compulsion, the paragraph is properly withheld because its release would cause substantial competitive harm to BIO.

a. The withheld information was voluntarily submitted and is of a kind not customarily released to the public

Information is categorically exempt from disclosure if it (1) is voluntarily provided and (2) "is of a kind that would customarily not be released to the public." *Critical Mass*, 975 F.2d at 879. The information redacted under Exemption 4 meets both criteria.

First, BIO was not obliged to submit the information. In fact, OSTP neither requested nor desired the information, which has little relevance to OSTP's mission or activities. Leonard Decl. ¶ 32; *see also* Compl. ¶22 ("Plaintiff cannot fathom what proprietary information an industry lobbyist would have sent over unsolicited to an agency with no regulatory role and without a request or promise of confidentiality."). BIO obtained no advantage from OSTP by

submitting the information. Dilenge Decl. ¶ 6 ("BIO did not believe that it would obtain any advantage by providing it to OSTP."). As BIO has explained, the withheld information was sent by mistake. LCivR 7(h) Stmt. ¶ 15; *see also* Dilenge Decl. ¶ 4 (paragraph was sent to OSTP "inadvertently"); *id.* at ¶ 5 (paragraph was "mistakenly" shared with OSTP); Leonard Decl. ¶ 23 ("It appears to have been mistakenly submitted to OSTP by BIO."). Such mistaken submissions are voluntary submissions which are exempt from disclosure. *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 244 F.3d 144, 148-49 (D.C. Cir. 2001) (holding that a "mistaken submission" constituted a voluntary submission for purposes of Exemption 4, even though agency had purported to demand the information).

Second, the information is of a kind not customarily released to the public, OSTP, or other third parties. LCivR 7(h) Stmt. ¶ 14 (citing Dilenge Decl. ¶¶ 5, 8). BIO would not normally share its internal strategy with third parties such as OSTP, and did not intend to share it with OSTP. Dilenge Decl. ¶ 8 ("BIO does not normally provide information about our internal strategic discussions with any third parties and views them as confidential."); *see also id.* at ¶ 5 (explaining that the information "is of a kind that BIO would not normally release to the public or any outside third party."); *id.* at ¶ 8 (noting that the redacted information "should not have been provided to OSTP at all"). Although OSTP obtained this confidential information by mistake, this mistake need not be compounded by a release of this confidential information to the public at large. *See Center for Auto Safety*, 244 F.3d at 148-49. Thus, OSTP properly withheld confidential information mistakenly submitted under Exemption 4.

b. The release of this information would cause substantial competitive harm to BIO

Although the paragraph should be analyzed as a voluntary submission, the information was properly redacted even if it is instead assessed under the more demanding standard for

confidentiality applied to required submissions because its release would cause substantial competitive harm to the submitter.

The D.C. Circuit does not require that a party show "actual competitive harm" in order to show a likelihood of substantial competitive harm. *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (citation omitted). Rather, "evidence revealing '[a]ctual competition and the likelihood of substantial competitive injury' is sufficient to bring commercial information within the realm of confidentiality." *Kahn v. Fed. Motor Carrier Safety Admin*., 648 F. Supp. 2d 31, 36 (D.D.C. 2009) (quoting *Pub. Citizen*, 704 F.2d at 1291). Although conclusory and generalized allegations of substantial competitive harm are insufficient to justify the application of Exemption 4, "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure." *Pub. Citizen*, 704 F.2d at 1291 (citations omitted). "[E]vidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." *Essex Electro Engineers, Inc. v. Sec'y of Army*, 686 F. Supp. 2d 91, 93-94 (D.D.C. 2010) (Leon, J.) (citing *Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

To begin, there is actual competition in the government relations and advocacy arena, particularly regarding biotechnology. Dilenge Decl. ¶7 ("BIO operates in an advocacy environment in which there are many organizations that oppose the use of biotechnology, particularly in the agricultural arena, and that seek to persuade federal, state and local agencies to restrict the technology's use."); *see also* Leonard Decl. ¶ 34 ("There are other organizations that compete with BIO."). Indeed, PEER itself actively competes with BIO to gain the attention of policy-makers on issues related to genetically-modified organisms. *See, e.g.*,

http://www.peer.org/news/print_detail.php?row_id=1456 (press release criticizing an agency's proposal regarding genetically-modified organisms).

Second, there is a likelihood of competitive injury to BIO and its members if BIO's strategy is made public. LCivR 7(h) Stmt. ¶ 16 (citing Dilenge Decl. ¶ 7). If this information were released, "'competitors could imitate or seek to counteract BIO's strategy and further their own contrary agendas at the expense of BIO and its members.'" LCivR ¶ 18 (quoting Dilenge Decl. ¶ 7); *see also Suzhou Yuanda Enterprise, Co. v. Customs & Border Protection*, 404 F. Supp. 2d 9, 13 (D.D.C. 2005) (holding that agency "demonstrated here that releasing the withheld information would cause substantial competitive harm . . . "because it is 'not the type of information a commercial entity would give to a competitor.'"). It has been accepted for decades that Exemption 4 protects against such harm. *Timken Co. v. U.S. Customs Service*, 531 F. Supp. 194, 201 (D.D.C. 1981) (finding Exemption 4 protects from disclosure marketing strategies, among other things, because release "would allow competitors to discern the strengths and weaknesses of the marketing strategies of these companies and target their weak points for attack. Competitors also could imitate the successful policies of these companies."); *see also Essex Electro*, 686 F. Supp. 2d at 94 (finding agency demonstrated risk of competitive harm "because the requested information could reveal Fidelity's business strategy and cost structure"). Because the release of BIO's strategy could undermine BIO's effectiveness and cost BIO support, there is a likelihood of substantial competitive harm, and OSTP properly withheld the portion of the e-mail under Exemption 4.

B. OSTP PROPERLY WITHHELD DELIBERATIVE INFORMATION UNDER EXEMPTION 5

Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5

U.S.C. § 552(b)(5). Records are exempt from disclosure if they would be "normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus incorporates the privileges that are available to an agency in civil litigation, including the deliberative process privilege. *Id.* at 148-50; *Rockwell Intern. Corp. v. DOJ*, 235 F.3d 598, 601 (D.C. Cir. 2001).

"Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears*, 421 U.S. at 151 n.18. To protect agency deliberation, the deliberative process privilege generally protects "'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)). "In deciding whether a document should be protected by the privilege [courts] look to whether the document is 'predecisional' [–] whether it was generated before the adoption of an agency policy [–] and whether the document is 'deliberative' [–] whether it reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "There should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take — of the deliberative process — by which the decision itself is made'" because the agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions . . . .'" *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears*, 421 U.S. at 151; *Vaughn*, 523 F.2d at 1144).

Exemption 5 was properly applied to withhold information about the deliberations of the Working Group and its members, such as information that discusses or reveals proposals under consideration. *See* Leonard Decl. ¶ 41; *Vaughn* Index.[4] For example, a single line is redacted from the agenda set forth in the e-mail communication Document 11-32.17 because that line reveals "proposed processes and policies for consideration and discussion by federal agencies at an upcoming meeting of the Ag Biotech Working Group." LCivR 7(h) Stmt. ¶ 21 (quoting *Vaughn* Index at 11-32.17). Similarly, Document 11-32.30 is an e-mail message from an OSTP staff member to the Director of OSTP that "describe[s] one official's impressions, sent solely to the OSTP Director, of issues of concern among federal agencies about a proposed agency action and the nature of informal interagency discussions about this proposal." LCivR 7(h) Stmt. ¶ 22 (quoting *Vaughn* Index at 11-32.30). "Interagency conference calls on policy matters," such as those conducted by the Working Group, "are quintessentially deliberative, and where documents reflect the contents of those calls, they are properly withheld under exemption (b)(5)." *ICM Registry, LLC v. Dep't of Commerce*, 538 F. Supp. 2d 130, 135 (D.D.C. 2008); *see also Bloomberg, L.P. v. SEC*, 357 F. Supp. 2d 156, 169 (D.D.C. 2004) (Leon, J.) (holding that privilege applied to "notes and memoranda" that "distill discussions reflecting the impressions of SEC officials regarding potential regulatory responses to analyst issues"). PEER is not entitled to the proposals under consideration by Working Group members or the status of deliberations regarding those issues, and is certainly not entitled to a single official's impressions of those deliberations. *See, e.g.*, *Wolfe v. HHS*, 839 F.2d 768, 774-75 (D.C. Cir. 1988) (holding privilege protects fact that a particular policy has been forwarded to another agency for review); *McKinley*

[4] The documents at issue under Exemption 5 remained within the Executive Branch and plainly meet Exemption 5's threshold requirement that the documents be "inter-agency or intra-agency" memoranda or letters. LCivR 7(h) Stmt. ¶ 19 (citing Leonard Decl. ¶ 40).

v. FDIC, 744 F. Supp. 2d 128, 140 (D.D.C. 2010) (applying privilege to e-mail containing, among other things, "proposed regulatory responses to the situation"); *Mayer, Brown, Rowe & Maw LLP v. IRS*, 537 F. Supp. 2d 128, 138 (D.D.C. 2008) (privilege applies to "a discussion of 'the status of ongoing determinations within the agency as to guidance with respect to SILO transactions and . . . issues that need to be resolved'"). In order to "protect against premature disclosure of proposed policies before they have been finally formulated or adopted," *Coastal States*, 617 F.2d at 866, Exemption 5 should be applied to exempt from disclosure those records revealing proposed agency policies.

Similarly, OSTP also properly withheld e-mail chains containing drafts (and edits to drafts) of weekly reports. LCivR 7(h) Stmt. ¶ 23; *see also Vaughn* Index 11-32.25-29, 35; Leonard Decl. ¶ 43. These drafts were "subject to further editing," LCivR 7(h) Stmt. ¶ 24 (quoting Leonard Decl. ¶ 43), and, as drafts, are exempt under the deliberative process privilege. *See, e.g.*, *Citizens for Resp. and Ethics in Washington v. DHS*, 514 F. Supp. 2d 36, 46 (D.D.C. 2007) (Leon, J.) (applying privilege to draft "situation reports"). "[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors." *In re Apollo Group, Inc. Securities Litigation*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (quotations omitted). Accordingly, "drafts are commonly found exempt under the deliberative process exemption." *People for the American Way Foundation v. National Park Service*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007). In addition to being drafts, these reports, once finalized, were intended to "apprise senior leadership of the status of deliberations and reflect differing views, contemporary debate, and disagreement among Executive Branch officials on topics that require further discussion by agency leadership."

LCivR 7(h) Stmt. ¶ 24 (quoting Leonard Decl. ¶ 43); *see also, e.g.*, *Vaughn* Index at 11-32.25 (draft "discusses one official's impressions of what particular agency processes will involve and what next steps may be possible"). As explained above, Exemption 5 applies to information that would reveal unadopted proposals, the status of deliberations, as well as an individual's impressions of either. *See also Citizens for Resp. and Ethics in Washington*, 514 F. Supp. 2d at 46 (holding agency "appropriately withheld 'predictive opinions about possible participants in [teleconference] discussions" (Doc. 1416-17) as reflecting how the decision to include certain individuals in discussions about the response to Hurricane Katrina was reached").

Because this information is covered by the deliberative process privilege, OSTP properly withheld it pursuant to Exemption 5.

III. OSTP RELEASED ALL REASONABLY SEGREGABLE NON-EXEMPT INFORMATION

Under FOIA, "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Accordingly, "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data*, 566 F.2d at 260. "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). A court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. DOJ*, 518 F.3d 54, 61 (D.C. Cir. 2008) (internal citation omitted).

Here, the Leonard declaration explains that OSTP withheld information only following "a careful, line-by-line review of each document withheld in part or in full to determine that there was no reasonably segregable factual or non-deliberative information responsive to plaintiff's

request." Leonard Decl. ¶ 49; *see also Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 776-77 (D.C. Cir. 2002) (holding that agency had demonstrated there was no reasonably segregable non-deliberative material when, among other things, it had submitted an affidavit by an agency official who stated that "she personally conducted a line-by-line review of each document withheld in full and determined that 'no documents contained releasable information which could be reasonably segregated from the nonreleasable portions.'"); *Adionser v. DOJ*, --- F.Supp.2d ----, 2011 WL 4346399, at *4 (D.D.C. 2011) (finding segregability obligation satisfied based on agency declaration that all reasonably segregable information was released).

Moreover, OSTP has provided a detailed *Vaughn* Index that describes each portion of each challenged document withheld, establishing its commercial or deliberative nature. *See Vaughn* Index. In addition to this detailed description of each withheld portion, OSTP provided information regarding date, time, sender, recipient, and subject line of every e-mail communication, and it provided this information separately for every e-mail in the chain with redactions. *See id.* This index establishes that OSTP released all reasonably segregable, non-exempt information. *See Hodge v. FBI*, 764 F. Supp. 2d 134, 144 (D.D.C. 2011) ("Because the Hardy Declaration and annotations identify the exemptions claimed for each individual document and, indeed, for each redaction, defendants have met their burden under the law of our Circuit."); *Judicial Watch, Inc. v. Dep't of State*, 650 F. Supp. 2d 28, 34-35 (D.D.C. 2009) (holding that agency established segregability because "it explicitly described the number and size of any withheld portions" and "was specific as to the title, printout date, and record of each document, indicating that the government conducted individualized review of these documents line-by-line" (citation omitted)).

Because OSTP has shown that all reasonably segregable, non-exempt responsive information has been turned over, OSTP is entitled to summary judgment.

CONCLUSION

For the foregoing reasons, this Court should grant OSTP's motion for summary judgment and dismiss PEER's complaint with prejudice.

Dated: January 20, 2012

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY,	)	
Plaintiff,	)	Civil Action No. 11-1583-RJL
v.	)	
OFFICE OF SCIENCE AND TECHNOLOGY POLICY,	)	
Defendant.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 7(h), Defendant Office of Science and Technology Policy (OSTP) hereby submits that the following material facts are not in genuine dispute:

Requests and Searches

1. In Request No. 11-18, PEER requested two categories of records:

   1. All communications to and from outside (non-federal) entities, including corporations, or individuals concerning cultivation of GE crops of national wildlife refuges; and
   2. All communications to and from other federal agencies, including the U.S. Fish and Wildlife Service and the Department of the Interior, concerning cultivation of GE crops on national wildlife refuges.

Leonard Decl., Ex. A.

2. In Request No. 11-32, PEER requested three categories of records "concerning the mission and activities of the Ag. Biotech Working Group":

   1. All documents, including communications, which reflect the mission, nature and/or scope of activities of the Ag. Biotech Working Group or any similarly named organization in which OSTP is a member or otherwise involved;

   2. All communications that OSTP has had with industry or industry representative organizations, such as the Biotechnology Industry Organization

(BIO), from January 1, 2010 to present concerning the Ag. Biotech Working Group or any similarly named organization; and

3. Records reflecting any other industry-promotion or partnership arrangements in which OSTP is currently participating.

Leonard Decl., Ex. B.

3. In response to Request 11-18, OSTP searched the records of nine individuals who worked on issues related to the request, and confirmed with the individuals identified that there were no other records custodians likely to have responsive records. Leonard Decl. ¶ 20.
4. This search was reasonably reasonable and appropriate to locate the records requested, if such records existed. *See* Leonard Decl. ¶ 20.
5. In response to Request 11-32, OSTP identified individuals who worked on issues related to the Agricultural Biotechnology Working Group or who otherwise might have responsive records related to the Working Group. Leonard Decl. ¶ 23 ("OSTP identified four staff members believed either to have worked on issues related to the Agricultural Biotechnology Working Group, or to potentially have responsive records related to the Working Group."). These individuals conducted a paper and electronic search for responsive records. *Id.* ("OSTP instructed these individuals to conduct a search of their records for any responsive records. . . . Respective OSTP staff individually searched their paper and electronic records and produced all responsive records, or submitted a statement that they had no responsive records.").
6. OSTP confirmed with the individuals identified that there were no other custodians likely to have responsive records. Leonard Decl. ¶ 23 ("OSTP also asked these staff members if they were aware of any other potential records custodians at OSTP.").

7. "One of the individuals asked to search for responsive records was the lead OSTP staff contact for the Agricultural Biotechnology Working Group. Because of his leadership role in the Working Group, this staff person's records were the most likely to contain records responsive to the request, and did in fact contain records responsive to the request." Leonard Decl. ¶ 24.
8. This search was reasonable and appropriate to locate the records requested, if such records existed. *See* Leonard Decl. ¶ 23 ("In my experience, instructing individuals who worked on issues related to the request to search for the requested records is one of the most effective methods to locate responsive records.").
9. PEER only challenges the adequacy of the search for records responsive to items numbered 1 and 2 of Request 11-32, the agency's withholding of information based on Exemption 4 in OSTP11-18.12, and the agency's withholding of information under Exemption 5 in the following records: 11-32.10, 11-32.13, 11-32.15, 11-32.16, 11-32.17, 11-32.18, 11-32.20, 11-32.21, 11-32.25, 11-32.26, 11-32.27, 11-32.28, 11-32.29, 11-32.30, 11-32.31, 11-32.32, 11-32.33, 11-32.34, and 11-32.35. Leonard Decl. ¶ 27.
10. The *Vaughn* Index fully and accurately describes the information withheld on the basis of Exemption 4 or Exemption 5 in each of these documents. Leonard Decl. ¶ 28.

Exemption 4

11. Biotechnology Industry Organization (BIO) is a trade association incorporated under Section 501(c)(6) of the Internal Revenue Code. Dilenge Decl. ¶ 1.
12. The information redacted from OSTP11-18.12 consists of BIO's "internal strategic discussions." Dilenge Decl. ¶ 8; *see also Vaughn* Index at 11-18.12 (redactions "discuss a recommendation for BIO's internal strategy").

13. The information redacted from OSTP11-18.12 is commercial. Dilenge Decl. ¶¶ 5-6.

14. The information redacted from OSTP11-18.12 is customarily not shared with the public, OSTP, or third parties. Dilenge Decl. ¶¶ 5 (explaining that the information "is of a kind that BIO would not normally release to the public or any outside third party."); *id.* at ¶ 8 ("BIO does not normally provide information about our internal strategic discussions with any third parties and views them as confidential.").

15. The information redacted from OSTP11-18.12 was mistakenly submitted to OSTP. Dilenge Decl. ¶ 4 (paragraph was sent to OSTP "inadvertently"); *id.* at ¶ 5 (paragraph was "mistakenly" shared with OSTP); *id.* at ¶ 8 (explaining that the BIO employee meant to forward only the attachment, and the e-mail information "should not have been provided to OSTP at all").

16. There is a likelihood of competitive injury to BIO and its members if the redacted information is made public. Dilenge Decl. ¶ 7.

17. There is actual competition in the government relations and advocacy arena, particularly regarding biotechnology. Dilenge Decl. ¶ 7.

18. If the information were to be released, "competitors could imitate or seek to counteract BIO's strategy and further their own contrary agendas at the expense of BIO and its members." Dilenge Decl. ¶ 7.

Exemption 5

19. All of the records withheld in full or in part under Exemption 5 are "inter-agency or intra-agency memorandums or letters." Leonard Decl. ¶ 40 ("[A]ll records withheld in full or in part under Exemption 5 remained within the Executive Branch."); *Vaughn* Index.

20. The portions redacted under Exemption 5 "discuss draft interagency comments, opinions and impressions of Executive Branch officials on draft documents, perceived priorities and issues for discussion, proposed policies and processes for consideration, and tentative concerns." Leonard Decl. ¶ 41; *Vaughn* Index.

21. For example, a single line is redacted from Document 11-32.17 that "proposed processes and policies for consideration and discussion by federal agencies at an upcoming meeting of the Ag Biotech Working Group." *Vaughn* Index at 11-32.17.

22. The redacted portions of the email at Document 11-32.30 "are deliberative because they describe one official's impressions, sent solely to the OSTP Director, of issues of concern among federal agencies about a proposed agency action and the nature of informal interagency discussions about this proposal." *Vaughn* Index at 11-32.30.

23. Documents 11-32.25, 11-32.26, 11-32.29, and 11-32.35 are drafts of weekly reports. *Vaughn* Index. Documents 11-32.27 and 11-32.28, discuss edits to the draft at Document 11-32.29. *Id.*

24. "The weekly reports apprise senior leadership of the status of deliberations and reflect differing views, contemporary debate, and disagreement among Executive Branch officials on topics that require further discussion by agency leadership. They are subject to further editing and are in draft form, or describe tentative comments on the draft submissions." Leonard Decl. ¶ 43.

25. OSTP released all reasonably segregable non-exempt information. Leonard Decl. ¶ 48 ("OSTP conducted a careful, line-by-line review of each document withheld in full and in part to determine that there was no reasonably segregable factual or non-deliberative information responsive to plaintiff's request."); *Vaughn* Index.

Dated: January 20, 2012

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