ORAL ARGUMENT NOT SCHEDULED

No. 19-5088

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUAN LUCIANO MACHADO AMADIS,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF STATE,
UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Plaintiff-appellant is Juan Luciano Machado Amadis.

Defendants-appellees are the United States Department of State and the United States Department of Justice.

Amici curiae in this Court are Advance Publications, Inc., American Society of News Editors, The Associated Press, The Associated Press Media Editors, Association of Alternative Newsmedia, Cable News Network, Inc., the California News Publishers Association, Californians Aware, The Daily Beast, First Look Media Works, Inc., The Foundation for National Progress, Gannett Co., Inc., the Inter American Press Association, the International Documentary Association, the Investigative Reporting Program, the Investigative Reporting Workshop, Los Angeles Times Communications LLC and The San Diego Union-Tribune, LLC, The McClatchy Company, The Media Institute, MPA—The Association of Magazine Media, the National Press Photographers Association, The New York Times Company, The News Guild—CWA, The Online News Association, PEN American Center, POLITICO, ProPublica, Radio Television Digital News Association, Reporters Without Borders, Reuters, Reveal from The Center for Investigative Reporting, the Society of Environmental Journalists, Society of

Professional Journalists, Student Press Law Center, The Tully Center for Free Speech, and The Washington Post. There have been no other amici curiae.

B. Rulings Under Review

Plaintiff appeals from the judgment entered on January 31, 2019, by Judge Trevor N. McFadden in No. 16-cv-2230 (D.D.C.). JA 351. The order has not been published. The district court's amended memorandum opinion is published at 388 F. Supp. 3d 1.

C. Related Cases

The case on review has not previously been before this Court or any other court. Counsel is unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Weili J. Shaw
WEILI J. SHAW

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GLOSSARY

DEA	Drug Enforcement Administration
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
OIP	Office of Information Policy

STATEMENT OF THE ISSUES

Plaintiff challenges responses to his FOIA requests by the U.S. Department of State (State), Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), and U.S. Department of Justice's Office of Information Policy (OIP). The issues presented are:

1. Whether the district court correctly rejected plaintiff's challenges to DEA's and FBI's responses to his third set of FOIA requests on the ground that plaintiff failed to exhaust administrative remedies.

2. Whether DEA's and State's searches were reasonably calculated to locate records responsive to plaintiff's second set of FOIA requests.

3. Whether OIP reasonably interpreted plaintiff's request for records "memorializing or describing the processing of his previous" FOIA appeals.

4. Whether OIP properly withheld, based on FOIA Exemption 5 and the deliberative process privilege, portions of records containing OIP line attorneys' views, thoughts, and recommendations regarding his appeals.

5. Whether OIP released all reasonably segregable portions of the responsive records.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to the Brief for Plaintiff-Appellant.

STATEMENT OF THE CASE

A. FOIA Requests at Issue

Plaintiff Juan Luciano Machado Amadis, a citizen and resident of the Dominican Republic, JA 10, ¶ 3, challenges the government's responses to a series of FOIA requests he submitted to the U.S. Department of State (State) and three components of the U.S. Department of Justice (DOJ)—the Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), and Office of Information Policy (OIP).

1. Machado submitted his first set of FOIA requests to DEA, FBI, and State in July 2016. JA 10, ¶ 8; JA 11, ¶ 15; JA 12, ¶ 22. The requests appeared to seek information relating to State's decision to deny Machado's application for a United States visa in 1990 on the ground that State had reason to believe that Machado was or had been a drug trafficker. *See* JA 68; JA 59 (request for State "[r]ecords regarding alleged criminal activities that have led to [Machado's] visa revocation/denial"); JA 102 (request for "all records related to this request, as well as [Machado's] entire records within the Drug Enforcement [Administration]"); JA 170 (request for FBI "[i]nformation regarding any/all criminal and/or drug trafficking related crimes for Juan Luciano Machado Amadis"). Machado administratively appealed the DEA and FBI responses to OIP. JA 108 (DEA); JA 186, 191 (FBI). OIP affirmed FBI's response, JA 193-94, and closed the DEA

appeal based on the pendency of Machado's lawsuit, JA 110. Machado has abandoned any claims with respect to this first set of requests. JA 327 n.4.

2. On May 16, 2017, Machado submitted a second set of FOIA requests that pertained to the processing of his first set of requests. The requests to State, DEA, and FBI sought "copies of all records, including emails, memorializing or describing the processing of his previous FOIA Request" to that agency. JA 81 (State); JA 112 (DEA); JA 221 (FBI request, which also sought "search slips"). Machado also submitted a request to OIP for "copies of all records, including emails, memorializing or describing the processing of his previous FOIA Appeal[s]" from his first DEA and FBI requests. JA 280.

State located five responsive pages and released them in full. JA 83, 85-89, 90. DEA identified twelve pages and released them in full, JA 117, then released five additional pages after an appeal to OIP and remand, JA 119, 122, 124, 126. FBI identified responsive records and withheld them pursuant to FOIA Exemptions 5 and 7. 5 U.S.C. § 552(b)(5), (b)(7)(E); JA 227; JA 236-37 (OIP affirmance on administrative appeal). OIP identified four responsive pages and released them with redactions pursuant to FOIA Exemptions 5 and 6. 5 U.S.C. § 552(b)(5), (6); JA 282.

3. On the same day, Machado also submitted a third set of somewhat broader FOIA requests to DEA and FBI. The request to DEA sought "all records,

including emails, about [Machado]." JA 129. The DEA found no responsive records. JA 14, ¶ 31; JA 132. However, DEA offered to conduct a second search if Machado provided, within thirty days, "additional search criteria such as other names and/or aliases . . . , any alternative dates of births, any additional Social Security Number(s) . . . , as well as any different spellings of [Machado's] name . . . and/or a specific DEA investigative file number and/or a specific event that the DEA participated in." JA 133. After receiving some additional information from Machado, JA 136, DEA informed Machado that it still could not identify records relating to him, JA 138, 140.

The request to FBI similarly sought "all records, including emails and cross-references, about" Machado. JA 241. FBI also found no responsive records, JA 254,[1] but stated that "[i]f you have additional information pertaining to the subject that you believe was of investigative interest to the Bureau, please provide us the details and we will conduct an additional search." JA 254. In response to an e-mail, FBI clarified that Machado would have to submit such information through a new request. JA 259. Machado has not yet done so.

[1] FBI's response included a *Glomar* response that "neither confirm[ed] nor denie[d] the existence of [Machado's] name on any watch lists." JA 254.

B. District Court Proceedings

Machado filed suit in district court to challenge the government's response to his FOIA requests. JA 1. Machado ultimately limited his challenge to the government's responses to his second and third sets of requests. JA 327 n.4. The court entered summary judgment for the defendants. JA 324, 350.

1. The district court rejected Machado's challenge to the government's response to his third FOIA requests to DEA and FBI. The court held that, because both agencies made determinations on his requests within twenty working days, Machado was obligated to exhaust administrative remedies before seeking judicial review. JA 330-31 (citing *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 64 (D.C. Cir. 1990)). Machado failed to do so. *Id.*

The court rejected Machado's argument that the agencies' response letters did not trigger the exhaustion requirement because DEA and FBI also offered to conduct additional searches if he submitted additional information. The court explained that the agencies' responses were "determinations" within the meaning of the statute, and that an agency that "compl[ies] with FOIA's timelines does not forfeit its ability to invoke the administrative exhaustion requirement merely because it offered a requester more than he was legally entitled." JA 333. "To hold otherwise would discourage agencies from trying to accommodate FOIA requesters and pervert the intent of the FOIA." *Id.*

2. The district court rejected Machado's argument that DEA's and State's searches in response to his second set of FOIA requests—those for records relating to his first set of FOIA requests—were inadequate.

With respect to Machado's second request to DEA, the court held that the agency had reasonably concluded that all responsive records would be stored in DEA's FOIA records system, and that it was not required to search employee e-mails when any responsive e-mails were reasonably likely to be in that system. JA 335. With respect to Machado's second request to State, the court held in relevant part that the State Department reasonably searched for responsive records using the FOIA case number for Machado's first request. JA 349-50.

3. Finally, the district court upheld OIP's response to Machado's request for "copies of all records, including emails, memorializing or describing the processing of his previous FOIA Appeal[s]" from DEA's and FBI's responses to his first set of requests. JA 280.

First, the court held that OIP properly treated as nonresponsive fifteen pages of DEA and FBI records relating to those agencies' initial processing of Machado's requests. JA 339. The court reasoned that these records did not fall within the plain language of Machado's request, which sought records "memorializing or describing" OIP's processing of his appeals. JA 339-40.

Second, the court held that OIP properly withheld portions of the four pages of responsive records pursuant to FOIA Exemption 5 and the deliberative process privilege. JA 341. The responsive records were "Blitz Forms" that OIP attorneys use to process appeals. *Id.* The district court held that the withholdings—which consisted of line attorneys' notes and recommendations in fields titled "Discussion," "Search Notes," and "Recommendation," *id.*—were proper because the redacted material was both predecisional and deliberative. JA 343-44. The court found that the Blitz forms were prepared by line attorneys to "succinctly summarize the initial search and response to the FOIA request at issue in the administrative appeal, identify important issues to be taken into account . . . , and provide key background information . . . for . . . presentation to reviewing senior OIP attorneys." *Id.* (quoting JA 268, ¶ 18). As the court explained, the redacted material "reflects OIP attorneys' 'evaluations, analysis, recommendations, and discussions in contemplation of the adjudication of [Machado's] administrative appeals.'" JA 343. The court further held that the agency demonstrated that it "reasonably fores[aw] that disclosure would harm an interest protected" by the exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I); JA 346. The court explained that OIP had provided evidence that disclosure "would have a chilling effect" on OIP attorneys, "who would no longer feel able to discuss their idea[s], strategies, and recommendations in Blitz Forms freely." JA 346.

SUMMARY OF ARGUMENT

1. The district court correctly rejected Machado's challenges relating to his third set of FOIA requests on the ground that he failed to exhaust his administrative remedies. A requester must exhaust administrative remedies before filing suit if the agency makes a determination on the request within FOIA's time limits. DEA's and FBI's responses were timely "determinations": the agencies gathered and reviewed the documents; determined and communicated what they intended to produce and withhold and why; and informed Machado of his appeal rights. Machado objects that exhaustion was unnecessary because he previously filed administrative appeals regarding similar prior requests not at issue here. Machado waived this argument and, in any event, those prior appeals did not give the government a chance to consider the issues presented by the requests actually at issue. Machado also argues that DEA's and FBI's offers to conduct additional searches if he provided additional information meant that they did not make a "determination" within the statutory time limit. However, the agencies' offers did not alter the status of their responses under this Court's precedent. Machado's contrary rule would wrongly penalize agency cooperation with requesters and undermine FOIA's administrative appeal scheme.

2. DEA's and State's searches in response to Machado's second set of FOIA requests—for records relating to his first set of requests—were reasonably

calculated to locate responsive records. DEA appropriately searched a database that was likely to contain all responsive records, and was not required to search employees' e-mails when they were not reasonably likely to contain additional records. State appropriately searched e-mails using the request number for Machado's original request because its records were organized by request number.

3. OIP reasonably interpreted Machado's request for records "memorializing or describing the processing of his previous FOIA Appeal[s]," JA 280, to exclude source material that predated the appeals in question. The records at issue described the processing of Machado's first set of requests, not his subsequent appeals. The fact that these records were received from DEA and FBI and located in the appeal files does not mean that they describe the processing of the appeals.

4. OIP properly withheld portions of the Blitz forms used to process Machado's appeals under FOIA Exemption 5 and the deliberative process privilege. The redacted fields contain OIP line attorneys' views, thoughts, and recommendations on how OIP should resolve Machado's appeal. These portions of the records are precisely the sort of predecisional, deliberative memoranda to decisionmakers that the deliberative process privilege seeks to protect. OIP also "reasonably fore[saw]" that disclosure would harm an interest protected by the deliberative process privilege within the meaning of 5 U.S.C. § 552(a)(8)(A)(i).

OIP's affidavit establishes many factors this Court has previously found to indicate that disclosure would harm the interests protected by the privilege. Because OIP more than satisfied its obligations under 5 U.S.C. § 552(a)(8)(A)(i), the Court need not accede to amici's request for dicta on what that provision would require in other circumstances.

5. Finally, although the district court erred by failing to consider whether OIP released reasonably segregable portions of these documents, this Court can and should resolve the issue in the first instance. Only four pages of records are at issue, and OIP provided a thorough affidavit explaining that it conducted a line-by-line review and withheld only predecisional and deliberative notes made for the purpose of informing the agency's ultimate decisions on those appeals. OIP's affidavit is more than sufficient to establish that OIP released all reasonably segregable portions of the two records at issue.

STANDARD OF REVIEW

This Court reviews de novo the district court's grant of summary judgment in a FOIA case. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 889 (D.C. Cir. 1995).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REJECTED MACHADO'S CHALLENGES RELATING TO HIS THIRD SET OF REQUESTS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

A. DEA and FBI Satisfied All Prerequisites for Triggering FOIA's Exhaustion Requirement

1. "As a general matter, a FOIA requester must exhaust administrative appeal remedies before seeking judicial redress." *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180, 182 (D.C. Cir. 2013) (*CREW*). Exhaustion is required "so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990)).

To trigger the exhaustion requirement, the agency must "make and communicate its 'determination' whether to comply with a FOIA request" by certain deadlines, *CREW*, 711 F.3d at 184; otherwise the requester "shall be deemed to have exhausted his administrative remedies," 5 U.S.C. § 552(a)(6)(C)(i). In *CREW*, this Court considered when an agency's response constitutes such a "determination." This Court held that the agency must "(i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of

the 'determination' is adverse." 711 F.3d at 188; *see also Oglesby*, 920 F.2d at 65 ("A response is sufficient for purposes of requiring an administrative appeal if it includes: the agency's determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse.").

2. Machado does not dispute that both DEA's and FBI's letters responding to his third set of FOIA requests were issued within the statutory time limit of twenty working days. *See* JA 129, 132; JA 241, 254; *see* 5 U.S.C. § 552(a)(6)(A)(i). Moreover, each agency's letter satisfied *CREW*'s requirements for making and communicating a "determination" that triggers the administrative exhaustion requirement. In its June 8, 2017, letter, DEA (i) stated that it had searched its Investigative Reporting and Filing System and its Narcotics and Dangerous Drug Information System and found no responsive records; (ii) determined and communicated that it had no responsive records to release; and (iii) informed Machado of his right to appeal DEA's determination. JA 132-33. In its June 12, 2017, letter, FBI likewise (i) stated that the FBI had searched its Central Records System and found no responsive records; (ii) determined and communicated that it had no responsive records to release; and (iii) informed Machado of his right to appeal FBI's determination. JA 254.

DEA's and FBI's timely responses to Machado therefore satisfied FOIA's requirements for a "determination" and triggered the administrative exhaustion requirement. Because Machado did not exhaust his administrative appeals, the district court correctly granted summary judgment as to these claims.

B. Permitting Suit on These Claims Would Undermine the Purposes of Exhaustion

Machado argues that this Court should excuse him from the exhaustion requirement because OIP previously heard his appeals as to a different set of searches—his first set of FOIA requests for information about himself. Br. 10-12. He contends that, because OIP's decision in those cases "informs how OIP likely would have resolved such an appeal" in these cases, requiring exhaustion would not serve the doctrine's purpose. Br. 11 (quoting *National Security Counselors v. DOJ*, 80 F. Supp. 3d 40, 48 (D.D.C. 2015), *aff'd in part, vacated in part*, 848 F.3d 467 (D.C. Cir. 2017)).

As an initial matter, Machado has waived this argument by failing to raise it before the district court. In any event, it fails on the merits. Although exhaustion in the FOIA context is a "jurisprudential doctrine" and not a jurisdictional one, "FOIA's administrative scheme favors treating failure to exhaust as a bar to judicial review." *Hidalgo*, 344 F.3d at 1259. This Court requires exhaustion so long as "'the purposes of exhaustion' . . . support such a bar." *Id.* at 1258-59 (quoting *Oglesby*, 920 F.2d at 61). Those purposes are to "to prevent premature

interference with agency processes, to give the parties and the courts benefit of the agency's experience and expertise and to compile an adequate record for review." *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004) (per curiam).

Those purposes fully apply in this case. By refusing to pursue administrative remedies with respect to his third set of requests, Machado denied the agency the opportunity to fully process these requests, provide its experience and expertise, and compile a record for review. "[I]t would be both contrary to 'orderly procedure and good administration' and unfair 'to those who are engaged in the tasks of administration' to decide an issue which the [agency] never had a fair opportunity to resolve prior to being ushered into litigation." *Dettman v. U.S. Dep't of Justice*, 802 F.2d 1472, 1476 n.8 (D.C. Cir. 1986) (quoting *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952)).

Machado's contrary argument relies on a district court case excusing failure to exhaust where a different party to the litigation exhausted an "identical" claim, *National Security Counselors*, 80 F. Supp. 3d at 40, as well as this Court's decision in *Wilbur*, in which the agency actually heard and decided an administrative appeal that was filed many years late, 355 F.3d at 677. In both cases, the agency had an opportunity to consider the identical issue to the one raised in court.

By contrast, Machado's third set of FOIA requests were not identical to his first set. His first FBI request, for example, sought "[i]nformation regarding

any/all criminal and/or drug trafficking related crimes for Juan Luciano Machado Amadis," JA 170, whereas his third sought "all records, including emails and cross-references, about him," JA 241. *Compare also* JA 102, *with* JA 129. Moreover, Machado included additional information in his third set of requests that he presumably believed would lead to additional records. *See, e.g.*, JA 129 ("For assistance locating the appropriate office or records custodian, I have attached a *Vaughn* index . . . which states . . . that a particular DEA agent . . . was named in the document in question. . . . You may not limit this request to 'investigative records maintained by DEA' or to records located in the [Investigative Reporting and Filing System and Narcotics and Dangerous Drug Information System]."). By refusing to exhaust, Machado prevented OIP from addressing these aspects of his third set of requests. Machado's argument also suffers from the further flaw that OIP never had the opportunity to resolve his administrative appeal from his first DEA request. Because Machado filed suit while the appeal was still pending, the appeal was closed before OIP could issue a decision. *See* 28 C.F.R. § 16.8(b)(2).

For both reasons, OIP never had a meaningful opportunity to resolve the issues presented by Machado's third set of requests. Enforcing the exhaustion requirement therefore serves that doctrine's purposes.

C. DEA's and FBI's Offers to Conduct Additional Searches Did Not Vitiate the Exhaustion Requirement

Machado further argues that, because DEA's and FBI's letters offered to conduct additional searches if Machado provided additional information, those letters did not constitute "determinations" within the meaning of FOIA. Br. 12; JA 133 ("If you provide additional search criteria, we will initiate a second search for any DEA records pertaining to your client."); JA 254 ("If you have additional information pertaining to the subject that you believe was of investigative interest to [FBI], please provide us the details and we will conduct an additional search."). That argument contradicts this Court's precedent and would penalize agencies for cooperating with requesters.

1. As explained above, DEA and FBI completed each of the steps required to trigger the exhaustion requirement under *CREW*: they gathered and reviewed documents; determined and communicated the scope of documents that they intended to produce and withhold and the grounds for any withholdings; and informed Machado that he could appeal any adverse portion of the determination.[2]

[2] Contrary to Machado's assertion, Br. 18, the government does not contend that merely informing the requester of appeal rights is sufficient to trigger the exhaustion requirement. Machado also suggests that these portions of the response letters were boilerplate that does not reflect the agencies' views on whether he could appeal. Br. 18-19. DEA's letter in particular belies that assertion. *See* JA 133 ("I understand that a FOIA litigation case . . . associated with your client's previous request is pending in the United States District Court, for the District of

That an agency offers to conduct an additional search if the requester provides additional information is of no significance under these criteria.

2. Machado's argument finds no support in *CREW*'s holding that it is insufficient for the agency to "simply decide to later decide" what it will produce and withhold. 711 F.3d at 186. In *CREW*, the agency merely "express[ed] a future intention to produce non-exempt documents and claim exemptions" without "inform[ing] the requester of the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *Id.* at 185. Among other reasons, this Court explained that requiring exhaustion under these circumstances would create a "Catch-22": "[a] requester cannot appeal within the agency because the agency has not provided the necessary information," "[y]et the requester cannot go to court because the requester has not appealed within the agency." *Id.* at 186.

That holding is not remotely applicable here. DEA and FBI did not "simply decide to later decide"; they both determined that they would not produce any documents because no responsive documents were found. The agencies' responses provided all the information Machado needed to appeal.

Columbia. You may, however, if you are not satisfied with my response to this new request, administratively appeal by writing to the Director, Office Information Policy (OIP), . . . or you may submit an appeal through OIP's FOIA online portal . . . .").

3. The possibility that an agency will conduct an additional search in the future does not mean that the agency did not "determine and communicate the scope of the documents it intends to produce and withhold" from the *current* search. *CREW*, 711 F.3d at 188. After all, a requester is always free to submit an additional FOIA request and include new information, and if that request passes muster under FOIA, the agency must conduct an additional search. That possibility cannot mean the requester does not have to exhaust; otherwise, the exhaustion requirement would never attach and FOIA's carefully constructed administrative appeal scheme would be undermined.

a. FBI's response in this case illustrates this precise scenario. Although FBI's initial offer to conduct a new search might have been ambiguous as to how Machado should submit any new information, FBI later clarified that Machado would have to submit a new FOIA request. JA 259. Thus, as Machado argues, FBI only offered him the same opportunity available to all FOIA requesters. Br. 12, 17. That offer cannot vitiate the exhaustion requirement.

Contrary to Machado's argument, the government is not "asking this Court to penalize [Machado] for not being able to divine the agency's hidden intent." Br. 17. FBI sent its clarification e-mail on June 30, 2017, shortly after the twenty-working-day window expired. JA 259. By this date, Machado was fully aware of both FBI's response and the fact that he would have to submit an additional FOIA

request to conduct a new search. Even if this date were treated as the effective date of FBI's response, administrative exhaustion would still be required because FBI's response was complete before Machado filed suit. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003).

b. DEA did not require Machado to submit information through a new FOIA request, but its willingness to conduct an additional search without a new request should not change the result. Generally, "[a]gencies are entitled to make requesters refile (and go to the end of the queue) when they want to alter the parameters of their initial search request." *Rubman v. U.S. Citizenship & Immigration Servs.*, 800 F.3d 381, 392 (7th Cir. 2015). Here, DEA extended Machado a courtesy by letting him alter search parameters without losing his place in line. Apart from this difference in procedural formalities, Machado's position was no different than that of any other FOIA requester who receives a timely agency response: he could request a new search, file an administrative appeal, or both. Neither the statute nor this Court's precedent offers any reason why extending this courtesy should alter the status of DEA's response as a "determination" that triggers administrative exhaustion.

Nor does the analysis change because DEA stated that it would administratively close Machado's request if he did not respond within thirty days. Br. 12. That statement merely reflects DEA's administrative mechanism for

allowing Machado to keep his place in line—keeping his current request open—and does not indicate that DEA's response was not a determination. Machado interprets the statement as indicating that DEA would "decide later" whether or not to close the request, but the closure or non-closure of the request is irrelevant. To constitute a determination, the agency must "determine and communicate the scope of the documents it intends to produce and withhold," *CREW*, 711 F.3d at 188, not whether it will close the request or keep it open.

4. Machado's position would create the perverse result of penalizing agencies that offer to conduct additional searches by making it significantly harder for such agencies to invoke exhaustion. FOIA has a short twenty-working-day window for making a "determination" on a request, 5 U.S.C. § 552(a)(6)(A)(i), extendable by only ten days in "unusual circumstances," *id.* at § 552(a)(6)(B).[3] In the vast majority of cases, conducting a search, reviewing the results, and preparing a response will take up most if not all of the time permitted to the agency. In this case, for example, DEA and FBI issued their initial responses four and two days, respectively, before the deadline of June 14, 2017. *See* JA 129, 132; JA 241, 254. It would have been nearly impossible to complete the process a *second* time—for Machado to provide new information and for DEA and FBI to

[3] After a requester has filed suit, a court can retain jurisdiction and give the agency additional time to comply in "exceptional circumstances." 5 U.S.C. § 552(a)(6)(C)(i).

conduct new searches, review the results, and prepare new responses—within the few days left. Yet Machado's argument would require agencies to perform precisely this feat, or risk losing the benefits of the administrative exhaustion requirement.

5. Machado also argues that "[a] final response is a response where the *only* option is to file an administrative appeal." Br. 13-14. He contends that, under the government's position, "the requester must choose whether to trust the agency to do a good job with the additional search or file a potentially wasteful appeal." Br. 14.

That argument cannot be squared with the reality that, as explained above, FOIA requesters can always obtain a new search by submitting a new FOIA request, regardless of whether the agency offers to conduct such a search. Thus, it is always a possibility that a timely administrative appeal will be "wasteful" if a new search produces the desired results. Nor is there any merit to Machado's suggestion that an appeal would "stop[] the [second] search process in its tracks." Br. 14. Machado cites no rule, regulation, or practice suggesting that agencies will generally stop processing a search if the requester has filed an appeal with respect to a prior search.

In any event, even if the requester declines a potentially "wasteful" appeal from the first search, the requester can still appeal from the second search and then

seek judicial review, regardless of whether the second search is pursuant to a separate request or the submission of additional information under the same request. Machado asserts that requesters will be unable to challenge the adequacy of any additional search, Br. 14-15, but provides no basis in statute or precedent for this conclusion. An agency that improperly withholds records found through a second search will be in violation of FOIA and subject to its remedial provisions. *See, e.g.*, 5 U.S.C. § 552(a)(4)(B) (vesting district courts with "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant").

II. DEA'S AND STATE'S SEARCHES WERE REASONABLY CALCULATED TO IDENTIFY RECORDS RESPONSIVE TO MACHADO'S SECOND SET OF REQUESTS

Machado next challenges the reasonableness of DEA's and State's responses to his second set of FOIA requests, which sought information about those agencies' processing of his first set of requests. Machado argues that DEA should have searched in more locations and that State should have used more search terms. Neither argument has merit.

A. DEA's Selection of Search Locations Was Appropriate

1. "The adequacy of [an agency's FOIA] search . . . is judged by a standard of reasonableness." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). An agency's search for records is sufficient if the agency

"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*, 920 F.2d at 68. "[T]he 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*, 745 F.2d at 1485 (emphases omitted).

This Court has explained that constructing a search requires the agency to exercise "both systemic and case-specific . . . discretion and administrative judgment and expertise." *Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002). FOIA generally relies on agencies to use their knowledge of their own operations to determine how best to locate responsive records. For this reason, this Court has cautioned that FOIA "is hardly an area in which the courts should attempt to micro manage the executive branch." *Id.*

An agency may establish its compliance with FOIA by providing "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 68. Such an affidavit is "accorded a presumption of good faith." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). To overcome that presumption, the requester must

provide countervailing evidence, not "purely speculative claims about the existence and discoverability of other documents." *Id.*

2. Machado's second DEA request sought "copies of all records, including emails, memorializing or describing the processing of his previous FOIA Request No. 16-00541-P." JA 112. DEA's affidavit explained that "DEA determined that all responsive information was reasonably likely to be found in the DEA Freedom of Information/Privacy Act Record System, JUSTICE-004." JA 100. Using the case number referred to in Machado's request, DEA was able to locate "the materials associated with the processing of" Machado's first DEA request. *Id.* DEA ultimately located 17 pages and released them in their entirety. JA 100, ¶ 33; *see* JA 117; JA 119, 124 (OIP appeal and remand); JA 126.

3. Machado's sole objection is that DEA should have searched its employees' e-mails for information about his request. Br. 22. But DEA searched the records system that was reasonably likely to contain any such e-mails and was not required to search additional locations.

This Court's decision in *Mobley v. CIA*, 806 F.3d 568 (D.C. Cir. 2015), is instructive. There, FBI searched locations it determined were reasonably likely to contain the requested records, including its Central Records System, but declined to search other locations that the agency determined were redundant or unlikely to contain responsive records. *Id.* at 581. The Court rejected the requester's

argument that "FBI was required to search" e-mail systems, instead crediting FBI's affidavit that its "e-mail systems . . . are not reasonably likely to result in additional responsive records because the records in them are redundant of records stored in the [Central Records System]." *Id.* As the Court reasoned, if it were to permit the requester to dictate search locations without a showing that additional responsive records were reasonably likely to be found there, "the reasonableness test for search adequacy long adhered to in this circuit would be undermined." *Id.* at 582.

DEA's affidavit in this case likewise explained that all information responsive to Machado's request for records about his prior request were reasonably likely to be contained in JUSTICE-004. DOJ's Privacy Act system of records notice for that system, of which this Court may take judicial notice, confirms that the system "consists of records created or compiled in response to FOIA . . . requests and administrative appeals, including . . . *all* related memoranda, correspondence, notes, and other related or supporting documentation." 77 Fed. Reg. 26,580, 26,581 (May 4, 2012) (emphasis added); *see McCready v. Nicholson*, 465 F.3d 1, 16 (D.C. Cir. 2006) (relying on system of records notice in Federal Register). Machado complains that DEA did not provide evidence as to how difficult it would be to search employees' e-mails, Br. 22, but such evidence is unnecessary under *Mobley*, which considered only whether such a

search would be reasonably likely to produce additional responsive records. 806 U.S. at 582. The DEA's search was clearly adequate.

Machado also criticizes the district court's quotation from another district court opinion in which the agency "searched the computer database that most likely would identify responsive records." Br. 21; JA 336 (quoting *Gillam v. U.S. Dep't of Justice*, 236 F. Supp. 3d 259, 265 (D.D.C. 2017)). Although a "most likely" standard would misstate the law, *Mobley*, 806 F.3d at 582, the district court's ultimate holding did not turn on that statement. Instead, the court's conclusion that DEA's search was adequate rested on the finding that DEA "reasonably determined that any email relevant to the processing of Mr. Machado Amadis's initial FOIA request would be in JUSTICE-004." JA 335.

B. State's Choice of Search Terms Was Appropriate

1. Machado's second FOIA request to State sought "copies of all records, including emails, memorializing or describing the processing of [Machado's] previous FOIA Request No. F-2016-10536." JA 81. The request specifically excluded "any correspondence exchanged with any attorney representing [Machado] and any records responsive to" the original request. *Id.*

State determined that the only office "reasonably likely to have documents responsive to Plaintiff's request was the Office of Information Programs and Services," JA 52, ¶¶ 20-21, which is responsible for responding to FOIA requests,

JA 49, ¶ 4. An Office of Information Programs and Services "Government Information Specialist who had knowledge of the [original request] and [Office of Information Programs and Services] records systems, conducted a search of the [Office of Information Programs and Services] case management system, FREEDOMS 2 . . . for all documents regarding the processing of" the original request. JA 57, ¶ 37. Moreover, "[t]he [Office of Information Programs and Services] Program Analyst who worked on processing [the original request] also searched their government email account and the FOIA Request mailbox [for] all correspondence related to [the request], using the search term 'F-2016-10536' because the records are organized by request number." *Id.*

2. Machado argues that State should have used other search terms besides the request number to conduct the e-mail searches. Br. 25. He objects that e-mails in these accounts may not include the request number, "including emails sent before the request number was assigned and emails sent to the accounts from outside the FOIA office." *Id.* Those arguments are unavailing.

As this Court has explained, the agency's "burden was to show that its search efforts were reasonable and logically organized to uncover relevant documents; it need not knock down every search design advanced by every requester." *DiBacco v. U.S. Army*, 795 F.3d 178, 191 (D.C. Cir. 2015). Thus, the relevant question is whether the search terms State actually used were reasonably

calculated to locate responsive records, and not whether State can "prove that it utilized *all* reasonable search terms." Br. 26 (emphasis added).

Here, State tasked the analyst who worked on Machado's original request with searching the relevant e-mail accounts. JA 57, ¶ 37. That analyst would by necessity be familiar with the organization of his or her own e-mail account and that of the FOIA Request mailbox. State's affidavit explained that these "records are organized by request number" and therefore that a search by request number was appropriate. *Id.*

State's affidavit was entitled to a "presumption of good faith." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). To overcome that presumption, Machado had to provide countervailing evidence, not "purely speculative claims about the existence and discoverability of other documents." *Id.* Machado's various conclusory assertions—for example, that "the proper use of unique identifiers is to *narrow* a search where there are a large number of potentially responsive records," Br. 26, and that "email searches normally require several different search terms," Br. 25—do not meet this standard. The district court found that Machado "offer[ed] no evidence" to rebut State's affidavit, JA 350, and Machado does not contest that conclusion, Br. 24-28.

Machado cites an e-mail exchange between his attorney and State in which State added the request number to the subject line when responding to the

attorney's e-mail. Br. 26 (citing JA 75). Machado argues that searching by request number would not have located his attorney's initial e-mail, which did not contain the request number. Br. 27. But apart from the obvious fact that the search actually located the e-mail chain containing his attorney's e-mail, Machado ignores that his own request expressly excluded correspondence between State and his attorneys. JA 81.

III. OIP REASONABLY INTERPRETED MACHADO'S REQUEST

Machado's request to OIP sought records "memorializing or describing the processing of his previous FOIA Appeal[s]" from DEA's and FBI's responses to his first set of FOIA requests. JA 280. OIP interpreted this request to exclude source material from DEA and FBI that pre-dated Machado's appeals. Machado challenges that interpretation, but OIP's interpretation was reasonable and should be affirmed.

A. In interpreting a FOIA request, "[t]he agency [is] bound to read it as drafted, not as either agency officials or [the requester] might wish it was drafted." *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984). Although an agency must "construe a FOIA request liberally," *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995), the requester bears the burden of "reasonably describ[ing]" the records sought, 5 U.S.C. § 552(a)(3)(A), such that "the agency is able to determine precisely what records are being requested." *Kowalczyk v.*

Department of Justice, 73 F.3d 386, 388 (D.C. Cir. 1996) (quoting *Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982)); *Larson v. Department of State*, 565 F.3d 857, 869 (D.C. Cir. 2009). The agency "is not obliged to look beyond the four corners of the request" in determining its scope. *Kowalczyk*, 73 F.3d at 389.

B. Machado's request to OIP sought "all records, including emails, memorializing or describing the processing of his previous FOIA Appeal[s]." JA 280. In response, OIP located the appeal files from those appeals. JA 276-77, ¶ 37. The files contained (1) "Blitz Forms," which "are created by Administrative Appeals staff attorneys in the course of adjudicating an administrative appeal," JA 277-78, ¶ 40; (2) Machado's first set of requests to DEA and FBI; (3) "the final response letters from DEA and FBI"; (4) "correspondence with plaintiff's previous attorney"; and (5) "source material from DEA and FBI that related specifically to the processing and searching for records responsive to plaintiff's initial DEA and FBI requests." JA 276-77, ¶ 37.

OIP conducted a page-by-page review of these files and concluded "that the Blitz Forms were the only pages that described the processing of plaintiff's FOIA appeals." JA 278, ¶ 41. OIP produced these forms with redactions. JA 287-90. "The remaining records did not describe the processing of plaintiff's FOIA appeals" and therefore were not responsive to Machado's request. JA 278, ¶ 41.

C. Machado challenges OIP's decision to designate the last category of documents—materials from DEA and FBI relating to their processing of Machado's initial requests—as nonresponsive. That category consists of "ten pages of DEA records and five pages of FBI records that were located within the appeal files." JA 276, ¶ 35.

Machado's challenge fails. As OIP's affidavit correctly explains, "[t]hese records pre-date the filing of plaintiff's OIP appeals" and "cannot reasonably be construed to 'memorialize or describe' OIP's processing of later-submitted FOIA appeals." JA 277, ¶ 38.

Machado offers two responses, both of which are unavailing. First, he contends that these materials were responsive because they were located within the appeal files. Br. 29. But the fact that a record is located in the appeal files does not make it responsive to Machado's request. As OIP's affidavit notes, Machado did not seek all contents of the appeal files, JA 277, ¶ 38, only materials "memorializing or describing the processing of his" appeals.

Second, Machado argues that processing an appeal involves gathering background information regarding the initial processing of the request, and therefore that "any records which show which background information was gathered from components and how those initial component determinations were characterized 'describes the processing of plaintiff's appeals,' even if they do not

include annotations or notes." Br. 29. In his view, any record that "shed[s] any light on the appeal process" would be responsive. Br. 30.

Machado's argument that all such records "describe[] the processing of plaintiff's appeals" cannot be squared with the normal meaning of the word "describe," which is "to give an account of or statement about in speech or writing" or "to portray in words." *Oxford English Dictionary* (3d ed. 2015). A historical record that does not "give an account . . . in writing" of the processing of the appeal, but instead describes pre-appeal events, does not satisfy this definition.

Finally, Machado accuses OIP of "gamesmanship to obtain a litigation advantage" because it initially informed Machado that it would send these records to DEA and FBI for processing, but then decided that the records were not responsive. Br. 30; JA 276 n.9. Machado's accusation is entirely baseless; he offers no evidence to contradict the agency's explanation in its affidavit that it simply revised its decision upon a final review of the records. JA 276 n.9.

IV. OIP Properly Withheld Portions of the Responsive Records Based on Exemption 5

OIP produced the Blitz forms described above but redacted fields containing the views, thoughts, and recommendations of OIP line attorneys pursuant to FOIA Exemption 5 and the deliberative process privilege. JA 287-90; *see* 5 U.S.C. § 552(b)(5). Machado's challenges to these withholdings lack merit.

A. The Withheld Portions Are Protected Under the Deliberative Process Privilege

1. FOIA Exemption 5 allows agencies to withhold "inter-agency and intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "[T]he parameters of Exemption 5 are determined by reference to the protections available to litigants in civil discovery; if material is not 'available' in discovery, it may be withheld from FOIA requestors." *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 516 (D.C. Cir. 1996); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975). The privileges protected under Exemption 5 include the deliberative process privilege and the attorney work-product privilege. *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

The deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Klamath Water*, 532 U.S. at 8-9 (quoting *Sears, Roebuck & Co.*, 421 U.S. at 150). The privilege serves at least three purposes. First, it "protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions." *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978). This rationale "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of

discovery and front page news." *Klamath Water*, 532 U.S. at 8-9. "Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon." *Jordan*, 591 F.2d at 772-73. Third, "it protects the integrity of the decision-making process itself by confirming that 'officials should be judged by what they decided, not for matters they considered before making up their minds.'" *Id.* at 773.

To fall within the deliberative process privilege, a document must be "both 'predecisional' and 'deliberative.'" *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 847 F.3d 735, 739 (D.C. Cir. 2017) (quoting *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010)). "Documents are 'predecisional' if they are 'generated before the adoption of an agency policy.'" *Id.* (quoting *Public Citizen*, 598 F.3d at 874). Documents are "'deliberative' if they 'reflect[] the give-and-take of the consultative process.'" *Id.* (alteration in original) (quoting *Public Citizen*, 598 F.3d at 874).

2. In this case, OIP relied on the deliberative process privilege in withholding portions of two Blitz forms. As OIP's affidavit explains, these forms were "created by OIP Administrative Appeals staff attorneys during the course of adjudicating plaintiff's administrative appeals." JA 264, ¶ 9 (footnote omitted). Line attorneys "prepare Blitz Forms to succinctly summarize the initial search and

response . . . , identify important issues to be taken into account . . . , and provide key background information in a concise format for ease of understanding and presentation to reviewing senior OIP attorneys." JA 271, ¶ 23. "OIP's senior Administrative Appeals Staff attorneys rely heavily on the creation of such Blitz Forms so that they can be fully informed on the substance of the many legal and policy issues being examined in each administrative appeal." JA 271-72, ¶ 24.

The Blitz forms contain a variety of fields, including "Subject of Request," "Agency Response," "Search Notes," "Arguments on Appeal," "Discussion," and "Recommendation." JA 287-90. OIP redacted only the "Discussion," "Search Notes," and "Recommendation" fields pursuant to the deliberative process privilege. *Id.* OIP explained that the notations in these fields "reflect the authors' opinions and analysis and reveal the internal deliberations of the OIP Appeals Staff as they evaluate the merits of each appeal, and whether to affirm or remand a component's initial decision on the FOIA request at issue." JA 272, ¶ 25.

3. OIP properly withheld these notations under Exemption 5 based on the deliberative process privilege. The redacted portions of the Blitz forms were plainly predecisional because they were created before the agency decided the relevant appeals. They were also deliberative in that they reflect "line attorneys' evaluations, recommendations, discussions, and analysis which are prepared for senior-level review and decisionmaking." JA 272, ¶ 25. The redacted portions are

therefore precisely the sort of "predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision" that is protected by the deliberative process privilege. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).

4. Machado's argument against application of the privilege turns almost entirely on the fact that, in both Blitz forms, the "Reviewer Comments" and "Attorney Follow-Up to Reviewer Comments" fields are blank. Br. 35; JA 288, 290. According to Machado, these empty fields indicate an absence of "back-and-forth dialogue," preventing application of the privilege. Br. 35. But application of the privilege does not turn on whether the senior decisionmaker engaged in back-and-forth discussion with the junior employee. To the contrary, the privilege applies even if the senior decisionmaker acts on a recommendation without any comment at all. *See, e.g.*, *Renegotiation Bd.*, 421 U.S. at 185-86 (holding that privilege applies to recommendations to the Renegotiation Board, which decided matters by vote without issuing opinions or ratifying the recommendations).[4]

[4] OIP also withheld the same fields on the Blitz forms on the basis of the attorney work-product privilege. JA 264, ¶ 10. The district court did not decide whether the work-product privilege applied because it upheld OIP's withholdings based on the deliberative process privilege. JA 343. If this Court holds that the deliberative process privilege does not apply, the government agrees with Machado that a remand would be appropriate for the district court to decide the applicability of the work-product privilege in the first instance. Br. 31.

Machado wrongly suggests that "if a supervisor simply agrees with a subordinate without comment, then the subordinate's decision has been adopted as a final agency decision" and "is not covered by the deliberative process privilege." Br. 36. Adoption occurs only if the agency makes an "'express[ ]' choice to use a deliberative document as a source of agency guidance." *Judicial Watch*, 847 F.3d at 739 (alteration in original). This Court does not treat a recommendation memo "as a decisional document subject to disclosure" where the decisionmaker "might have relied on the memo's reasoning in deciding to take the action it recommended, but it is also possible that [the decisionmaker] did not." *Id.* Machado also alleges a factual dispute as to how line attorneys were assigned to the matters at issue, Br. 36, but the resolution of that question does not alter the validity of the agency's assertion of privilege.

B. OIP Reasonably Foresaw That Disclosure Would Harm an Interest Protected by the Deliberative Process Privilege

An amendment to FOIA in 2016 provides in relevant part that agencies shall withhold information under certain exemptions, including Exemption 5, "only if . . . the agency reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A)(i). Machado contends that "OIP did not even attempt to demonstrate that the release of the withheld information would create a foreseeable harm" within the meaning of this provision.

Br. 31. That assertion is patently false in light of OIP's detailed affidavit explaining its rationale for claiming the exemption.

1. The FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(D), 130 Stat. 538, 539, amended FOIA to provide in relevant part that:

> (8)(A) An agency shall—
>
> (i) withhold information under this section only if—
>
> > (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
> >
> > (II) disclosure is prohibited by law[.]

5 U.S.C. § 552(a). The accompanying Senate Report explains that "this measure codifies the policy established in January 2009 by President Obama for releasing Government information under FOIA." S. Rep. No. 114-4, at 4 (2015). Specifically, the statute was intended to codify a "presumption of openness"—that an agency should withhold information only if it "reasonably foresees" harm to a protected interest. *Id.* Codification was necessary, the report explains, to avoid changes to the standard when new administrations enter office, which would be "confusing to FOIA processors and requesters alike." *Id.* at 3.

2. This Court and others have previously had occasion to consider how an agency can establish that disclosure of records would harm the interests protected by the deliberative process privilege. For example, in *Coastal States Gas*

Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980), this Court identified several potential questions that help "test whether disclosure of a document is likely to adversely affect the purposes of the privilege." Courts ask whether "public disclosure is likely in the future to stifle honest and frank communication within the agency." *Id.* Courts also "ask whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another." *Id.* Moreover, "the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Id.* at 868. Similarly, "[t]he identity of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made." *Id.*

3. In this case, OIP's affidavit addressed all of these points. The affidavit explained that redacted portions of the Blitz forms provide (among other things) analysis of the issues on appeal and recommendations as to their resolution, JA 271, ¶ 23; described the decisionmaking process and the role Blitz forms play in that process, JA 271-72, ¶¶ 23-24; and explained that Blitz forms are sent from line attorneys to supervising officials, *id.* The affidavit also explained how disclosure

would harm OIP's deliberative process. The withheld notations "reflect the authors' opinions and analysis and reveal the internal deliberations of the OIP Appeals Staff as they evaluate the merits of each appeal, and whether to affirm or remand a component's initial decision on the FOIA request at issue." JA 272, ¶ 25. Disclosure of these "developing, preliminary assessments" "would severely hamper the efficient day-to-day workings of the Administrative Appeals Staff attorneys, who would no longer feel free to candidly discuss their ideas, strategies, and recommendations in Blitz Forms." *Id.* ¶¶ 25-26. "This lack of candor [would] seriously impair the Administrative Appeals Staff's ability to foster the forthright internal discussions necessary for efficient and proper adjudication of administrative appeals." *Id.* ¶ 26.

4. Machado's attempt to dismiss these detailed explanations as "generic 'chilling effect' claims," Br. 32, is unfounded. This Court and others have relied on exactly these types of explanations to conclude that "disclosure of a document is likely to adversely affect the purposes of the privilege." *Coastal States*, 617 F.2d at 866. Indeed, it is hard to imagine what else OIP or any other agency could offer. The deliberative process privilege is principally concerned with *future* harm to agency processes, and FOIA similarly requires consideration of what the agency "reasonably foresees." This sort of predictive judgment is not easily susceptible to documentary proof. *Coastal States* itself relied on the proposition that "[h]uman

experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)). The Supreme Court has similarly rested the privilege on the "obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Klamath Water*, 532 U.S. at 8-9.

Machado baldly asserts that "this Court [need] not fear that a team of specialized career attorneys performing a critical agency function will cease providing candid analysis of agencies' handling of FOIA requests." Br. 34. But Machado offers no explanation for why any of these factors—that the employees are career attorneys, or that they are performing a critical agency function—would obviate the need for the privilege. Machado's argument ultimately amounts to an attack on the idea of the deliberative process privilege itself, but FOIA and this Court's precedent foreclose such a challenge.

C. This Case Is Not an Appropriate Vehicle for Resolving Additional Questions About the Interpretation of the Foreseeable Harm Standard

Amici media organizations suggest that the Court use this case to provide additional guidance on the foreseeable harm standard in 5 U.S.C. § 552(a)(8)(A)(i). *See* Reporters Comm. Br. 3. However, the guidance amici seek is largely beyond

the scope of this case, and there is no need for this Court to offer dicta on those topics here.

In particular, amici complain that the government sometimes seeks to withhold records on a wide range of topics based on "only a single justification," and that "the foreseeable harm standard must be satisfied with respect to each record that the agency seeks to withhold." Reporters Comm. Br. 16, 18-19. Amici accordingly argue that "[a]gencies should . . . be required to add another 'column' to their *Vaughn* indices identifying evidence and argument as to why each withholding satisfies the standard." *Id.* at 16.

This case, however, only concerns redactions to a pair of two-page documents that are essentially identical in form and purpose. Moreover, the agency provided an extremely detailed explanation for its withholdings through an affidavit. Accordingly, this Court need not consider if and how the government can justify withholdings with respect to broad categories of documents, or how the government must document its withholdings in a *Vaughn* index.

Nor would prescribing a particular form of *Vaughn* index be consistent with this Court's precedent, which has recognized that "it is the function, not the form, of the index that is important." *Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987). There is accordingly no particular formula for such an index, and its nature and content can vary based on the nature and quantity of the documents

at issue. *See, e.g.*, *id.* ("The declarations in conjunction with the coded deletions, accomplished those functions, and did so more efficiently and clearly than would the classical *Vaughn* index."); *Weisberg*, 745 F.2d at 1489-90 (approving *Vaughn* indices based on sampling of 60,000 documents). Indeed, agencies need not submit a *Vaughn* index at all; "an agency may even submit other measures," such as an affidavit, "in combination with or in lieu of the index itself." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006).

Similarly, this Court need not resolve amici's call to define an "age, content, and character" standard for evaluating foreseeable harm across all FOIA exemptions. Reporters Comm. Br. 22.[5] Only Exemption 5 and the deliberative process privilege are at issue in this case, so this Court need not address the standard's application to any other privilege or exemption. As for the deliberative process privilege, this Court's guidance concerning when withholding serves the privilege's purposes already calls for consideration of the content and character of the record. *See supra* pp. 38-39. And the very recent vintage of the records at

[5] The "age, content, and character" standard appears to be drawn from a Senate Report relating to the FOIA Improvement Act. *See* S. Rep. No. 114-4, at 8. Prior to the Act, OIP's guidance to federal agencies on discretionary release included the same standard. OIP, *President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines* (Apr. 17, 2009), https://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government.

issue provides no occasion for considering how interests protected by the privilege diminish with time.

A few points in amici's brief, however, warrant response. Amici wrongly suggest that the government believes the amendments at Section 552(a)(8)(A)(i) have no legal effect. That is plainly incorrect; the amendment converted an executive branch policy into a statutory requirement enforceable in a FOIA action.[6]

Amici contend that "the foreseeable harm provision clearly requires a more substantial showing for certain exemptions," and that it "has an especially important role to play" with respect to the deliberative process privilege because of Congress's concern with that privilege. Reporters Comm. Br. 21-22. However, Congress specifically addressed its concerns with the deliberative process privilege by enacting a 25-year limit for invoking that privilege. *See* 5 U.S.C. § 552(b)(5). Congress thus knew how to single out the deliberative process privilege when it

[6] Amici assert that the foreseeable harm standard merely reflected DOJ's policy as to when it would defend agencies in FOIA litigation. Reporters Comm. Br. 12; *see* Eric Holder, Memorandum for Heads of Executive Departments and Agencies 2 (Mar. 19, 2009), https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf (explaining when DOJ will defend a denial of a FOIA request). In this case, OIP, as a component of DOJ, was already subject to the foreseeable harm policy by virtue of DOJ regulations in place prior to the enactment of the 2016 amendments. *See* 80 Fed. Reg. 18,099, 18,106 (Apr. 3, 2015) ("As a matter of policy, the Department makes discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption . . . .").

wanted to, but chose not to do so when enacting the foreseeable harm standard. Indeed, the relevant House Report suggests that Congress expected the 25-year-sunset provision, and not the foreseeable harm standard, to be the amendment's principal means for limiting the privilege. *See* H.R. Rep. No. 114-391, at 11 (2016) (noting the difficulty of crafting statutory language to limit the privilege and explaining that "[i]n an attempt to provide some transparency in this area, H.R. 653 carves out a 25-year time limitation to exemption five"). There is accordingly no reason to interpret the foreseeable harm standard as imposing a higher burden for asserting the deliberative process privilege than for other privileges and exemptions.

This Court need not decide whether and how much the amendments increase the showing necessary to assert the deliberative process privilege in a FOIA suit. As explained above, this Court's precedent already provides guidance on how agencies can establish that withholding serves the purposes of the deliberative process privilege. *See supra* pp. 38-39. The agency's detailed affidavit here is more than sufficient under those cases, and nothing in amici's articulation of the standard would change that result. *See* Reporters Comm. Br. 25-27. This Court therefore need not decide whether any distance exists between its existing precedents and the requirements of Section 552(a)(8)(A)(i).

Finally, amici assert that the foreseeable harm standard requires agencies to demonstrate that disclosure "would" harm an interest protected by an exemption. Reporters Comm. Br. 24. That reading cannot be squared with the text of the statute, which states that an agency can withhold information only if "the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection." 5 U.S.C. § 552(a)(8)(A)(i). Under amici's reading, the first five words in the quotation above would be extraneous; Congress could have achieved the same result by simply stating that the agency can "withhold information . . . only if . . . disclosure would harm an interest protected by an exemption." Congress's inclusion of those five words strongly suggests that it intended the agency's judgment to play an important role in the process. A court's role is to review the agency's judgments for reasonableness, not to make de novo predictions of what will happen if privileged material is produced.

V. OIP RELEASED ALL REASONABLY SEGREGABLE PORTIONS OF THE RESPONSIVE RECORDS

A. This Court May Review Segregability in the First Instance

Finally, Machado argues that the district court erred by not conducting a segregability analysis. FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see also id.* § 552(a)(8)(A)(ii). As this Court has explained, "failure to address segregability

. . . is reversible error." *Juarez v. Department of Justice*, 518 F.3d 54, 60 (D.C. Cir. 2008).[7] However, this Court may in its discretion decide that issue in the first instance rather than remanding the issue to the district court. *Id.* ("[W]e need not prolong the case further by remanding it solely for this purpose."). This Court explained in a prior case that "our review of summary judgment is *de novo*," and because "we have the same record before us as did the district court, we are just as capable of evaluating the . . . affidavits regarding segregability as is the court below." *Id.*

In this case, it is both appropriate and more efficient for this Court to resolve the segregability issue on its own. The withholdings at issue comprise only five redactions across four pages of documents, and the agency's detailed affidavit directly addresses segregability.

B. OIP Released All Reasonably Segregable Portions of Records

Should this Court agree to consider the question, OIP's affidavit thoroughly establishes that the agency complied with its obligation to release reasonably segregable portions of records. The affidavit explains that "OIP conducted a line-by-line review of [the Blitz forms] and determined that some non-exempt, factual information within them could be segregated for release." JA 273, ¶ 27.

[7] Machado did not meaningfully argue segregability in the district court, but the district court has "an affirmative duty to consider the segregability issue *sua sponte*." *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007).

Accordingly, "[o]ther information in these records, including administrative and logistical information regarding the initial request and appeal, and summaries of arguments presented on appeal, have been released to plaintiff." JA 268 n.5. "OIP only applied the deliberative process privilege to information consisting of pre-decisional, deliberative notes made by line attorneys during the course of adjudicating administrative appeals, for the purpose of informing decisions that would ultimately be made on those appeals." JA 273, ¶ 27. OIP accordingly concluded that "[a]ll reasonably segregable, nonexempt information from these records has been disclosed to plaintiff." *Id.* These averments are sufficient to establish that OIP complied with its segregation obligations under FOIA.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,046 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface.

s/ Weili J. Shaw
WEILI J. SHAW

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

s/ Weili J. Shaw
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