IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No.: 1:17-cv-00816-TJK

PLAINTIFF'S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR LEAVE TO CONDUCT LIMITED DISCOVERY

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7, Plaintiff Center for Biological Diversity ("Center") respectfully cross-moves for summary judgment as to four claims, and opposes Defendant Environmental Protection Agency's ("EPA") cross-motion for summary judgment, in this case pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA") and the Administrative Procedure Act, 5 U.S.C. § 706 ("APA").

The Center requests that the Court grant summary judgment to the Center and deny summary judgment to EPA as to Claims 1, 2, 3, 7 of Plaintiff's First Amended Complaint, ECF No. 7, and that the Court order EPA to conduct an adequate search for *all* responsive records—*i.e.*, all of the communications of EPA Administrator E. Scott Pruitt—in any formats, including emails, text messages, instant messages, cell phone and desk phone logs, and any other communications that were sent or received by Administrator Pruitt, as Plaintiff requested, between February 17, 2017, when the Administrator took office, and the date when the agency commences an adequate search for records. The Court should also deny EPA's cross-motion for summary judgment because EPA has failed to carry its burden to prove that it lawfully withheld

records under Exemption 5 or Exemption 6 of FOIA, and/or as "not responsive" to the Center's request. To enforce EPA's flagrant violations of FOIA, Plaintiff respectfully requests the Court to order the agency to disclose those records to the Center without further delay.[1]

However, the parties dispute material facts that pertain to Plaintiff's: (a) Claim 4 of its First Amended Complaint, which argues that the limited, narrow search that the agency did conduct in response to the Center's request for the Administrator's communications was not adequate; and (b) Claim 7, by which Plaintiff alleges that EPA has failed to maintain the Administrator's communications, including federal records that would otherwise be responsive to the Center's FOIA request, in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)[2]. Therefore, Plaintiff respectfully requests that the Court allow the Center to take limited discovery of the agency's retention and maintenance of Administrator Pruitt's communications, including but not limited to the ways and format of records that the Administrator uses to communicate, how and in which location(s) EPA and the Administrator record or retain his communication record(s); and whether EPA searched all such locations in connection with the Center's request. These are the facts necessary for the Court to determine whether EPA has complied with FOIA and other applicable law as to Claims 4 and 7. To gather these necessary facts, as explained in the following memorandum of law, declarations, exhibits, and proposed orders, Plaintiff respectfully seeks leave to depose up to five EPA officers or personnel who are familiar with the methods and locations of Administrator Pruitt's

[1] The Center does not seek summary adjudication as to Claim 6, which alleges that EPA failed to carry out its FOIA obligations consistent with the APA.

[2] The Parties have conferred and EPA agrees that the Agency's invocation of Exemption 5 as to one of the communications records as part of EPA's cross-motion for summary judgment can be appropriately resolved at this stage, however the parties defer to the Court as to whether it would require supplemental pleadings.

communications, and to propound up to 25 Interrogatories, 15 Requests for Admission, and 10 Requests for Production.

In support of this combined motion, Plaintiff submits the attached memorandum of points and authorities; statement of material facts and opposition to EPA's statement of material facts; declarations of Brett Hartl and Margaret E. Townsend; Exhibits 1-42; and proposed orders.

DATED: May 25, 2018

Respectfully submitted,

/s/ Margaret E. Townsend

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF THE CENTER'S MOTION FOR LEAVE TO CONDUCT LIMITED DISCOVERY

Eleven days after E. Scott Pruitt assumed his new post as administrator, on February 28, 2017, Plaintiff Center for Biological Diversity ("Center") submitted two straightforward requests for records pursuant to FOIA. First, the Center requested Administrator Scott Pruitt's communications, including (but not limited to) his emails, letters, text messages, instant messages, voicemails, phone logs, and any other correspondence sent to or from the administrator, in any location and of any format. By a separate request, the Center requested Administrator Pruitt's calendars and schedules.

The following day, EPA rejected the Center's request for Administrator Pruitt's communications by claiming that the Center did not adequately describe the records it was seeking. A business day later—and without conducting any search of the Administrator's communications sent or received during those initial 11 days—EPA made a final determination and denied the Center's request, again claiming that the Center's request was not reasonably described. The Center appealed this determination two weeks later, and EPA then took six

weeks to affirm its denial of the Center's request for Administrator Pruitt's communications—*i.e.*, on the basis that they were not "reasonably described"—leading the Center to file this action on May 3, 2017. Compl., ECF No. 1; *see also* First Am. Compl., ECF No. 7.

It was not until late-July 2017—five months after the Center submitted its request for the Administrator's communications—when EPA finally agreed to process it. While EPA abandoned its claim that the Center had not reasonably described its request for Administrator Pruitt's communications, EPA still refused to apply the date of its eventual search for responsive records as the "cut-off date," in spite of the Center's repeated requests that it do so.

EPA waited nearly another month, to August 2017, before it began its narrow search for 11 days of the Administrator's communications—which was six months after Plaintiff submitted its FOIA request—and did not complete its search for at least three more months. In November 2017, EPA finally disclosed some records, but did not make a final determination on the Center's request until January 3, 2018. Finally, on March 5, 2017—the same day that EPA provided its *Vaughn* index—EPA disclosed portions of a redacted record that it had initially withheld in its entirety, along with Administrator Pruitt's cell phone logs with uniform redactions of all incoming and outgoing phone numbers pursuant to FOIA Exemption 6, purportedly to protect the undeclared privacy interests of unidentified entities. In addition to ignoring any responsive communications that were created or received by Administrator Pruitt after February 28, 2017, EPA's eventual disclosures were also ultimately limited to *email* messages that other parties had been received *by* Administrator Pruitt, while excluding all other forms of communications that Administrator Pruitt created during the first 11 days in office. The agency excluded whole categories of electronic communications from the scope of its search, including text messages,

instant messages, voicemails, and any other similar formats that were created or received by Administrator Pruitt in his first 11 days as EPA administrator.[1]

In effect, EPA asks the Court to believe that a cabinet official such as Administrator Pruitt, who may have possessed at least four EPA email addresses and an unknown number of personal email accounts when he took office, did not generate a *single* email to anyone during his first days as EPA Administrator. This simply does not pass the straight-faced test; this is especially true when considering Administrator Pruitt's penchant for secrecy.

These and many more indisputable facts are fully substantiated below, and accordingly, the Court should deny the Defendant's cross-motion for summary judgment and grant partial summary judgment to the Center on Claim 1 of Plaintiff's First Amended Complaint, which challenges EPA's effective refusal to disclose any of the Administrator's communications. The Court should order EPA to conduct an adequate search for all communications, in any format, in any location, and applying the date of the new search as the cut-off date for responsive records.

In addition, EPA's *Vaughn* index lacks sufficient information to justify EPA's withholding of one record under the "deliberative-process privilege" of FOIA Exemption 5, 5 U.S.C § 552(b)(5), or its use of the "personal-privacy privilege" of Exemption 6, 5 U.S.C. § 552(b)(6), to redact phone logs and a portion of an additional record. Thus, EPA has failed to carry its burden to prove—as FOIA expressly mandates, 5 U.S.C. § 552(a)(4)(B)—that it properly withheld and redacted these records under these exemptions. *Dep't of Justice v. Tax*

[1] While waiting for EPA to respond to its previous request for the Administrator's communications, the Center periodically submitted several nearly identical FOIA requests. To date, EPA's responses to those requests remain overdue. In fact, EPA has yet to disclose any records that are responsive to the Center's later-filed requests for Administrator Pruitt's communications. Therefore, the Center recently filed an additional FOIA lawsuit in this Court to enforce FOIA and related legal authorities as to those FOIA requests as well. Complaint, *Ctr. for Biological Diversity v. U.S. EPA*, No. 18-cv-1219 (D.D.C. May 24, 2018), ECF No. 1.

Analysts, 492 U.S. 136, 142 n.3 (1989) ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" (citation omitted)). Similarly, EPA's *Vaughn* index lacks sufficient information to justify EPA's withholding of communications it initially deemed responsive but later deemed "non-responsive." Accordingly, the Center respectfully moves this Court to find that EPA has failed to meet its burden; deny summary judgment to EPA as to its use of Exemptions 5 and 6 and its withholding of communications that the agency deemed to be "non-responsive;" and order EPA to release these records to the Center. *See Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 262 (D.D.C. 2012) [hereinafter "*Nat'l Sec. Counselors I"*] (district court has "broad equitable powers under the FOIA." *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 228-29 & n.4 (D.D.C. 2001)).

While the material facts in support of such relief are undisputable, the converse is true with respect to Claims 4 and 7, for which factual questions remain concerning whether EPA's search methods were adequate and conducted in good faith, and whether Administrator Pruitt is lawfully retaining all communications in compliance with the letter and spirit of FOIA, EPA's own records management policies, and the Federal Records Act, 44 U.S.C. §§ 3101-3107 ("FRA"); *see also Armstrong v. Bush*, 924 F.2d 282, 295 (1991) (judicial review is available in the event "of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General"). Thus, to ensure that EPA is fully complying with FOIA, the FRA, APA, and all other relevant authorities, Plaintiff respectfully seeks leave to conduct limited discovery to develop material facts and understand how Administrator Pruitt communicates, the locations where the Administrator's communications are found or retained, and whether EPA has searched those locations. Knowing the answers to these questions are necessary to assess

whether EPA has conducted an adequate search of all of Administrator Pruitt's communications—and if not, the specific reasons for not doing so. *See Pulliam v. U.S. EPA*, 292 F. Supp. 3d 255, 262 (D.D.C. 2018) (court ordered discovery to plaintiff and denied summary judgment to agency where agency's declaration failed to provide "the 'rationale for searching certain locations and not others,'" or "describe how the spaces were actually searched" (quoting *Defs. Of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 92 (D.D.C. 2009); and citing *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551-52 (D.C. Cir. 1994))); *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) ("if a review of the record raises substantial doubt, particularly in view of 'well-defined requests and positive indications of overlooked materials,' summary judgment is inappropriate." (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999))).

The points and authorities that support the Center's motion are set forth below.

FACTUAL BACKGROUND

I. EPA ADMINISTRATOR SCOTT PRUITT

Scott Pruitt has conducted much of his official government business in secrecy, from day one as the EPA Administrator, and for six years prior as Attorney General of Oklahoma, when he sued the agency he now heads 13 times (including a FOIA suit).[2]

Administrator Pruitt was less than candid to Congress about his unorthodox ways in which he communicated while Attorney General for the State of Oklahoma. During his January 18, 2017 confirmation hearing before the U.S. Senate Committee on Environment and Public

[2] Exhibit ("Ex.") 1 (Dominique Mosbergen, *Scott Pruitt Has Sued the Environmental Protection Agency 13 Times. Now He Wants to Lead It.*, HUFFINGTON POST (January 17, 2017), https://www.huffingtonpost.com/entry/scott-pruitt-environmental-protection-agency_us_5878ad15e4b0b3c7a7b0c29c); *Oklahoma v. U.S. EPA*, No. CIV-13-726-M., 2013 U.S. Dist. LEXIS 177381 (W.D. Okla. Dec. 18, 2013) (Pruitt's FOIA action against EPA).

Works, committee members, including Senators Cory Booker and Sheldon Whitehouse, asked Administrator Pruitt if he used a personal email address to communicate about official state business. Ex. 2 (Letter from Democratic members, Committee on Environment and Public Works, U.S. Senate, to Scott Pruitt (Mar. 17, 2017)). Three times during his confirmation hearing, Administrator Pruitt represented that as Oklahoma Attorney General, he only used his official email address to communicate about official business. *Id.* However, the Oklahoma Attorney General's Office subsequently released records in response to an Oklahoma public records lawsuit which revealed Administrator Pruitt had in fact used a personal email address—which was not searched initially—as Oklahoma Attorney General. *See* Ex. 3, at 242 (Transcript, Hearing on Nomination of Attorney General Scott Pruitt to be Administrator of the U.S. Environmental Protection Agency (Jan. 18, 2017)) (Excerpts); *see also* Ex. 2.[3] Federal law prohibits the use of personal email for official business, as it can lead to losses of federal record and security breaches. *See, e.g.*, 44 U.S.C. § 2911(a); *see also* Ex. 4, at 5, (EPA Records Management Policy, CIO 2155.3 (Feb. 2015)) ("It is important not to use non-EPA systems to conduct Agency business, since such use could potentially lead to the mismanagement of Agency records and/or the unauthorized disclosure of Agency information.").

Administrator Pruitt has only further solidified his reputation for secrecy since he took office at EPA. For example, in one of his first acts, Administrator Pruitt spent at least $43,000 in taxpayer funds for a sound-proof "phone booth" in his office, complete with silenced ventilation

[3] The Oklahoma Bar Association is investigating possible ethical violations stemming from Administrator Pruitt's misrepresentations to Senators about his use of a personal email address for official business and speeches he gave to right-wing organizations against environmental protection while he was Oklahoma Attorney General. Ex. 5 (Ctr. for Biological Diversity and K. van de Biezenbos to Oklahoma Bar Association, Office of the General Counsel: Grievance v. E. Scott Pruitt (Mar. 21, 2017)); *see also* Ex. 6 (Letter from Senator Sheldon Whitehouse to Gina Hendryx, General Counsel, Oklahoma Bar Association (July 18, 2017)).

and "noise-lock" paneling, to take calls and hold meetings in secrecy.[4] No EPA administrator has requested a sound-proof phone booth in his or her office until now.[5] And while EPA claims in response to the Center's FOIA request that Administrator Pruitt has rarely communicated by email, *see* Townsend Decl., at ¶ 4, Administrator Pruitt reportedly has *at least four* different official EPA email accounts, a strong indication that he uses email to communicate.[6] However, all requests for his emails have been ignored, with the EPA offering little to no explanation as to why.[7]

II. THE CENTER'S FOIA REQUESTS AND APPEAL

This lawsuit involves two FOIA requests that the Center sent to EPA on February 28, 2017. One sought all of Administrator Pruitt's communications, in any format. Ex. 9 (Pruitt Correspondence FOIA Request from Center for Biological Diversity to FOIA Officer, U.S. EPA

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[4] *See, e.g.*, Ex. 7 (Jennifer A. Dlouhy, *Here's a Scorecard of the Scott Pruitt Investigations: QuickTake*, WASH. POST, April 25, 2017).

[5] Administrator Pruitt appeared to misrepresent the existence of this privacy booth to Congress, "fail[ing] to comply with a governmentwide statutory requirement that an agency notify the appropriations committees before it spends more than $5,000 for the office of a presidential appointee." Ex. 8 (Lisa Friedman, *E.P.A. Chief's $43,000 Phone Booth Broke the Law, Congressional Auditors Say*, N.Y. TIMES, April 16, 2018).

[6] Ex. 11 (Juliet Eilperin and Brady Dennis, *Scott Pruitt Has Four Different EPA Email Addresses. Lawmakers Want to Know Why*, WASH. POST, April 12, 2018).

[7] Administrator Pruitt's secrecy at EPA prompted a Congressional investigation that implicates ethics and government transparency, including questions about the Administrator's possible use of undisclosed email addresses, his sound-proof booth, and more. *See* Ex. 12 (Lisa Friedman. *Scott Pruitt Faces a 12th Investigation, This One Focused on His Email*, N.Y. TIMES, April 18, 2018). Democratic Senators on the Committee for Environment and Public Works have repeatedly asked Administrator Pruitt to be transparent and to address questions about his records-retention practices and policies, but those requests have been largely ignored. *See* Ex. 13 (Press Release, U.S. Senate Comm. on Env't & Pub. Works, Carper Statement on Long-Overdue Release of Administrator Pruitt's Schedule (Sept. 21, 2017)); Ex. 14 (Press Release, U.S. Senate Comm. on Env't & Pub. Works, Carper Leads Senators in Asking Pruitt to Correct the Record and Commit to Transparency at the EPA (March 17, 2017)); Ex. 15 (Press Release, U.S. Senate Comm. on Env't & Pub. Works, EPW Democrats: Irresponsible to Force Through an Extreme Nominee without Essential Information (Feb. 2, 2017)); Ex. 16 (Press Release, U.S. Senate Comm. on Env't & Pub. Works, EPW Dems Demand Substantive, Straightforward Answers from Scott Pruitt (Feb. 1, 2017)).

(Feb. 28, 2017)). The other sought his calendar and schedule. Ex. 10 (Pruitt Schedules FOIA Request from Center for Biological Diversity to FOIA Officer, U.S. EPA (Feb. 28, 2017)).

I. Pruitt's Communications

The Center submitted a FOIA request to EPA on February 28, 2017, just over a week after Administrator Pruitt was sworn into office. Ex. 9. The Center asked for all of Administrator Pruitt's communications, including "letters, emails, text messages, instant messages, voicemails, and phone logs for any phones utilized by . . . EPA Administrator Scott Pruitt . . . from any and all agency and EPA servers, cloud portals, secure websites, computers, tablets, smart phones, etc., sent to or from Administrator Pruitt, with the exception of any records that are or will be publicly available (e.g., through regulations.gov)." *Id*.

EPA initially refused to process the Center's request. By email dated March 1, 2017—just two weeks after Administrator Pruitt was confirmed and the day after receiving the Center's FOIA request—EPA claimed the Center "d[id] not reasonably define a set of records to search as required by the FOIA and EPA regulations." Ex. 17 (Email from Jonathan Newton, U.S. EPA, to the Center for Biological Diversity (March 1, 2017)). EPA claimed the Center was required but failed to any provide "key terms, subject matters or titles." *Id*.

EPA formally denied the Center's request in a letter sent the following day, stating again that "EPA cannot process your request as currently constructed." Ex. 18 (Letter from Victor Farren, U.S. EPA, to Center for Biological Diversity (March 2, 2017)). The Center appealed on March 13, 2017, explaining that the request narrowly defined the records sought for Administrator Pruitt's communications, and that neither FOIA nor EPA regulations required the Center to provide search terms, titles, or subject matters. Ex. 19 (FOIA Appeal from Center for Biological Diversity, to FOIA Officer, U.S. EPA (March 13, 2017)). EPA acknowledged the

Center's appeal the same day and affirmed its determination a month later. Ex. 20 (Email from foia_hq@epa.gov to foia@biologicaldiversity.org (March 15, 2017)) and Ex. 21 (Letter from Kevin Miller, General Law Office, U.S. EPA to Center for Biological Diversity (April 26, 2017)). EPA maintained that the Center failed to specify "subject matters," claiming it made the request too burdensome for the agency to process. Ex. 21.

Plaintiff filed this action on May 3, 2017, challenging EPA's violations of FOIA and APA as its determination was not in accordance with laws governing EPA's retention of agency records, such as the FRA or the agency's own policies. Compl., ECF No. 1; First Am. Compl., ECF No. 7.

It was not until July 28, 2017, when EPA finally agreed to "process" the Center's request. Ex. 22 (Email from Marina Utgoff Braswell, U.S. Attorney's Office, to Center for Biological Diversity (July 28, 2017)). EPA waited almost another month before it finally commenced a search for responsive records on August 23, 2017—about six months after the date of the Center's request—yet insisted that its search would be limited to communications that were dated between February 17, 2017, and February 28, 2017—*i.e.*, the 11 days between Administrator Pruitt's confirmation and the date of the Center's request. Joint Status Report, ECF No. 16.

On November 17, 2017, EPA sent the Center some of the requested communications, consisting only of those generated between February 17, 2018, and February 28, 2017, and with portions of records redacted pursuant to various FOIA exemptions. None of the emails or correspondence that EPA provided from its Correspondence Management System ("CMS") were communications that Administrator Pruitt created. EPA did not show that it had searched for communications in any other formats, such as text messages, instant messages, voicemails, cell

and desk phone logs, and any other forms of communications created or received by Administrator Pruitt.

By letter dated November 22, 2017, the Center notified EPA of many concerns about EPA's November 17 production. Ex. 23 (Letter from Center for Biological Diversity to Marina Utgoff Braswell, Assistant U.S. Attorney (Nov. 22, 2017)). The Center explained how EPA evidently had not searched for or disclosed any communications that Administrator Pruitt had created or sent, and asked if EPA intended to provide those records. *Id.* at 1. The Center also explained that EPA had not indicated when it had initiated its search for responsive records nor had it described basic information about the search itself, such as how many records had been located. *Id*. The Center expressed concern that the agency had applied the date of the Center's request as the cut-off date for its search for responsive records. *Id*. at 2. The Center clarified that use of the date of Plaintiff's FOIA request was not reasonable, particularly since EPA did not commence its search for half a year. *Id.* It once again asked EPA to use the "date of the search" as the search cut-off date. *Id.* The Center urged the agency to locate and provide Administrator Pruitt's communications, as the Center had requested in subsequent FOIA requests, or the Center would have to file additional litigation to compel EPA to produce responsive records, that it could have easily avoided had the agency simply complied with FOIA. *Id.*

In a November 29, 2017 phone conference, counsel for EPA informed the Center's undersigned counsel that Administrator Pruitt he did not communicate via email—*at all*—during the first week and a half of his tenure at EPA as the agency construed during its search for responsive records. Townsend Decl. at ¶ 4. Counsel for Defendant also said that the Center could expect an additional disclosure of records the following day, and that EPA would "verify

that it had conducted a search for text messages, instant messages, and chats" by December 15, 2017. *Id.* at ¶ 3.

On November 30, 2017, EPA provided more communications with redactions pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6). Ex. 24 (Letter from Elizabeth White, U.S. EPA, to Center for Biological Diversity (Nov. 30, 2017)). EPA asserted that this production consisted of all responsive records located in the agency's CMS System that were dated during Administrator Pruitt's initial 11 days in office. *Id.* EPA also purported to explain the basis for its previous determination to withhold records in their entirety. *Id.* In the Parties' November 30, 2017 status report, EPA reported that it had searched for other forms of communication—specifically, text messages, instant messages ("IMs"), and phone logs—and did not yield any "responsive" IMs. Joint Status Report at ¶ 5, ECF No. 17. The agency was silent as to whether it planned to search for communications in any other formats, like voicemails. None of the records that EPA provided were communications that had been created by Administrator Pruitt.

On December 15, 2017, EPA determined that "it has not located ay responsive phone log records for the period of February 11, 2017 to February 28, 2017." Ex. 25 (Letter from Lynn Kelly, U.S. EPA, to Center for Biological Diversity (Dec. 15, 2017)). EPA also informed the Center that it would provide any "responsive" text messages by December 22, 2017. *Id.*

On January 3, 2018, EPA announced that its search was complete and that it had located no more records. Ex. 26 (Letter from Elizabeth White, U.S. EPA, to Center for Biological Diversity (Jan. 3, 2018)). EPA provided the Center with *Vaughn* indices on March 5, 2017, along with (1) a record that it previously withheld in full but later decided to disclose and (2) Administrator Pruitt's cell phone log, both of which were redacted pursuant to Exemption 6. Ex. 27 (Email from Lynn Kelly, U.S. EPA, to Center for Biological Diversity (March 5, 2018)) and

Ex. 28 (Mobile Phone Log Record of Administrator Scott Pruitt (Feb. 14, 2017 – Aug. 29, 2017)). EPA's counsel revised the redactions for some communications on April 10, 2018. Ex. 29 (Email from Marina Braswell, Assistant U.S. Attorney, to Center for Biological Diversity (April 10, 2018)). EPA also revised a mobile phone log and disclosed a desk phone log on April 11, 2018, with redactions of nearly all phone numbers under Exemption 6. Ex. 30 (Revised Mobile Phone Log of Administrator Scott Pruitt (Feb. 14, 2017 – Aug. 29, 2017)), and Ex. 31 (Archive Call Search, U.S. EPA Region 4 (March 23, 2017)).

B. Pruitt's Calendars and Schedules

On February 28, 2017, the Center also requested "all calendars and/or schedules, including but not limited to [Administrator Pruitt's] travel itineraries and meeting schedules." Ex. 16. EPA acknowledged the request the same day it was sent. Ex. 32 (Email from foia_hq@epa.gov to foia@biologicaldviersity.org (Feb. 28, 2017)).

After receiving no further communication from EPA, the Center notified EPA that the agency was in violation of FOIA's mandatory 20-workday deadline and offered to assist EPA in completing a determination on the Center's request for Administrator Pruitt's calendars and schedules. Ex. 33 (Letter from Center for Biological Diversity, to FOIA Officer, U.S. EPA (March 29, 2017)). EPA informed the Center the next day that it was searching for responsive records, that it would review those records soon, and that it "anticipate[d] to have this request closed in the next 15 business [days]." Ex. 34 (Email from Ana Espinoza, U.S. EPA, to Center for Biological Diversity (March 30, 2017)).

When the Center filed this action on May 3, 2017, it had not received any records or a determination on the Center's February 28, 2017 FOIA Request. Jackson Decl. at ¶ 6, ECF No. 22-5. A day later, EPA released a final determination and 41 pages of responsive records

consisting of Administrator Pruitt's schedule from February 17, 2017, to February 28, 2017. Ex. 35 (Email from Jonathan Newton, U.S. EPA, to foia@biologicaldiversity.org (May 4, 2017)) and Ex. 36 (Letter from Brian Hope, U.S. EPA, to Center for Biological Diversity (April 19, 2017) (sent May 4, 2017)). EPA applied numerous redactions pursuant to FOIA Exemptions 5, 6, 7(D), and 7(F).[8] On October 3, 2017, EPA sent the Center an "updated and corrected" production of Administrator Pruitt's schedule for the dates of February 17, 2017, through February 28, 2017. EPA also provided additional calendar entries through May 18, 2017.[9] Ex. 37 (Email from Lynn Kelly, U.S. EPA, to Center for Biological Diversity (Oct. 3, 2017)).

LEGAL BACKGROUND

I. SUMMARY JUDGMENT IS APPROPRIATE IN FOIA CASES TO RESOLVE ISSUES FOR WHICH THERE IS NO DISPUTED MATERIAL FACT(S), YET DISCOVERY IS NECESSARY WHEN QUESTIONS ARISE REGARING THE ADEQUACY OF THE AGENCY'S SEARCH.

FOIA was enacted "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 131 (D.D.C. 2013) [hereinafter *Nat'l Sec. Counselors II*] (quoting *ACLU v. U.S. Dep't of Justice*, 655 F.3d 1, 5 (D.C. Cir 2011), *aff'd,* 750 F.3d 927, 929 (D.C. Cir. 2014)), giving the public the right to know "what the Government is up to." *Nat'l Archives & Records Admin. V. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 772-73 (1989)). FOIA requires each federal agency, "upon any request," to make "promptly available to any person" any records in its possession, unless the records may be withheld under one or more of nine, narrowly construed exemptions. 5 U.S.C. § 552(a)(3)(A), (b). Thus,

[8] The Center is not challenging EPA's redactions pursuant to Exemptions 7(D) or 7(F).

[9] In mid-September 2017, EPA publicly released heavily sanitized versions of Administrator Pruitt's schedule from April 3, 2017, through September 8, 2017, available at https://www.washingtonpost.com/apps/g/page/politics/epa-administrator-scott-pruitts-schedule-from-april-3-2017-to-sept-8-2017/2241/?tid=a_mcntx.

agencies must "perform more than a perfunctory search in response to a FOIA request." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). Importantly, an agency "cannot limit its search" to restricted places "if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

FOIA cases are typically resolved on motions for summary judgment, but summary judgment can be granted only when there are no genuine disputes of material fact and the moving party "is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). An agency bears the burden to prove "beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents." *Nat'l Security Counselors II*, 960 F. Supp. 2d at 132 (alteration in original) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007)). Agencies must also prove they released all nonexempt records and that any FOIA exemptions they claimed were lawful. *See* 5 U.S.C. § 552(a)(4)(B); *Reporters Comm. For Freedom of Press*, 489 U.S. at 755.

To prevail on summary judgment, EPA "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,* 920 F.2d at 68 (citations omitted). Declarations sufficient to justify summary judgment must identify the types of files that an agency maintains and the search terms that it employed, and demonstrate that all files that can be reasonably expected to include responsive records were searched. *Id.* However, "[i]f a review of the record raises substantial doubt, particularly in view of 'well-defined requests and positive indications of overlooked materials,' summary judgment is inappropriate." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)).

Discovery is not typical in FOIA cases, but a court may permit a requester to conduct discovery if there is a "reasonable *suspicion*" that the agency thwarted the purposes of FOIA: to allow the citizenry to know what their government is up to. *Landmark Legal Found. V. U.S. EPA*, 82 F. Supp. 3d 211, 220 (D.D.C. 2015) (emphasis in original).

An agency must construe FOIA's exemptions narrowly when deciding whether to exempt responsive records from FOIA's disclosure mandate. *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 132 (quoting *Milner v. Dep't of Navy*, 525 U.S. 562, 565 (2011)). And in doing so, they must ensure "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see also Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010) ("FOIA allows agencies to withhold only those documents that fall under one of nine specific exemptions, which are construed narrowly in keeping with FOIA's presumption in favor of disclosure.") (citations omitted)).

In FOIA cases, the "agency bears the burden of showing that a claimed exemption applies." *Pub. Citizen*, 598 F.3d at 869 (citation omitted); *see also* 5 U.S.C. § 552(a)(4)(B). An agency may carry its burden by preparing an affidavit and, where necessary, a *Vaughn* index, to justify each exemption. *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 132; *see Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973). A *Vaughn* index must "describe[ ] the documents withheld or redacted and the FOIA exemptions invoked, and explain[ ] why each exemption applies." *Prison Legal News v. Samuels*, 787 F.3d 1142, 1145 n.1 (D.C. Cir. 2015).

Even if an exemption may lawfully apply, FOIA requires agencies to disclose "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b). Moreover, an agency must disclose all "purely factual material

contained in deliberative memoranda" even if it can show portions of a record may be withheld, *Mink v. EPA*, 410 U.S. 73, 87-88 (1973), unless such materials are "inextricably intertwined with exempt portions" of the record. *Schiller v. Nat'l Labors Relations Bd.*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (citation omitted). This "'segregability' requirement applies to all documents and all exemptions in the FOIA." *Schiller*, 964 F.2d at 1209 (quoting *Ctr. for Auto Safety v. U.S. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984)).

ARGUMENT

I. EPA DID NOT CONDUCT AN ADEQUATE SEARCH INCLUDING ALL FILES THAT MAY INCLUDE RESPONSIVE RECORDS, USING APPROPRIATE CUT-OFF DATES AND SEARCHING ALL METHODS OF COMMUNICATION.

The Center is entitled to summary judgment for Claim 1 in its First Amended Complaint because EPA's memorandum and sworn declarations fall short of "demonstrat[ing] beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (citations omitted). Perhaps most glaring, EPA's ending search date was unreasonable. EPA also failed to adequately describe the scope or manner of its search and failed to search for records the Center expressly requested, such as text messages and voicemails. *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) ("agency affidavits [must] denote which files were searched or by whom, . . . reflect a[ ] systematic approach to document location, and . . . provide information specific enough to enable [the requester] to challenge the procedures utilized."). Moreover, EPA's declarant flatly admits the agency did not search for all possible locations of the administrator's text messages, and instead relied on Administrator Pruitt's out-of-court statements —which are hearsay presumably made months after the fact—attesting that he did not send any text messages during the relevant timeframe, "to the best of his knowledge."

White Decl. at ¶ 27, ECF No. 22-1. Summary judgment thus cannot be granted to EPA as to the adequacy of its search for Administrator Pruitt's communications (Claim 4), or its failure to act according to its own rules, record-retention requirements, the FRA, and the APA (Claim 7).

EPA waited months to commence an extremely narrow search for responsive records, and then took several more months to complete it. And at the end, EPA failed to produce a single communication that Administrator Pruitt had either composed or sent during his first 11 days at EPA, a claim that is simply implausible in today's professional world. When considered with this Administrator's reputation for secrecy, the results of EPA's search certainly create reasonable suspicion that the agency failed to conduct the search in good faith. Furthermore, in EPA's own sworn declarations, the agency admits it did not search Administrator Pruitt's personal email accounts for responsive records nor ensure that he searched his accounts himself. White Decl. at ¶¶ 27-28, ECF No. 22-1. Confusion surrounding EPA's search for Administrator Pruitt's phone logs only adds reasons to suspect that its search was less than adequate.

Therefore, the Center respectfully asks this Court to order EPA to adequately search for and disclose all responsive records, which it has refused to do to date. Specifically, the Center asks the Court to direct EPA to use the date of its search as the cut-off date for its search, and to search for all files that are reasonably likely to contain all requested forms of Administrator Pruitt's correspondence.

A. Search Cut-Off Date

EPA only started searching for responsive records six to nine months after receiving the Center's FOIA request, and when it finally started looking, the EPA arbitrarily set its cut-off date as the date of the Center's request. EPA has never given compelling justification for using the date of the request as the search cut-off date, which it must do given the authority to the contrary.

See Pub. Citizen v. U.S. Dep't of State, 276 F.3d 634, 644 (D.C. Cir. 2002) (an agency must have a "compelling justification for imposing a date-of-request cut-off on a particular FOIA request"). EPA cannot, simply for the sake of its own bureaucratic convenience, refuse to search for records that are specifically identified in a FOIA request. *Ctr. for Biological Diversity v. U.S. EPA*, 279 F. Supp. 3d 121, 141 (D.D.C. Sept. 28, 2017). Indeed, courts rarely conclude that the date of a FOIA request should be used as the cut-off date for an agency's search for responsive records, and when they do, it is due to fact-specific circumstances. *See, e.g., Pub. Citizen v. U.S. Dep't of State*, 276 at 643-44 (quoting *McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983)); *see also McGehee*, 697 F.2d at 1102-04 (rejecting proposition that "use of a time-of-request cut-off date is *always* reasonable") (emphasis in original); *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 282-83 (D.D.C. 2012); *see also Ctr. for Biological Diversity v. U.S. EPA*, 279 F. Supp. 3d at 140-42 (explaining that it is not "*always* reasonable" to use the date that a FOIA request is submitted as the temporal cut-off date for responsive documents, and that an agency "must have a 'compelling justification for imposing a date-of-request cut-off on a particular FOIA request'" (citations omitted) (emphasis in original)).

Thus, it would have been reasonable for EPA to use the date of its search as its cut-off date, particularly under the circumstances here, where EPA failed to commence any search for half a year. *See Ctr. for Biological Diversity v. U.S. EPA*, 279 F. Supp. 3d at 140-41 ("EPA should have used the 'date of the search' as the cut-off date" (citations omitted)); *McClanahan v. U.S. Dep't of Justice*, 204 F. Supp. 3d 30, 47 (D.D.C. 2016) ("Relying on this guidance from the Circuit, a date-of-search cut-off has routinely been found to be reasonable, even if the agency performed subsequent searches." (citations omitted)); *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 153 (D.D.C. 2013) (The D.C. Circuit "implicitly approv[ed] as reasonable a 'date-of-search

cut-off [date]'" (second alteration in original)) citing *Pub. Citizen*, 276 F.3d at 644)); *Schoenman v. FBI*, 573 F. Supp. 2d 119, 140 (D.D.C. 2008) (finding no "infirmity in the State Department's current date-of-search cut-off policy"); *Edmonds Inst. v. U.S. Dep't of Interior*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005) ("The D.C. Circuit has all but endorsed the use of date-of-search as the cut-off date for FOIA requests." (citing *Pub. Citizen*, 276 F.3d at 642)); *Ferguson v. U.S. Dep't of Educ.*, No. 09-100057 (FM), 2011 U.S. Dist. LEXIS 103954, at *32-33 (S.D.N.Y. Sep. 13, 2011) ("[T]he date on which the agency commences its search is an appropriate cut-off date." (citations omitted));; *see also* 22 C.F.R. § 171.11(j) (State Department regulation: "In determining which records are responsive to a request, the Department ordinarily will include only records in its possession as of the date the search for responsive documents is initiated, unless the requester has specified an earlier cut-off date."); 28 C.F.R. § 16.4(a) (Department of Justice regulation: "In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that it begins it search."). A date-of-search cut-off date is especially appropriate here because EPA has a backlog of FOIA requests. *See Pub. Citizen,* 276 F.3d at 643.

The Center submitted its FOIA request on February 28, 2017, but almost immediately, EPA refused to process it, erroneously claiming that the Center's request was not reasonably described. Ex. 17. Five months after the Center submitted its request—and only after the Center filed its complaint—EPA finally agreed to "process" the Center's request, apparently reversing its initial position that it lacked a reasonable description. Ex. 22; *see also Oklahoma v. U.S. EPA*, No. CIV-13-726-M, 2013 U.S. Dist. LEXIS 177381, at *11 (W.D. Okla. Dec. 18, 2013) (a FOIA request is reasonably described if a "professional employee of the EPA who is familiar with the subject area of the request is able to locate the records with a reasonable amount of

effort."). Still, EPA did not actually commence its narrow search until August 23, 2017, nearly a full month after it agreed to process the Center's request, White Decl. at ¶ 12, ECF No. 22-1, and proceeded to continue searching for records for months, White Decl. at ¶¶ 26, 32, and ultimately yielded a subset of potential responsive records from the 11-day period that was the complete scope of the agency's search.

Furthermore, it cannot be ignored that if EPA had simply commenced its search for records when it received the Center's request—rather than rejecting it outright—the date range might have been relatively narrow. But it was six months before EPA even agreed to search Administrator Pruitt's records, yet EPA narrowed the temporal scope to an 11-day period between February 17, 2018, and February 28, 2017, which "cast[s] considerable doubt on the merits of the agency's [search] procedure." *McGehee*, 697 F.2d at 1103. Since it is seeking all of Administrator Pruitt's communications—not just those created or received between February 17 and February 28, 2017—the Center must continuously send updated FOIA requests for Pruitt's communications, virtually identical to the Center's original request and different only in their temporal scope, simply to accommodate EPA's delays, use of unreasonable cut-off dates, unduly narrow constructions of FOIA requests, and as explained further below, overly broad construction of FOIA's exemptions. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (FOIA's exemptions "are explicitly made exclusive . . . and must be narrowly construed." (citations and internal quotation marks omitted)).[10]

[10] EPA's responses to those additional FOIA requests remain grossly overdue. The Center has not received a single responsive record, and has been left with no other option but to enforce FOIA through litigation, *Ctr. for Biological Diversity v. U.S. EPA*, No. 18-cv-1219 (D.D.C. May 24, 2018), ECF No. 1, unnecessarily consuming agency and judicial resources, as well as Plaintiff's.

EPA has demonstrated that it certainly can provide records that post-date a FOIA request. In response to the Center's request for Administrator Pruitt's calendar, EPA provided calendar entries through May 18, 2017. Ex. 37. Additionally, EPA provided phone logs for Administrator Pruitt's desk phone through August 2017, although EPA redacted all phone numbers under Exemption 6. Ex. 28. EPA only insisted on using the date of the Center's request as a cut-off date for the request for Pruitt's communications.

EPA cannot violate the law through an agency rule or policy when it fails to comport with the law. EPA argues that its regulation, 40 C.F.R. § 2.103(a), permits the agency to automatically impose a date-of-request cut-off date, without justification. Def's Mot. Summ. J. 9-13, ECF No. 22. Indeed, far from requiring the agency to apply the date-of-request as the search cut-off date in connection with all searches, the rule simply states that an EPA office will "ordinarily" apply the date of the request. 40 C.F.R. § 2.103(a).

Here the Center repeatedly requested EPA to use the date of the agency's search for Administrator Pruitt's communications as the cut-off date, as the search was not commenced for six months, took many more months to complete, and ultimately yielded few responsive records even narrowly construed to encompass Administrator Pruitt's first 11 days at EPA. *See also* Plaintiff's Statement of Material Facts ("Pl. SoF") at ¶ 11; *see also* 40 C.F.R. § 2.103(a) (allowing EPA to use "any other date" as to any search for records). To the extent that EPA relies on this policy to circumvent its FOIA obligations, "the agency [has] adopted, endorsed, or implemented some policy or practice that constitutes an ongoing 'failure to abide by the terms of the FOIA'" and, thus, the policy itself is unlawful. *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013) (quoting *Payne Enter. v. United States*, 837 F.2d. 486 491 (D.C. Cir. 1988)).

Finally, the issue of the search cut-off date (within Claim 1) is not moot because a live controversy exists between EPA and the Center, and there is a more-than-speculative chance that the same issue will affect the Parties in the future. *See Clarke v. United States*, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988) (additional citations omitted)). EPA's refusal to use the date of the search as its cut-off date has injured the Center and will continue to injure the Center unless and until it receives Administrator Pruitt's communications. EPA claimed on April 10, 2018, that it has "initiated a search for electronic communications to or from Administrator Pruitt" for the Center's later filed requests, Ex. 28, yet the Center has not received a single record responsive to any of its later-filed requests. *See* Complaint, *Ctr. for Biological Diversity v. U.S. EPA*, No. 18-cv-1219 (D.D.C. May 24, 2018), ECF No. 1.[11]

Even if the issue were moot, which it is not, EPA's unreasonable use of the date-of-request cutoff is "capable of repetition, yet evading review." *Spencer v. Kemna*, 523 U. S. 1, 17 (1998). Again, the Center has filed will continue to pursue transparency and the ability to know the priorities and day-to-day activities of Administrator Pruitt through FOIA. EPA's continued, unlawful application of the date-of-request as the cut-off date for its searches will impair the Center's continued ability to receive records pursuant to FOIA while unnecessarily expending administrative and judicial resources.

In light of the foregoing, this Court should order EPA to conduct a search using the date of the search as the cut-off date for responsive records.

[11] Moreover, simply stating that EPA initiated a search does not mean that its search was proper or that EPA otherwise complied with its FOIA obligations. Indeed, it may not even mean that a search has been initiated yet. EPA's failures have necessitated the use of additional judicial resources to adjudicate the inadequacy of EPA's search in this and in the Related Case. *Ctr. for Biological Diversity v. U.S. EPA*, No. 18-cv-1219 (D.D.C.).

B. Pruitt's Communications

Further underscoring the inadequacy of EPA's search, in the agency's November 17, 2017 release EPA only disclosed emails and letters that were sent *to* Administrator Pruitt, yet the Center requested "all correspondence . . . *sent to or from* Mr. Pruitt . . . ." Ex. 9; Ex. 38 (Email from Lynn Kelly, U.S. EPA, to Center for Biological Diversity (Nov. 17, 2017)) (emphasis added). EPA's declarants do not describe any effort to find communications that had been authored *by* or sent *from* Administrator Pruitt. Again, it simply defies common sense to accept the idea that Administrator Pruitt authored *no* communications, even if one's search is limited to his first 11 days at EPA.

The glaring omission of these communications from the agency's response illuminates more questions about the agency's compliance with the Federal Records Act. The FRA mandates that "[t]he head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency . . . ." 44 U.S.C. § 3101. The FRA's implementing regulations require every federal agency to "[d]ocument the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically[,]" and to "[d]ocument important board, committee, or staff meetings." 36 C.F.R. § 1222.22(e)-(f).

Numerous "functions, policies, decisions, procedures, and essential transactions of the agency" and, without question, meetings took place during the Administrator's first days in office, yet EPA has disclosed no communications that Administrator Pruitt authored or sent during that limited period. In its November 22, 2017 letter, the Center asked EPA to confirm

that it would provide email sent by Administrator Pruitt, as well as the other types of requested records. Ex. 23. During a November 29, 2017 phone call to discuss the Center's letter, EPA's counsel said that Administrator Pruitt did not use email at all from February 17, 2017, to February 28, 2017. Townsend Decl. at ¶ 4. EPA's counsel would not comment as to whether Administrator Pruitt used email after that date. *Id*. at ¶ 5. In any event, EPA's response remains incomplete because it did not provide a single record Administrator Pruitt either composed or sent in his first days in office.

C. Text Messages

When EPA finally searched for Administrator Pruitt's communications, which started more than six months after it received the Center's request, it did not search for *any* of Administrator Pruitt's text messages. Def's Mot. Summ. J. 7, ECF No. 22 (admitting it "did not search the Administrator's work cell phone for text messages."). EPA only *asked* Administrator Pruitt if he texted during the first 11-days heading the agency. *Id.*; *see also* Jackson Decl. at ¶ 16, ECF No. 22-5. EPA claimed that "Administrator Pruitt did not use a work cell phone to send or receive text messages during February 17-28, 2017"—"*to the best of his knowledge*." Def's Mot. Summ. J. 7, ECF No. 22 (emphasis added). In addition to constituting inadmissible hearsay, FED. R. EVID. 802, it was patently inadequate for EPA merely to ask the Administrator whether he recalled communicating by text message on one cell phone—as late as six months later—instead of simply searching all phones he used to communicate as EPA Administrator. Additionally, by conceding that it did not *search* for these records, EPA cannot establish a presumption of regularity for its out-of-court statement that they do not exist. Thus, because EPA failed to adequately search for, locate, and disclose Administrator Pruitt's text messages,

this Court should order EPA to conduct a search of Administrator Pruitt's text messages using the date of the search as the cut-off date.

D. Phone Logs

EPA initially informed the Center that it "pulled the phone logs for the main office line for the Office of the Administrator" but then later "determined that this was an incorrect number to search, because the Administrator does not personally make or receive phone calls using the main office line for the Office of the Administrator." White Decl. at ¶ 18, ECF No. 22-1. According to EPA, the agency searched the number for Administrator Pruitt's direct line on November 29, 2017, for responsive phone logs for the period of February 17 to 28, 2017. *Id.* at ¶ 19. Yet apparently, only one entry was found from this time period, and EPA released it to the Center with Administrator Pruitt's phone number redacted pursuant to Exemption 6.[12] *Id.* at ¶ 20.

If it is true that Administrator Pruitt does not use a single method of electronic communication for official EPA business, despite the reported existence of at least four different agency email addresses, Ex. 7 (Juliet Eilperin and Brady Dennis, *Scott Pruitt Has Four Different EPA Email Addresses. Lawmakers Want to Know Why*, WASH. POST (April 12, 2018)), then Administrator Pruitt is violating either the Federal Records Act or FOIA, or both. Indeed, the lack of clarity on this issue precludes entry of summary judgment at this time.

II. THE COURT SHOULD GRANT PLAINTIFF LEAVE TO CONDUCT LIMITED DISCOVERY ON EPA REGARDING ITS RECORD RETENTION AND SEARCH PRACTICES, PROCEDURES, AND POLICIES.

Because factual questions remain that are material to Claims 4 and 7 of the Center's First Amended Complaint, the Center is not seeking summary judgment on those claims in this cross-

[12] The Center is not challenging this redaction.

motion. However, before this Court can rule on cross-motions for summary judgment on the adequacy of EPA's search, the Center must first be permitted to gather the facts necessary for the Court to assess whether EPA's search for records was adequate under FOIA, and that it complied with applicable rules, records management policies, and the FRA—*i.e.*, the facts necessary to determine if EPA conducted the search adequately and in good faith.

Plaintiff seeks limited discovery from EPA pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, which permits nonmovant to show by affidavit or declaration that, "for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to obtain affidavits or declarations or take discovery." FED. R. CIV. P. 56(d)(2). To obtain discovery under such circumstances, the affidavit or declaration must:

1. Outline the particular facts that the movant intends to discover and describe why those facts are necessary to the litigation;

2. Explain why the movant could not produce the facts in opposition to the motion for summary judgment; and

3. Show that the facts sought are discoverable.

Convertino v. U.S. Dep't of State, 684 F.3d 93, 99-100 (citations omitted).

Specifically, the Center seeks leave to propound discovery to gather relevant information about the methods and means that Administrator Pruitt utilizes to communicate, including all forms of electronic messages, since becoming the Administrator. In addition, the Center seeks to learn how the Administrator and EPA retain such communications, and the degree to which the agency's search for records in fulfilling the Center's request comported with those records management systems. *See Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980). In particular, the Center seeks discovery about whether EPA search encompassed all

responsive agency records in all likely locations, including all forms of electronic communication Administrator Pruitt has used to communicate since becoming the Administrator.

Because of the inherent, "asymmetrical distribution of knowledge" between the requester and the keeper of information, the Center requires limited discovery to obtain facts essential for the Court to determine whether EPA's search was adequate and otherwise lawful. FED. R. CIV. P. 56(d); *see* 5 U.S.C. § 706(2)(A) (reviewing court "shall . . . set aside" any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006) (FOIA requesters face an "'asymmetrical distribution of knowledge' where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request" (citation omitted)); *Judicial Watch, Inc. v. U.S. Dep't of State*, No. 13-1363, 2016 U.S. Dist. LEXIS 62283, at *13 (D.D.C. May 4, 2016); *Landmark Legal Found. v. U.S. EPA*, , 959 F. Supp. 2d 175, 184 (D.D.C. 2013).

Here, discovery is necessary because the Center requires certain facts to determine whether EPA met the standard for an adequate search. As explained above, EPA's searches were inefficient at best. At worst, they were confusing and/or designed to undermine FOIA and the public's right to know what Administrator Pruitt and the EPA are "up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-73 (1989) (citations omitted). Thus, the Center also seeks leave to propound discovery of facts concerning whether EPA *intentionally* undermined FOIA in connection with the Center's and other parties' FOIA requests for records that concern Administrator Pruitt—*e.g.*, by failing to maintain federal records, creating at least four different EPA email addresses, building a $43,000 privacy phone booth, prohibiting note-taking during meetings, and other secretive practices and systems. Indeed, EPA failed to search all potential locations for responsive records including on all

devices that Administrator Pruitt likely used to communicate as EPA administrator, simply taking Administrator Pruitt's representations that he complied with record-retention policies.[13]

The Declaration of Brett Hartl further describes the particular, discoverable facts that the Center intends to discover, and how they are not publicly available yet material to whether EPA has searched adequately for all responsive communications of the Administrator, in accordance with all applicable law. Declaration of Brett Hartl ("Hartl Decl."). As Mr. Hartl explains, much about Administrator Pruitt's record-retention practices and methods of communicating as EPA administrator is unknown. Hartl Decl. at ¶ 5. Congressional publications, correspondence, media reports, and other sources have reported on Administrator Pruitt's and EPA's unprecedented secrecy and purposeful avoidance of transparency. Pl. SoF at ¶¶ 1-11; Exs. 2, 3, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, and 39.

Indeed, if Administrator Pruitt truly did or does not use email or phones to communicate, Townsend Decl. at ¶ 4, it raises basic questions about how Administrator Pruitt is able to function in his position. There simply must be methods and means by which he communicates—with staff, other officials, politicians, and others, and records of those communications. Shrouding these details even further are reports that Administrator Pruitt has not one, but *four* different EPA-issued email addresses, three of which are currently operational, Ex. 11. If true, this would strongly suggest that Administrator Pruitt likely does use email, and presumably other electronic messaging applications or devices as well—it is likely that the only questions are where those records are located and whether EPA looked for them in those places in responding to the Center's request. EPA's declarations do not establish any presumption of an adequate search because they do not assert, let alone establish, that all of Administrator Pruitt's many

email addresses or similar methods of communicating were searched.[14] The Center therefore requires discovery to gather this information to determine if EPA conducted a search in good faith.

Here too, the circumstances surrounding Administrator Pruitt's apparent habit of using non-official methods of communication are akin to those in *Landmark Legal Foundation*, where the plaintiff requested records of senior EPA officials, but learned that certain officials used personal email accounts for official business. 959 F. Supp. 2d at 177, 180. Because EPA did not search those accounts in response to the FOIA request at issue, the Court denied summary judgment for EPA, finding an outstanding issue of material fact with respect to the adequacy of EPA's search. *Id*. at 182. Thus, the Court permitted plaintiff to conduct discovery. *Id*. at 184 ("The possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA."). Now, like the FOIA requester in *Landmark Legal Foundation*, the Center requires discovery to obtain the necessary evidence from EPA to establish these facts as well as to determine how to obtain responsive records.

As in *Landmark Legal Foundation*, here too the circumstances easily trigger a "reasonable suspicion" that EPA and Administrator Pruitt deliberatively thwarted FOIA in connection with the request at issue here, and therefore discovery is warranted. *See Landmark Legal Found. v. U.S. EPA*, 82 F. Supp. 3d 211, 220 (D.D.C. 2015) (discovery is warranted if there is a "reasonable *suspicion*" that EPA deliberately thwarted FOIA (emphasis in original));

[14] EPA glossed over whether "Administrator Pruitt was specifically briefed on [the] requirement" that EPA staff must "forward any work-related records sent to or received by a personal messaging account, such as a personal email address, to their EPA email account within 20 days of sending or receiving such a message." Def's Mot. Summ. J. 8, ECF No. 22; White Decl. at ¶ 27, ECF No. 22-1.

Judicial Watch, Inc. v. Export-Import Bank, 108 F. Supp. 2d 19, 25 (D.D.C. 2000) (In FOIA cases, discovery is warranted when a plaintiff raises a "sufficient question as to the agency's good faith in processing or in its search." (citation omitted)); *see also Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 41 (D.D.C. 1998) (discovery warranted when necessary "to explore the extent to which [the agency] illegally destroyed and discarded responsive information, and possible methods for recovering whatever responsive information still exists outside of the [agency's] possession").[15]

III. EPA FAILED TO CARRY ITS BURDEN TO SHOW THAT IT MAY LAWFULLY WITHHOLD RECORDS PURSUANT TO EXEMPTION 5.

Plaintiff challenges EPA's decision to withhold in full CMS_0002, a two-page memorandum and four-page attachment that the agency describes as "Final Rule: Further Delay of Effective Date for Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7) – ACTION MEMORANDUM" (hereinafter "Action Memorandum"). *See Vaughn* index at 1-2. This Action Memorandum is neither predecisional nor deliberative, as explained below.

EPA has failed to meet its burden to prove that it properly withheld one record under the deliberative process privilege of FOIA Exemption 5. "[T]he deliberative process privilege must be construed as narrowly as is consistent with efficient government operation." *Army Times Pub. Co. v. Dep't of Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993) (citation omitted). To

[15] While not ordinary, discovery in FOIA cases is permissible and allowed when necessary, and it has occurred in other FOIA cases involving EPA as a defendant. *See, e.g., Landmark Legal Found. v. U.S. EPA*, 959 F. Supp. 2d 175, 183-84 (D.D.C. 2013) (ordering limited discovery to assess the adequacy of EPA's search); *Pub. Citizen Health Research Grp. v. FDA*, 997 F. Supp. 56, 72 (D.D.C. 1998) (ordering discovery for "investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like" (citation omitted)), *rev'd in part on other grounds,* 185 F.3d 898 (D.C. Cir. 1999).

qualify for the privilege, a record must be "*both* pre-decisional and deliberative." *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015) (emphasis added) (citing *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). A "predecisional" record is "generated before the adoption of an agency policy." *Coastal States*, 617 F.2d at 866; *see also Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). However, "[e]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted . . . ." *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) (citation omitted). To be privileged, a record must also be "deliberative" —i.e., "reflect[s] the give-and-take of the consultative process." *McKinley v. FDIC*, 744 F. Supp. 2d 128, 138 (D.D.C. 2010) (citation omitted).

Thus, to meet its burden, EPA must "[a]t the very least" provide for each record or portion of a record: "(1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient." *Pub. Emps.*, 213 F. Supp. 3d 1, 13 (D.D.C. 2016) (citations omitted). Merely asserting that the privilege applies because a record involves discussions between agency employees will not be sufficient to overcome FOIA's strong presumption in favor of disclosure to withhold information under the narrowly construed privilege. *Founding Church of Scientology, Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 830-31 (D.C. Cir. 1979) ("conclusory and generalized allegations of exemptions are unacceptable" (internal quotations marks omitted)); *see also COMPTEL v. FCC*, 910 F. Supp. 2d 100, 119 ("conclusory assertions of privilege will not suffice to carry the Government's burden of proof in defending FOIA cases" (citation omitted)); *Senate of P.R. ex rel. Judiciary Comm. v. U.S. Dep't of Justice*, 823 F.2d 574 585 (an assertion of privilege is "conclusory" if "no factual support is

provided for an *essential* element of the claimed privilege" (emphasis in original)). EPA must identify and release all segregable portions of exempt records because the privilege "does not protect documents in their entirety" and "if the government can segregate and disclose non-privileged factual information within a document, it must." *McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 709-10 (2014) (quoting *Loving v. U.S. Dep't of Def.*, 550 F.3d 32, 38).

The Action Memorandum that EPA withheld is not predecisional. Because EPA had already published the final rule, the Action Memorandum was not "[a]ntecedent to the adoption of an agency policy," *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (alteration in original) (quoting *Jordan*, 591 F.2d 753, 774), but instead was a politically driven decision to delay implementing a policy. In August 2013, President Obama issued Executive Order 13650 to address risks from industrial use and storage of hazardous substances. Ex. 40 (Exec. Order, 3 C.F.R. 13650 (2013)). EPA published the final "update rule" in January 2017. Accidental Release Prevention Requirements, Final Rule, 82 Fed. Reg. 4594, 4594 (Jan. 13, 2017).

The update rule strengthened requirements for facilities subject to the Occupational Safety and Health Administration Safety Management Program; have a history of accidents; or are close to public receptors such as offsite residences, businesses, or recreational areas. *Id.* EPA had received petitions from several trade associations and states expressing concern about EPA's basis for updating its RMP regulations and asking EPA to reconsider the update rule. EPA, Final Amendments to the Risk Management Program (RMP) Rule, https://www.epa.gov/rmp/final-amendments-risk-management-program-rmp-rule. In response, on March 16, 2017, EPA granted a 90-day stay of the final rule. Accidental Release Prevention Requirements, Further Delay of Effective Date, 82 Fed. Reg. 13,968, 13,968 (Mar. 16, 2017).

EPA later issued a rule extending the stay until February 19, 2019. Accidental Release Prevention Requirements, Further Delay of Effective Date, 82 Fed. Reg. 27,133, 27,135 (June 14, 2017).

The Action Memorandum at issue, CMS_0002, dated February 22, 2017, went to Administrator Pruitt sometime between the time that EPA published the January 13, 2017 final update rule and the time that EPA decided to grant the initial 90-day stay of rule. Presumably this stay was a direct response to stakeholder petitions, and it raises significant questions about whether EPA granted the lengthy stay of the risk management update rule to placate industrial facilities by not requiring stronger risk management programs. The decisionmaking process had already concluded for the Risk Management Rule. All that was left was to implement the rule, and the new administration was determined to delay its implementation indefinitely. Even if the record was once predecisional, the delay of the rule was adopted, and thus the record lost any predecisional status it may have had. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) (citation omitted).

Likewise, the CMS_0002 is not "deliberative" because it does not involve discretionary agency policymaking, but is instead a post-decisional, purely procedural Action Memorandum, calling for delay of the implementation of the final Risk Management Rule. *See, e.g., Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 10-11 (D.C. Cir. 2014) (when "predecisional recommendations . . . are expressly adopted in [a] final, nonexempt memorandum, . . . 'the reasoning becomes that of the agency and becomes *its* responsibility to defend.'") (alteration in original) (citation omitted); *Nat'l Day Laborer Org. Network v. ICE*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011) (holding that "[d]eliberations about how to present an already decided policy to the public, or documents designed to explain that policy to . . . the

public, including in draft form, are at the heart of what should be released under FOIA"). EPA indicated that Barry Breen sent the Action Memorandum to Scott Pruitt on February 22, 2017, but provided no other information about the record. ECF No. 22-4, Correspondence Records *Vaughn* Index. Research shows that Mr. Breen is the Acting Assistant Administrator of the EPA's Office of Land and Emergency Management, and he is therefore responsible for managing the EPA's hazardous and solid waste management programs and emergency response program. Ex. 41 (U.S. EPA, *About the Acting Assistant Administrator of EPA's Office of Land and Emergency Management*, https://www.epa.gov/aboutepa/about-acting-assistant-administrator-epas-office-land-and-emergency-management (last updated on March 13, 2018)). Due to the timing of the rule delay coinciding with Administrator Pruitt starting at EPA, it is more than likely that Mr. Breen was informing Administrator Pruitt that this Obama Administration rule should be delayed and asking Administrator Pruitt for a signature. As an Acting Assistant Administrator, Mr. Breen's decisionmaking authority is likely not recommendatory in nature and requires only Administrator Pruitt's signature to affirm the recommended action.

Due to the significant risks that the delay of this rule has on human health and the environment—as well as the highly political nature of the underlying activities and policies—the public interest in knowing the reasons for EPA's delay of the risk management program update rule—*i.e.*, in knowing what EPA is "up to," *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-73 (1989))—significantly outweighs any interest the agency has in preventing transparency and public scrutiny about whether industry groups were granted a favor early in Administrator Pruitt's tenure as EPA Administrator. 5 U.S.C. § 552(a)(8)(A).

There is a strong public interest in the Action Memorandum, which is neither predecisional nor deliberative, that significantly outweighs any interest that the agency has in preventing its disclosure, and hence, withholding the record under Exemption 5 is not justified or lawful under FOIA. Therefore, the Court should order EPA to disclose the record in its entirety.

IV. EPA FAILED TO CARRY ITS BURDEN TO SHOW THAT IT MAY LAWFULLY WITHHOLD RECORDS PURSUANT TO EXEMPTION 6.

EPA also failed to prove that it lawfully redacted records pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6). *See* Ex. 42 (Administrator Pruitt Mobile Phone Log Record (2/17/17 - 2/28/17) and Administrator Pruitt Desk Phone Log Record (2/17/17 - 2/28/17)); ECF 22-9, Administrator Pruitt Calendar Record, February 24, 2017.

EPA redacted a portion of a record about a meeting on Administrator Pruitt's official EPA calendar, as well as the phone numbers of individuals Administrator Pruitt spoke with that were listed on a phone log, under Exemption 6. Exemption 6 does not apply to this material, as it can only be applied in narrow circumstances when federal agencies seek to withhold "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added).

Additionally, Exemption 6's high standard requires a balancing test of the public interest in disclosure versus any privacy interest. *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 862 (D.C. Cir. 1981). The phrase "clearly unwarranted" in the statute "instructs the court to tilt the balance in favor of disclosure." *Getman v. Nat'l Labor Relations Bd.*, 450 F.2d 670, 674 (D.C. Cir 1971). "'If no significant privacy interest is implicated . . . FOIA demands disclosure.'" *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008) (alteration in original) (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)). To

implicate a cognizable privacy interest, records must typically include "personal" or "intimate details" of one's life. S. REP. NO. 89-813, at 9 (1965); H.R. REP. NO. 89-1497, at 11 (1966).

In this case, the balance tips in favor of disclosure because the strong public interest in the information outweighs any privacy interest in secrecy. Because Administrator Pruitt is a federal employee, any of his official agency records simply do not implicate any significant privacy interest. *See, e.g.,* FOIA Update, Vol. III, No. 4, at 3 ("Privacy Protection Considerations") (civilian federal employees not involved in law enforcement or sensitive occupations generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees). Indeed, the privacy interests of public officials are not as strong as those of private citizens, particularly where those interests may disclose "official misconduct." *Lissner v. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001) (quoting *Dobronski v. Fed. Comms. Comm'n*, 17 F.3d 275, 279 (9th Cir. 1994).

EPA is attempting to withhold information about a calendar entry on Administrator Pruitt's official EPA calendar. There is a strong public interest in knowing who Administrator Pruitt is meeting with and what they discussed. Senator and Interior, Environment and Related Agencies Appropriations Subcommittee Chairwoman Lisa Murkowski recently expressed concern in a Congressional hearing that "[i]nstead of seeing articles about [Administrator Pruitt's] efforts to turn the agency to its core mission, I'm reading about [his] interactions with representatives of the industries that [he] regulate[s]."[16] This concern has been widespread throughout the media from the first day that Administrator Pruitt took office as EPA Administrator.[17] The information that EPA is withholding would, if disclosed as FOIA requires,

[16] https://www.eenews.net/eedaily/2018/05/17/stories/1060081933.
[17] *See, e.g.*, Coral Davenport and Eric Lipton, *The Pruitt Emails: E.P.A. Chief was Arm and Arm with Industry*, N.Y. TIMES (Feb. 22, 2017),

allow the public to consider whether Administrator Pruitt's actions as EPA Administrator are consistent with the agency's underlying mission "to ensure", among other things, that: "Americans have clear air, land and water"; that "National efforts to reduce environmental risks are based on the best available scientific information"; and that "All parts of society—communities, individuals, businesses, and state, local and tribal governments—have access to accurate information sufficient to effectively participate in managing human health and environmental risks." U.S. EPA, Our Mission and What We Do, https://www.epa.gov/aboutepa/our-mission-and-what-we-do. This is especially true because EPA withheld the name of the person Administrator Pruitt met with and the subject of the meeting, and it is important for the public to know who has the EPA Administrator's ear. *DR Partners v. Bd. of Cty. Comm'rs*, 6 P.3d 465, 470 (Nev. 2000) ("there is . . . a public interest in knowing who is being consulted by the Government and contributing to its decisions.") (alteration in original) (quoting Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda,* 86 HARV. L. REV. 1047, 1065-66 (1973)); *accord Times Mirror Co. v. Superior Court*, 813 P.2d 240, 259-60 (Cal. 1991).

Even if there were a privacy interest, EPA gives no explanation as to why disclosing the information would somehow harm that interest.

Similarly, the phone numbers of individuals that Administrator Pruitt spoke with simply may not be completely redacted. The strong public interest in knowing who Administrator Pruitt

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https://www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.html; Ellen M. Gilmer, *EPA Drops Request for Methane Information from Oil and Gas Industry*, SCIENTIFIC AMERICAN (March 23, 2017) https://www.scientificamerican.com/article/epa-drops-request-for-methane-information-from-oil-and-gas-industry/; Juliet Eilperin and Brady Dennis, *EPA's Pruitt and Staff to Attend Chemical Industry Meeting at Luxury Resort Next Week*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/11/02/epas-pruitt-and-staff-to-attend-meeting-at-luxury-resort-next-week/.

is speaking with outweighs any privacy interests that may exist in individual parties' phone numbers. Importantly, even if a privacy interest exists as to any of these phone logs, any numbers that are already publicly available could have only a *de minimis* privacy interest, hence the balance tips sharply in favor of disclosing those numbers.

When weighing such *de minimis* privacy interests against the strong public interest in disclosure, the balance tips in favor of disclosure. Even if there were a privacy interest at stake, the balance supports disclosure because any such interest would not be outweighed by the strong public interest in disclosure of records that reveal who Administrator Pruitt is speaking to and meeting with as Administrator of the EPA. Clearly, the balance tips in favor of disclosure. Therefore, the Center respectfully requests that this Court require EPA to promptly release the information withheld from the requested records.

V. EPA MUST RELEASE ALL RECORDS THAT IT IMPROPERLY WITHHELD AS "NON-RESPONSIVE."

EPA admits it improperly withheld Administrator Pruitt's communications as "non-responsive." White Decl. at ¶¶ 19, 28, ECF No. 22-1. Before reviewing the records for possible use of exemptions for disclosure, EPA asserts that its eDiscovery Services team "completed the collection of *responsive* records." *Id.* at ¶ 28 (emphasis added). However, EPA then avers that it "did not identify any responsive instant messages" or "any responsive email messages sent or received using a personal email account of Administrator Pruitt" in the collected records. *Id.* EPA suggests that this was because the agency's "[s]taff attorneys reviewed the collected records for responsiveness and for any applicable exemptions" and deemed them to be "non-responsive" even though EPA's eDiscovery Services team had previously identified and collected them as responsive. *Id.*

Thus, EPA conducted two different levels of review of the "responsive" communications' "responsiveness," but has yet to articulate any basis for how it reached the conclusion that it did. These records are communications of the Administrator that are within the agency's possession and control. For EPA's staff attorneys to reverse their position and deem these records—instant messages and email messages of the administrator—not responsive, particularly when the Center specifically requested such records, is highly suspect. Simply deeming a record not "responsive" does not make it so. In the absence of a response from EPA concerning why collected instant messages and personal emails of Administrator Pruitt were withheld as "non-responsive," the Center will incorporate questions related this issue in any discovery it is granted leave to serve.

FOIA "does not authorize withholding of information . . . except as specifically stated" in the statutory framework. 5 U.S.C. § 552(d). The D.C. Circuit Court of Appeals has concluded that "[u]nder [FOIA's] statutory framework, once the government concludes that a particular record is responsive to a disclosure request, the sole basis on which it may withhold particular information within that record is if the information falls within one of the statutory exemptions from FOIA's disclosure mandate." *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 670 (D.C. Cir. 2016).[18] Therefore, EPA has also failed to carry its burden to prove that records it has deemed "non-responsive" may be withheld. If these records are "communications" of Administrator Pruitt, they are responsive and must be disclosed barring application of a lawful exemption.

[18] *See also* STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT (2016), at 14"), available at https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf (saying that agencies must determine responsiveness to the request on a page-by-page basis, and if any information on a page falls within the scope of the request, then the entire page should be provided) (citations omitted),; *Id.* at 29 ("At no point in the correspondence does [the agency] provide an explanation of how they know that the 70,000 documents are not responsive to the request.").

CONCLUSION

For the foregoing reasons, the Center respectfully requests that the Court deny EPA summary judgment and, grant partial summary judgment to the Center as to those Claims for which there is no question of material fact. For the remaining Claims, the Court should permit the Center to take limited discovery of the administrator's and the agency's retention of agency records that are responsive to the Center's FOIA request for the administrator's communications. The Center also respectfully requests that the Court: (1) declare that EPA's searches were improper; and (2) order EPA to conduct a new search for all responsive records, applying the search date as the cut-off date and promptly disclosing all records and all reasonably segregable portions of records previously withheld or redacted pursuant to Exemption 5, Exemption 6, or as not "responsive"; and (3) declare unlawful and enjoin the EPA's further use of the date of the request as the cut-off date for its searches for records responsive to FOIA requests submitted by Plaintiff.

DATED: May 25, 2018

Respectfully submitted,

/s/ Margaret E. Townsend

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No.: 1:17-cv-00816-TJK

[Proposed] ORDER

Upon consideration of the Plaintiff Center for Biological Diversity's Motion for Leave to Conduct Limited Discovery, the supporting memorandum of law, exhibits, and declarations in support thereof, and for good cause shown, it is hereby:

ORDERED that the Plaintiff's motion is **GRANTED**; and it is further

ORDERED that the Defendant shall submit to the following forms discovery to be propounded by the Plaintiff:

1) Depositions of up to five custodians of EPA records with knowledge of the methods by which Administrator E. Scott Pruitt creates, receives, or retains communications, and/or any EPA officer or personnel with knowledge of the methods by which EPA retains, locates, and the administrator's communications, including Administrator E. Scott Pruitt, Ms. Elizabeth While, Mr. Ryan Jackson, and other EPA officers or personnel with knowledge of the above;
2) Up to 25 interrogatories, to be served on EPA and answered by officers or personnel with knowledge of the methods by which Administrator Pruitt creates, receives, or retains communications;

3) Up to 15 requests for admission, to be served on EPA and answered by officers or personnel with knowledge of the methods by which Administrator Pruitt creates, receives, or retains communications; and

4) Up to 10 requests for production of Administrator Pruitt's communications, of any format, not previously disclosed to the Plaintiff pursuant to the Freedom of Information Act ("FOIA"), that were created and/or received between February 17, 2017 and the date of the agency's search, any other records that are reasonably relevant to the Court's disposition of Plaintiff's claims that EPA has failed to conduct an adequate search for records in response to its requests pursuant to FOIA or otherwise failed to comply with EPA rules, policies, Federal Records Act, and/or the Administrative Procedure Act; and it is further hereby

ORDERED that discovery shall be propounded and completed no later than 60 days from the date of this Order.

SO ORDERED.

Date:_____

_____
TIMOTHY J. KELLY
United States District Judge

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