IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Adam Steele, Brittany Montrois, and Joseph Henchman, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

United States of America,
Defendant.

Case No. 14-cv-01523-RCL

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF WITHHELD INFORMATION

The IRS's primary arguments in opposition to Plaintiffs' Motion to Compel are that the IRS has already done too much in discovery, and Plaintiffs have not done enough to challenge the Service's claims of privilege. Neither argument responds to Plaintiffs' motion, and neither argument is relevant to the question in front of the Court: has the IRS properly invoked the deliberative process privilege?

Defendant's complaints about the burdensome nature of discovery are irrelevant to whether it has properly invoked the deliberative process privilege. *See* Opp'n (ECF 166) at 1-3. Regardless of how much information has been produced and how much has been withheld, the burden is on the IRS to establish that each piece of information withheld was both predecisional and deliberative. *Leopold v. Off. of Dir. of Nat'l Intel.*, 442 F. Supp. 3d 266, 275 (D.D.C. 2020) ("Under the federal common law, the proponent bears the burden of demonstrating the applicability of any asserted privilege, including the deliberative process privilege."). It must meet this burden with "competent evidence," not just "conclusory statements, generalized assertions, and unsworn

averments of its counsel." *Id.* (internal quotation marks and citation omitted). The IRS has not met its burden.

By its own count, the IRS has withheld in full or in part 1,362 documents. It has provided logs with descriptions that are not enough even to ascertain the general subject matter of the withheld information. Yet the IRS demands the impossible, arguing that Plaintiffs must demonstrate the relevance of withheld information, despite meaningless descriptions such as "[d]iscussion of proposed initiative in connection with agency decisionmaking"[1] and "[d]iscussions of draft responses to GAO and/or TIGTA." *See* Opp'n at 1-2. It is impossible to tell from those descriptions the subject of the "agency decisionmaking" or the "GAO and/or TIGTA inquiries."[2] Without even that basic information, Plaintiffs cannot determine how or if the withheld information relates to the issue of whether the IRS charged PTIN fees for activities that exceeded the scope of its authority.

Plaintiffs relied on *Cause of Action Inst. v. Exp.-Imp. Bank of the U.S.*, 521 F. Supp. 3d 64, 89-91 (D.D.C. 2021) to argue, despite the facial insufficiency of the entries claiming privilege over deliberations relating to "GAO and/or TIGTA inquiries," that the information was not properly withheld. The IRS responded that Plaintiffs' reliance on *Cause of Action Institute* was misplaced

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[1] One document with this description is included in the Goldman Declaration. The other is not.

[2] A TIGTA Messaging Document produced by the IRS, "IRS Efforts to Address Unregulated Return Preparer Misconduct Lack a Coordinated Strategy and Could Be More Effective" provides statistics of tax compliance and criminal background checks run by the Suitability Office within the Return Preparer Office, and observes, "When established, Suitability and Competency and Standards were expected to have significant role regulating the entire tax return preparer community. Because the courts ruled that the IRS does not have authority to regulate preparers, Suitability has focused attention on preparers who volunteer for the Annual Filing Season Program (AFSP) and tax professionals." Exhibit A (USA-0030696 at 714). Tax compliance checks and criminal background checks account for a significant portion of the costs used to set the $50 PTIN fee in 2010.

because "the case before this Court does not involve a FOIA request, does not question whether the Service is an agency, and does not relate to congressional deliberations." Opp'n at 11-12. FOIA Exemption 5 covers information withheld under the deliberative process privilege, and case law interpreting Exemption 5 is often cited in analyzing the deliberative process privilege. *See, e.g.*, Opp'n at 9 (citing and discussing *U.S. Fish & Wildlife Serv. v Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021), a FOIA case). Plaintiffs cannot know whether the withheld information in this case "relate[s] to congressional deliberations" because the IRS has not disclosed whether the withheld information related to an inquiry by TIGTA, an Executive-Branch entity providing independent oversight of IRS activities, or an inquiry by GAO, a "unit within the Legislative Branch." *Cause of Action Inst.*, 521 F. Supp. 3d at 89. The court in *Cause of Action Institute* considered a GAO audit to be performed "specifically to assist Congress." *Id.* at 91 (internal quotation marks and citation omitted). Without an explanation of how the information withheld as relating to "GAO and/or TIGTA inquiries" "served [the IRS's] own decisionmaking process" as opposed to that of GAO (Congress) or TIGTA (independent oversight authority), the IRS has not properly invoked the privilege. *Id*. As with its other entries, the IRS has not provided sufficiently detailed descriptions to properly invoke the privilege.

Although it argues that "declarations are not mandatory," Opp'n at 13-14, the IRS has provided a declaration in support of its Opposition, Goldman Decl. (ECF 166-4). None of the cases it cites support the proposition that declarations are not required, and none evaluated claims of privilege based on a log alone, as the IRS contends. In each case, the court ordered an *in camera* review of the documents because the logs were insufficient. *Ascom Hasler* squarely contradicts the IRS's position, stating "affidavits are necessary to support an agency's detailed argument for the claim of privilege, but are in no way sufficient in themselves to establish that privilege." *Ascom*

Hasler Mailing Sys., Inc. v. U.S. Postal Serv., 267 F.R.D. 1, 4 n.3 (D.D.C. 2010). There, the court considered a log, which it found inadequate, and contemplated ordering disclosure based on the insufficient substantiation of the privilege. It declined to compel production based on the unique factual circumstances of the case: "[T]he privilege log and declaration alone are not sufficient for me to make a determination as to the privilege claim because the assertions in the declaration are conclusory. While I might be tempted to deny the claim of privilege on that ground, I also presided over the settlement discussions between the United States and Pitney Bowes, and I am determined to protect the confidentiality of those discussions at all costs." *Id.* at 6.

Despite this argument, the IRS has now produced a declaration in support of its privilege claims. The Goldman Declaration provides descriptions for twenty-six (of 1,362) log entries,[3] but still does not provide enough detail to support the IRS's claims. Much of the "new" information is already available in surrounding, unredacted text. Many of the descriptions add no detail about the information actually withheld, adding instead only conclusory assertions that the information withheld was "not finalized or approved by the IRS," or was created "at a time when the IRS had not yet made any final decisions related to those issues." *See e.g.*, Goldman Decl. at 7. Nine of the twenty-six descriptions in the Goldman Declaration specify that the author and date of the document are unknown. *Id*. at 6-17. Seventeen of the twenty-six describe the author as unknown.

[3] The IRS recognizes that the documents identified by Plaintiffs in their letters were "exemplars." Opp'n at 5-6. In providing a declaration for these examples, and stating, "[t]he United States, in turn, has repeatedly requested that the Plaintiffs identify specific log entries, to no avail," the IRS intimates that it would have substantiated additional claims of privilege if Plaintiffs had just asked. But, in fact, 249 log entries share the descriptions identified in Plaintiffs' letters and the IRS includes only twenty-six in the Goldman Declaration. For example, sixty-five documents in the Booz Allen Withheld Log have the description, "discussion of potential risks in connection with agency decisionmaking regarding Loving district court decision," and fifty-five documents on the United States Redacted Log have the description, "discussion of potential risks related to agency decisionmaking," but the Goldman Declaration describes only one of each. *Id*. at 8, 6.

Id. One document, BAH_0000643, is described as "[e]ighteen pages of undated financial information, untitled, author unknown. The data compiles operating financials of various components of the IRS Return Preparer Initiative." *Id*. Despite not knowing (or refusing to explain) the purpose of the dataset, when it was created, who created it, and to whom it was provided, the IRS asserts the privilege, claiming "the worksheets reflect[] the author's judgement of relevant financial information and key financial assumptions, and represents an analysis of the Return Preparer Initiative not finalized or approved by the IRS." *Id.* Few, if any, of the log entries or Declaration descriptions identify a final decision or decisionmaking process to which the withheld information relates. Such scant contextual information is not enough. *See, e.g.*, *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 61 (D.D.C. 2014) (describing a "document's context" as "the *sine qua non* of the court's assessment of whether or not the document is predecisional and deliberative"); *Elec. Frontier Found. v. U.S. Dep't of Just.*, 826 F. Supp. 2d 157, 168-69 (D.D.C. 2011) (discussing the importance of "provid[ing] the necessary contextual information about the particular decisionmaking processes to which the withheld documents contributed, and the role the withheld documents played in those processes"); *Elec. Priv. Info. Ctr. v. Dep't of Just.*, 511 F. Supp. 2d 56, 70-71 (D.D.C. 2007).

The IRS argues it need not identify a final decision to which the deliberative information relates, and cites *Sierra Club,* 141 S. Ct. at 786. Both *Cobell*, cited by Plaintiffs, and *Sierra Club* were concerned with the requirement that withheld information be predecisional. *Id.*; *Cobell*, 213 F.R.D. at 4-5. In order for information to be predecisional, it must contribute to a "decisionmaking process." *Access Reps. v. Dep't of Just.*, 926 F.2d 1192, 1196-97 (D.C. Cir. 1991). Identifying a specific "agency decision or policy" is one way to connect withheld information to a decisionmaking process in order to establish it as predecisional. In its logs, the IRS has not

identified either an "agency decision or policy" or a "decisionmaking process[]" to which the withheld information contributed, and has not established in any other way that the information did not reflect "the agency's settled position." *Sierra Club*, 141 S. Ct. at 786; *Cobell*, 213 F.R.D. at 4-5.

Plaintiffs referred to the IRS's withholding of the 2012 cost model as an example of its insufficient descriptions, including its failure to establish the information as predecisional. Pls.' Mot. (ECF 163) at 7-8. Defendant responds that only "graphs" and "budget exhibits"—not data or assumptions—were "inherited" and "carried over," respectively. Opp'n at 12-13. This ignores that "graphs" cannot be imported in Excel without the underlying data and assumptions, and the "budget exhibits" are ten Excel worksheets of data and assumptions. One worksheet in the 2013 cost model even includes links (now broken) to the 2012 cost model.[4] *See* Ex. H to Pls.' Mot. (ECF 163-9) at 2, 4.

Defendant also argues that Plaintiffs "have sufficient information in the hundreds of thousands of pages of discovery and privilege logs provided by the United States to conclude that, yes, these drafts and discussions are deliberative process." Opp'n at 9. Producing thousands of pages more than it has withheld does not absolve an agency of its obligation to establish "with competent evidence" that withheld information is both predecisional and deliberative, and it is unclear how reviewing thousands of unrelated documents is supposed to help Plaintiffs determine the nature of documents that have been withheld in their entirety. Even where documents have been redacted, the surrounding information often provides no useful context, or worse, undermines

[4] At the same time the IRS refused to produce the 2012 Cost Model, claiming "it was a preliminary analysis conducted during an off year review (2012) and the 2013 cost model is the final agency action," it produced another 2012 analysis, "User Fee Funded OPR Comparison_2_29_12_v2.xls." *See* Ex. H to Pls.' Mot. (ECF 163-9) at 2.

the claim of privilege. For example, USA-0013035 (one of 55 documents described in the log as "[d]iscussion of potential risks related to agency decisionmaking," and one of the documents in the Goldman Declaration) is a quarterly Business Performance Review designated as confidential under the Protective Order. Goldman Decl. at 6. The text surrounding the redaction indicates that risk mitigation measures have already been identified and implemented, and therefore that the withheld information is not predecisional. USA-0013035 at 038.

The IRS concludes by assuming the privilege applies, and arguing that Plaintiffs cannot establish that the need for disclosure outweighs the protection of the privilege. Opp'n at 16-21. But the privilege does not apply because the IRS has not provided sufficient information to invoke it. Even if the privilege applied, the lack of sufficient descriptions precludes proper consideration of the factors necessary to determine if disclosure is appropriate despite the privilege.

The IRS wrongly states multiple times that Plaintiffs have requested an *in camera* review of the information withheld, and that such a review is "improper." *See* Opp'n at 3-4, 9-10. Plaintiffs have not requested an *in camera* review and agree with Defendant that it would be a "waste of judicial resources." "*In camera* review. . . is not a substitute for the government's obligation to provide detailed public indexes and justifications whenever possible." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 523 F. Supp. 3d 24, 37 (D.D.C. 2021) (alteration in original) (internal quotation marks and citation omitted). Defendant should not be permitted to shift its burden to substantiate its claims of privilege to the Court. It has failed several times over the course of several months to provide enough evidence to properly invoke the deliberative process privilege. For the reasons set forth here and in Plaintiffs' Motion to Compel (ECF 163), the IRS should be compelled to produce the information.

Dated: February 25, 2022

/s/ Meghan S. B. Oliver

MOTLEY RICE LLC
Meghan S. B. Oliver
moliver@motleyrice.com
Charlotte E. Loper
cloper@motleyrice.com
Ebony Bobbitt
ebobbitt@motleyrice.com
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
Telephone: (843) 216-9000
Facsimile: (843) 216-9450

MOTLEY RICE LLC
William H. Narwold
bnarwold@motleyrice.com
D.C. Bar No. 502352
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
Telephone: (860) 882-1676
Facsimile: (860) 882-1682

Class Counsel

LAW OFFICE OF ALLEN BUCKLEY LLC
Allen Buckley
ab@allenbuckleylaw.com
2727 Paces Ferry Road, Suite 750
Atlanta, GA 30339
Telephone: (678) 981-4689
Facsimile: (855) 243-0006

GUPTA WESSLER PLLC
Deepak Gupta, Esq.
deepak@guptawessler.com
Jonathan E. Taylor
jon@guptawessler.com
1735 20th Street, NW
Washington, DC 20009
Telephone: (202) 888-1741
Facsimile: (202) 888-7792

CAPLIN & DRYSDALE,
CHARTERED
Christopher S. Rizek, Esq.
crizek@capdale.com
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
Telephone: (202) 862-8852
Facsimile: (202) 429-3301

Additional Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2022 I electronically filed Plaintiffs' Reply in Support of Their Motion to Compel Production of Withheld Information through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: February 25, 2022

/s/ William H. Narwold
William H. Narwold