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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ALLIANCE OF CALIFORNIANS FOR COMMUNITY EMPOWERMENT; HOUSING AND ECONOMIC RIGHTS ADVOCATES; URBAN REVIVAL dba CITY LIFE/VIDA URBANA; THE COLORADO FORECLOSURE RESISTANCE COALITION; HOME DEFENDERS LEAGUE; NEW JERSEY COMMUNITIES UNITED; NEW YORK COMMUNITIES FOR CHANGE,

Plaintiffs,

v.

FEDERAL HOUSING FINANCE AGENCY,

Defendant.

CASE No.: 13-cv-05618-KAW

PLAINTIFFS' OPPOSITION, NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT THEREOF

Hearing Date:	July 18, 2014
Time:	11:00 a.m.
Location:	Oakland U.S. Courthouse Courtroom 4, 3rd Floor
Judge:	Magistrate Judge Kandis A. Westmore

NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT: TO DEFENDANT AND ITS COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT on July 18, 2014 at 11 am, or as soon thereafter as the parties may be heard, Plaintiffs Alliance of Californians for Community Empowerment; Housing and Economic Rights Advocates; Urban Revival dba City Life/Vida Urbana; The Colorado Foreclosure Resistance Coalition; Home Defenders League; New Jersey Communities United; New York Communities for Change will bring for hearing a motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56 in this Freedom of Information Act ("FOIA") action on the ground that Defendant has failed to conduct an adequate search and is unlawfully withholding agency documents because exemptions asserted by the agency as to the documents processed thus far are inapplicable. The hearing will take place before the Honorable Kandis Westmore, in Courtroom 4, Third Floor, 1301 Clay Street, Oakland, California 94612. This motion is based on this notice, the attached memorandum of points and authorities, the accompanying Declaration of Shayla Silver-Balbus, and attached exhibits, all pleadings and papers filed in this action, and such oral argument and evidence as may be presented at the hearing on the motion.

Dated: June 5, 2014

Respectfully submitted,

By: /s/
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I. INTRODUCTION

This is an action under the Freedom of Information Act ("FOIA") to enforce the public's right to information about defendant Federal Housing Finance Agency's ("FHFA" or "the Agency") relationship with the nation's powerful financial institutions and its efforts to prevent municipalities from implementing a program to address the mortgage foreclosure crisis – which has devastated the national economy and minority communities in particular. FHFA has taken an aggressive stance against municipalities' efforts to devise local solutions. While the Agency's stance is at odds with the urging of the Secretary of the Treasury, economists across the political spectrum, and the Agency's statutory mandate to assist struggling homeowners, it is entirely consistent with the views of the nation's most powerful financial industry trade groups. This action seeks to shed light on the extent of the industry's contact with and influence over FHFA.

The records produced to date confirm concerns that FHFA's aggressive stance may be the result of its close ties with the private financial industry. *See Alexis Goldstein*, "Wall Street Group Aggressively Lobbied a Federal Agency to Thwart Eminent Domain Plans: Emails obtained through a FOIA request reveal the extraordinary access SIFMA had to Federal Housing Finance Administration officials," THE NATION (Jan. 17, 2014).[1] Yet the Agency has additional records that it is unlawfully withholding. The Agency has not conducted an adequate search for records, inexplicably refusing to search the files of employees who clearly have responsive records. The Agency has also withheld numerous responsive documents, without adequate justification. These additional records may shed further, important light on the industry's influence over the Agency, and FOIA requires that the Agency produce them.

II. BACKGROUND

A. Factual Background

The foreclosure crisis has ravaged the economy and hit minority communities especially

[1] *Available at* http://www.thenation.com/article/177965/wall-street-group-aggressively-lobbied-federal-agency-thwart-eminent-domain-plans, *attached as* Silver-Balbus Decl. at ¶ 36 & Exh. 27.

hard. The foreclosure crisis has devastated the national economy and the lives of millions of families across the country. In California alone, banks have foreclosed on approximately 1.7 million homes since 2008, and another 65,000 California homeowners have received notice that they may soon face foreclosure. *See* Silver-Balbus Decl. at ¶ 3 & Exh. 1. The crisis, while national in scope, disproportionately affects communities with large minority populations, like the City of Richmond, California. *See id.* at ¶ 4 & Exh. 2.

A chorus of authoritative voices has called for mortgage principal reduction as a solution to the mortgage crisis. Economists across the political spectrum have identified mortgage debt as one of the prime obstacles to strong economic growth and have recommended that the government implement a program of widespread principal reduction. *See id.* at ¶ 5 & Exh. 3. Principal reduction for underwater homeowners can benefit both the borrower, by reducing monthly bills, and the mortgage holder, by reducing the likelihood of foreclosure, which is costly. Because foreclosures often reduce the value of surrounding properties, helping homeowners avoid foreclosure also benefits neighbors, and because foreclosures and declining property values reduce revenue to local governments, principal reduction can benefit communities and municipalities. *See id.* at ¶ 6 & Exh. 4.

The Secretary of the Treasury has called for defendant FHFA to permit Fannie Mae and Freddie Mac, the entities it oversees, to use principal reduction programs as an essential solution to the foreclosure crisis. *See id.* at ¶ 7 & Exh. 5. Implementing these types of programs would help FHFA meet its statutory mandate to maximize assistance to struggling homeowners and promote programs that reduce foreclosures. *See* 12 U.S.C. § 5220(b)(1). According to the Congressional Budget Office, such programs could save taxpayers $2.8 billion. *See* Silver-Balbus Decl. at ¶ 8 & Exh. 6.

Local government use of eminent domain powers presents a promising form of mortgage principal reduction. Although principal reduction would yield widespread benefits, there are practical barriers to its implementation, particularly when it comes to mortgages that have been securitized. Ownership of a mortgage by numerous bondholders creates a collective action

problem that can prevent principal reduction, even when it would be in the interest of the bondholders; this problem may be compounded by the conflict of interest between bondholders and the mortgage servicer, for which foreclosures may be more profitable (or less costly) than principal reduction. *See id.* at ¶ 9 & Exh. 7.

Advocates have suggested that state and local governments can use their eminent domain powers to buy and restructure underwater mortgages, thus sidestepping the collective-action problems that impede the otherwise economically rational solution of principal reduction. *See id.* at ¶ 6 & Exh. 4. Seizing on this opportunity, municipalities across the country have proposed to purchase residents' underwater mortgages, paying the mortgage holders current market value for the loans, and then issuing new mortgages to homeowners in amounts that reflect the homes' current value. *See id.* at ¶ 10 & Exh. 8. This results in lower mortgage payments.

The financial industry vigorously opposes eminent domain principal reduction proposals. In 2013, Richmond, California was one of the first municipalities to announce a plan to purchase underwater mortgages secured by Richmond homes, and to indicate it would consider the use of eminent domain if lenders refused to sell the loans at fair market value. *See id.* at ¶ 11 & Exh. 9. Many of the nation's most powerful financial lobby groups, including the American Bankers Association, the American Securitization Forum, and the Securities Industry and Financial Markets Association ("SIFMA") have registered strong opposition to local eminent domain proposals like Richmond's. *See id.* at ¶ 12 & Exh. 10. Wells Fargo and other financial institutions went so far as to file litigation against the city. *See id.; see also Wells Fargo v. City of Richmond*, N.D. Cal. Case No. 13-03663-CRB (filed Aug. 7, 2013); *Bank of New York Mellon v. City of Richmond*, N.D. Cal. Case No. 13-03664-CRB (filed Aug. 7, 2013).

FHFA has refused to implement and, indeed, actively opposed principal reduction programs. Notwithstanding the substantial benefits likely to flow to homeowners and taxpayers, and the urging of the Secretary of the Treasury, defendant FHFA has refused to implement any principal reduction programs. *See* Silver-Balbus Decl. at ¶ 13 & Exh. 11.

Worse, FHFA has actually threatened to take legal action against cities wishing to initiate

local solutions to the foreclosure crisis. *See* Press Release, Federal Housing Finance Agency, *FHFA Statement on Eminent Domain, attached as* Silver-Balbus Decl. at ¶ 14 & Exh. 12. On the heels of the overwhelming backlash from the private financial industry against such local proposals, FHFA released a statement citing "serious concerns on the use of eminent domain to restructure existing financial contracts." *See id.* In this statement, the FHFA threatened to "take any of the following steps" against municipalities or states that implemented such a policy, including "initiat[ing] legal challenges to any local or state action that sanctions the use of eminent domain to restructure mortgage loan contracts that affect the FHFA's regulated entities," and "act[ing] by order or by regulation to direct the regulated entities to limit, restrict or cease business activities within the jurisdiction of any state or local authority employing eminent domain to restructure mortgage loan contracts." *See id.*

FHFA's position against principal reduction and eminent domain is at odds with the opinions of top economists who identify private mortgage debt as the primary obstacle to economic recovery, *see id.* at ¶ 15 & Exh. 13, and effectively blocks the hardest hit communities from pursuing a promising solution on behalf of their residents. FHFA's position is, however, consistent with the views of the nation's most powerful financial lobbying groups.

The public has an urgent interest in information about the foreclosure crisis and FHFA's opposition to one of its few solutions. The foreclosure crisis is ongoing in communities across the country, and public interest in the issue, including efforts, like Richmond's, to find local solutions, remains high. *See id.* at ¶ 16 & Exh. 14 (citing media coverage). The Haas Institute at the University of California at Berkeley recently released a report, titled "Underwater America," documenting the persistence of the mortgage crisis and calling for local or federal intervention to reduce mortgage principal. *See id.* at ¶ 16. Members of Congress have introduced legislation regarding local eminent domain solutions and principal reduction was a central topic of the recent Senate Banking Committee hearing considering the nomination of Congressman Melvin Watt to lead FHFA. *See id.* at ¶ 17 & Exh. 15. The public has a particular interest in understanding why FHFA opposes one of the few mechanisms that has emerged to implement

mortgage principal reduction. *See id.* at ¶ 18 & Exh. 16 (citing media coverage).

B. Procedural Background

On October 1, 2013, Plaintiffs submitted a FOIA request to FHFA, seeking records pertaining to the use of eminent domain to purchase mortgages. *See id.* at ¶ 20 & Exh. 17. The request sought expedited processing. *See id.* The purpose of the request is to shed light on defendant's unprecedented threat against local communities, and to determine the extent to which FHFA is advancing the interests and directives of the private banking industry at the expense of our nation's own homeowners – despite its statutory mandate to assist struggling homeowners and promote programs that reduce foreclosures. *See* 12 U.S.C. § 5220(b)(1).

The request therefore sought records that would shed light on the nature and extent of the financial industry's contacts with FHFA. In particular, the FOIA request seeks:

* "All documents related to any and all communications or meetings between FHFA leadership and representatives of the [financial industry] and any other firms or trade groups pertaining to the use of eminent domain to purchase mortgages. This includes correspondence, phone messages, emails, calendar entries, and notes or memoranda describing any such meetings";

* "All documents, including correspondence, phone messages, emails, calendar entries, and notes or memoranda of describing meetings, regarding the City of Richmond's offer to buy underwater mortgages from residents"; and

* "Any studies or empirical analyses of the impact of eminent domain or principal reduction proposals…."

See Silver-Balbus Decl. at ¶ 20 & Exh. 17 at 3-4.

Despite Plaintiffs' request for expedited processing and the Agency's statutory mandate to respond to FOIA requests within 20 days, *see* 5 U.S.C. § 552(a)(6)(A), two months passed with no response. Plaintiffs therefore filed this action on December 5, 2013. *See* Plaintiffs' Complaint (ECF No. 1).

After Plaintiffs filed suit, FHFA produced a first round of documents by letter dated December 30, 2013. *See* Silver-Balbus Decl. at ¶ 21 & Exh. 18. Plaintiffs identified numerous deficiencies in the production, explaining in detail why the Agency's search was inadequate and the information it withheld was not exempt under FOIA. *See id.* at ¶¶ 23, 25 & Exhs. 19, 21. The

Agency has addressed some but not all of Plaintiffs' concerns in supplemental productions. *See id.* at ¶¶ 23-28 & Exhs. 19-23. While the meet and confer process has narrowed the issues in dispute, several of the issues raised by Plaintiffs remain unaddressed. *See id.*

III. ARGUMENT

A. FHFA Has Failed to Perform an Adequate Search

FHFA has not met its burden on summary judgment of showing that it conducted a search reasonably calculated to uncover all documents responsive to this FOIA request. Its declarations are wholly conclusory and, moreover, the factual record makes clear that documents are likely or indeed certain to exist in locations that FHFA inexplicably refuses to search.

1. Legal Standard

On summary judgment, FHFA must "show beyond material doubt … that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (adopting *Weisberg* standard). "The court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure." *Campbell v. United States Dept. of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998) (citation omitted).

To prevail, the Agency must demonstrate adequacy through "reasonably detailed, nonconclusory affidavits." *Zemansky*, 767 F.2d at 571. It must provide details of "the search terms and the type of search performed, and averring that *all* files likely to contain responsive materials (if such records exist) were searched." *Nation Magazine v. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal quotation marks and citation omitted). In addition, an agency "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Campbell*, 164 F.3d at 28.

Relatedly, a search is "inadequate" where "the record itself reveals 'positive indications of overlooked materials.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999) (citation omitted). "If … the record leaves substantial doubt as to the sufficiency of the

search," the agency cannot prevail. *Truitt v. Dept. of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

Finally, failure to search an office "likely to turn up the information requested" renders a search "deficient." *Valencia-Lucena*, 180 F.3d at 326, 327 (internal quotation marks and citation omitted) (agency's search inadequate where it failed to search records in Georgia); *see also Krikorian v. Dept. of State*, 984 F.2d 461, 468-69 (D.C. Cir. 1993) (reversing summary judgment for agency where it had not searched offices with potentially responsive documents).

2. FHFA Must Search Records of Employees with Responsive Records

FHFA has refused to search the records of three employees who, the record makes clear, were involved in Agency discussions with the financial industry on eminent domain, as well as other employees likely to have responsive records. FHFA's conclusory assertion that these employees do not have responsive records does not satisfy its summary judgment burden.

Because the purpose of Plaintiffs' FOIA request is to shed light on the nature and extent of financial industry influence on defendant FHFA, the request seeks records related to correspondence and meetings between FHFA and the financial industry about eminent domain. *See* Silver-Balbus Decl. at ¶ 20 & Exh. 17. Plaintiffs expressly requested that FHFA search specified offices within the Agency (such as the office of the Acting Director and General Counsel) and "all relevant employees." *See id.*, Exh. 17 at 4. FHFA, however, only searched the records of the head of each of the identified FHFA offices. *See* Easter Decl. at ¶ 10 (ECF No. 38). The Agency justifies the limited scope of its search on the basis that each supervisor was the "most likely to have documents reflecting their office's response to the request." *Id*.

FHFA's justification for not searching additional relevant employees is conclusory, and fails to show that it conducted a search reasonably calculated to uncover *all* relevant documents. *Weisberg*, 705 F.2d at 1351. That the supervisors are most likely to contain responsive materials does *not* mean that additional employees do not as well. Indeed, the record contains numerous positive indications that additional employees are in possession of responsive records.

a. Mario Ugoletti, Meg Burns, and Pat Lawler

A search reasonably calculated to uncover all relevant documents must include a search

of the records of Mario Ugoletti, Special Advisor at FHFA; Meg Burns, Senior Associate Director for Housing and Regulatory Policy at FHFA; and Pat Lawler, Chief Economist at FHFA. *See* Silver-Balbus Decl. at ¶ 29 & Exh. 24. Their titles alone suggest that all are likely to have responsive records. More significantly, documents produced by FHFA demonstrate that all were involved in Agency discussions on eminent domain.

Mr. Ugoletti attended a Bank of America meeting with other key FHFA employees, according to a meeting agenda produced by the Agency. *See id.* at ¶¶ 24, 30 & Exh. 20 at Bates 16. The meeting must have addressed eminent domain issues because the Agency produced the agenda, in response to this FOIA request. *See id.* at ¶ 30. Mr. Ugoletti was also included on an email chain in which then-Acting Director DeMarco forwarded an email from SIFMA to General Counsel Alfred Pollard and Mario Ugoletti. *See id.* at ¶¶ 24, 30 & Exh. 20 at Bates 17-18. Finally, Mr. Ugoletti is listed as an attendee at three meetings related to eminent domain, as documented by calendar entries produced by the Agency. *See id.* at ¶¶ 27, 30 & Exh. 23 at Bates 3-5. Similarly, both Ms. Burns and Mr. Lawler are shown to have attended the same Bank of America meeting as Mr. Ugoletti. *See id.* at ¶¶ 24, 31 & Exh. 20 at Bates 16. In calendar entries produced by FHFA, Mr. Lawler is listed as an attendee at five eminent domain meetings, and Ms. Burns is listed as an attendee at four. *See id.* at ¶¶ 27, 31 & Exh. 23 at Bates 5-9.

Despite Plaintiffs' identification of documents demonstrating that Mr. Ugoletti, Ms. Burns, and Mr. Lawler participated in Agency discussions about eminent domain, *see id.* at ¶ 25 & Exh. 21 at 2-3, FHFA has steadfastly refused to search their records. The only explanation offered is the unadorned assertion that their files "were unlikely to produce responsive documents." Easter Decl. at ¶ 24. This conclusory determination "is due no deference" on summary judgment. *See American Civil Liberties Union of Northern California v. Drug Enforcement Administration*, N.D. Cal. Case No. C 11-01997 RS, *9 (Seeborg, J.) ("*DEA*"), *attached as* Silver-Balbus Decl. at ¶ 35 & Exh. 26. In *DEA*, another court of this district denied summary judgment for the agency on the search's adequacy where the agency "failed to offer a single, specific reason in support of its belief" that a particular official was "unlikely to possess"

responsive documents. *Id.* at *9. Here, FHFA has likewise "failed to offer a single, specific reason in support" of its choice not to search these three employees' records, *id.*, and thus failed to meet its burden on summary judgment. *See Zemansky*, 767 F.2d at 571 (agency bears burden of demonstrating adequacy of search through "reasonably detailed, nonconclusory affidavits").

Moreover, the record contains "positive indications" of overlooked materials. *Valencia-Lucena*, 180 F.3d at 326. Because FHFA's own records indicate that these employees were personally involved in eminent domain discussions, FHFA must search their records. *See DEA*, N.D. Cal. Case No. C 11-01997 RS at *7, 9 (ordering DEA to "search Administrator Leonhart's office for responsive files" in FOIA suit for documents pertaining to lethal injection drugs, where agency's "own documents implicat[ed] … the Administrator's involvement" in the issue,); *see also Campbell*, 164 F.3d at 28 (requiring agency to conduct further search where, in course of initial search, agency "discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search.").

b. FHFA Must Search Records of Administrative Assistants

FHFA refuses to search the files of assistants to FHFA officials because "it was determined that they were far less likely to have responsive documents than the supervisory officials whose files had already been searched." Easter Decl. at ¶ 24. On its face, this statement is insufficient: the assertion that these individuals are "less likely" to have responsive records than other employees does not mean they *do not* possess responsive records. *See Weisberg*, 705 F.2d at 1351 (agency bears burden of "show[ing] beyond material doubt … that it has conducted a search reasonably calculated to uncover *all* relevant documents") (emphasis added).

Also inadequate is the Agency's assertion that "FHFA administrative assistants do not, by practice, monitor or maintain the email correspondence of their supervisors." Easter Decl. at ¶ 24. Plaintiffs requested "all documents" related to meetings between FHFA and financial industry stakeholders on the topic of eminent domain, including, not only emails, but also "correspondence, phone messages, … calendar entries, and notes or memoranda." *See* Silver-Balbus Decl. at ¶ 20 & Exh. 17 at 3-4. Thus, even if administrative assistants do not "monitor or

maintain the email correspondence" of their supervisors, they may still be in possession of the other types of documents requested by Plaintiffs. In fact, the records produced by FHFA show that assistants help schedule meetings for their supervisors – and are therefore very likely to possess records relating to meetings between FHFA officials and the financial industry about eminent domain. For example, FHFA has produced calendar entries showing that Joan Harrington, Administrative Office Manager at FHFA, *see id.* at ¶ 29 & Exh. 24, was responsible for organizing an August 16, 2012 meeting on "Eminent Domain with Richard Dorfman and Joseph Cox from SIFMA." *See id*. at ¶ 27 & Exh. 23 at Bates 5. The Agency's determination not to search the records of assistants "is due no deference." *See DEA*, N.D. Cal. Case No. C 11-01997 RS at *9. This is especially so in light of "positive indications" that assistants possess responsive records about meetings between FHFA and the financial industry. *Valencia-Lucena*, 180 F.3d at 326, 327 (failure to search an office "likely to turn up the information requested" renders a search "deficient").

3. FHFA's Search of the Records of an Employee with Responsive Records Was Inadequate

FHFA's search of the records of an employee who undisputedly has responsive records was obviously inadequate. At Plaintiffs' request, FHFA searched the files of Mary Ellen Taylor, but contends that it found no responsive records. *See* Easter Decl. at ¶ 24. Its declaration does not provide the court with sufficient information about the search to assess its adequacy. Moreover, the record – replete with evidence of Ms. Taylor's substantial involvement in Agency discussions on eminent domain – belies any assertion that she has no responsive documents.

FHFA's own records show that Ms. Taylor, Senior Policy Advisor at FHFA, *see* Silver-Balbus Decl. at ¶ 29 & Exh. 24, was personally, and extensively, involved in Agency discussions about eminent domain. She was tasked with spearheading the Agency's discussions on eminent domain with a key industry trade group. In an email from Wanda DeLeo, in the FHFA Office of Strategic Initiatives, to Richard Dorfman of SIFMA, on which Ms. Taylor is copied, Ms. DeLeo wrote: "Good Morning Richard! … We would be happy to spend some time with you next week

discussi[ng] eminent domain. Mary Ellen [Taylor] is going to take the lead here at FHFA to make this happen." *See id.* at ¶¶ 24, 32 & Exh. 20 at Bates 12-13. Ms. Taylor was also the recipient of multiple emails regarding eminent domain (produced as a result of searches of other employees' records). *See id.* at Bates 11-12, 14-15. Furthermore, calendar entries produced by FHFA show that Ms. Taylor attended numerous Agency meetings on the topic. *See id.* at ¶¶ 27, 32 & Exh. 23 at Bates 5, 7. Nor was she merely a passive participant at these meetings. In one calendar entry, she provided other attendees with substantive background information in preparation for the meeting. *See id.* at ¶¶ 27, 32 & Exh. 23 at Bates 2.

Remarkably, FHFA's declaration states that Ms. Taylor had "*no* documents responsive to this request." Easter Decl. at ¶ 24 (emphasis added). But a search of her records should at least have yielded the documents, previously produced by FHFA, on which she was copied.[2]

To support summary judgment, FHFA must offer more than a "[c]onclusory statement[] that the agency has reviewed relevant files." *Nation Magazine*, 71 F.3d at 890. FHFA's declaration states that Ms. Taylor was "instructed … to search her hard copy files," and that "Ms. Taylor responded she had no documents responsive to this request." Easter Decl. at ¶ 24. But the Agency offers no statement, based on personal knowledge or otherwise, that Ms. Taylor actually conducted the search. *See Berman v. CIA*, 378 F. Supp. 2d 1209, 1216 n.7 (E.D. Cal. 2005) (agency may submit search declaration from FOIA official but only "where that official has personal knowledge of the procedures used"). Nor, even assuming the search was conducted, does the declaration explain what hard copy files were searched or how. *See Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (reversing summary judgment where agency "provide[d] no information about the search strategies"). The bare statement that Ms. Taylor had no responsive records "does not provide sufficient detail for the court itself to determine the search's adequacy." *Id.* at 1121; *see also DEA*, N.D. Cal. Case No. C 11-01997 RS at *13 (denying summary

[2] The Agency's declaration does not state that it found no records in Ms. Taylor's files *that had not previously been produced.* It states that it found no records at all.

judgment "[i]n light of the DEA's failure to describe its search … in any detail").

FHFA's declaration also states that the Agency's IT help desk conducted a search of Ms. Taylor's "emails and electronic files/folders" using certain phrases. Easter Decl. at ¶ 24. But the declaration provides no information about (1) the Agency's electronic recordkeeping system, (2) what documents are included in the "files/folders" that were searched, and (3) whether any documents are kept in other "files/folders." *See Nation Magazine*, 71 F.3d at 891 (declaration "did not describe [agency's] recordkeeping system in sufficient detail to permit [court] to identify what subject matter files … might hold responsive information"). In *Rosenfeld v. Dep't of Justice*, 2008 WL 3925633, *12 (N.D. Cal. Aug. 22, 2008), Judge Patel found inadequate an FBI declaration that stated that the agency had performed a search of its "Central Records System" using specified search terms. *Id.* at *12. Judge Patel found the declaration too "general" because it "lack[ed] [any] explanation about other electronic databases beyond the CRS," and ordered the agency to explain, among other things, "the nature and scope of all databases and indices maintained by defendants" and "which databases and indices were not searched and why not." *Id.* at *14. Like the FBI's declaration in *Rosenfeld*, FHFA's declaration – which provides no information about the nature of the email and electronic "files/folders" searched or any other "files/folders" that were not searched – is too "general [in] nature." *Id.* Further, the inadequacy of FHFA's search is confirmed by the extensive record evidence of Ms. Taylor's involvement in Agency discussions on eminent domain. It is simply implausible that she has no responsive records. *See DEA*, N.D. Cal. Case No. C 11-01997 RS at *13 (ordering supplemental description of search where agency's own evidence raised substantial doubts about the adequacy of search).

4. FHFA Must Search Phone Messages

Plaintiffs seek to shed light on the level of contact between defendant FHFA and financial industry leaders, and the extent to which this contact has influenced FHFA's strenuous opposition to local principal reduction programs. Accordingly, Plaintiffs requested phone messages from financial industry trade groups. *See* Silver-Balbus Decl. at ¶ 20 & Exh. 17 at 3-4. FHFA, however, refused to search its phone messages, variously justifying its decision on the

grounds that it "does not retain phone messages as agency records," "does not have the capability to search telephone records," and "does not maintain phone records in a searchable format." *See id.* at ¶ 24 & Exh. 20 at Bates 6; Easter Decl. at ¶ 11. These generalized, conclusory explanations are wholly insufficient at the summary judgment stage. *See Zemansky*, 767 F.2d at 571 (requiring agency to provide "reasonably detailed, nonconclusory affidavits").

"The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records.'" *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989). FHFA has not met this burden. Records constitute "agency records" if they were "'either create[d] or obtain[ed]'" by the agency, and "the agency [is] in control of the requested materials at the time the FOIA request is made." *Id.* at 144, 145 (citation omitted). But FHFA has offered no factual basis to support its assertion that phone messages are not "agency records." *Id.* at 145. The Agency provides no evidence that phone messages are not "created" or "obtained" by the Agency, or that the Agency was not in control of the requested materials at the time the request was made.

Nor does FHFA's bare assertion that it "does not maintain phone records in a searchable format," Easter Decl. at ¶ 11, justify its refusal to search these records. The Agency provides no information about the format in which in the records are kept and why the format renders them unsearchable. Even if a search would be tedious, an agency is not relieved of its statutory duty to search for responsive records. *See, e.g.*, *Public Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (rejecting agency's claim that it need not conduct search of "25,000 paper files [that] would be 'costly and take many hours to complete,'" and would require "send[ing] the files from Texas to California, or employees from California to Texas").

B. FHFA is Unlawfully Withholding Information

Relying on conclusory assertions, FHFA has not met its burden of justifying the proferred FOIA exemptions.

1. Legal Standard

The government "has the burden of proving the applicability of any FOIA exemption

claimed." *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1175 (9th Cir. 2000) (citations omitted); *see* 5 U.S.C. § 552(a)(4)(B). Because "disclosure, not secrecy, is the dominant objective of the Act," FOIA's exemptions "must be narrowly construed." *Department of the Air Force v. Rose*, 425 U.S. 353, 361 (1976). Unsupported assertions that disclosure will or may result in a particular consequence are insufficient; the Agency must provide sufficient facts to allow the court to reach independent conclusions about what will or will not happen. *See Wiener v. FBI*, 943 F.2d 972, 981-82 & nn.14 & 15 (9th Cir. 1991). Affidavits must provide sufficient information "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Id.* at 977 (internal quotation marks and citation omitted).

2. (b)(4): The Confidential Commercial Information Exemption does Not Apply

FHFA has invoked Exemption 4, for confidential commercial information, to withhold six documents (Documents A36; A37; C1; C2; C4; and C5) about eminent domain prepared by Freddie Mac and Fannie Mae. *See* FHFA Br. at 16 (ECF No. 35); Wright Decl. at ¶ 16-18 (ECF No. 38). Freddie Mac and Fannie Mae are Government Sponsored Enterprises that participate in the secondary mortgage market; FHFA serves as their conservator. Wright Decl. at ¶¶ 5, 9. FHFA correctly states that this exemption applies if disclosure would "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." *See GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994); FHFA Br. at 16. But FHFA has failed to establish either element.

FHFA's claim that disclosure would impair its ability to gather this information in the future, *see* FHFA Br. at 18, is belied by its admission that "Fannie Mae and Freddie Mac are *required* to submit to FHFA the information in the six redacted documents at issue." *See id.* at 17 (emphasis added). Where, as here, third parties are "required to provide" the information, courts have declined to find that disclosure would impair the ability of the Government to obtain it in the future. *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir.

1974) (financial information provided by concessioners to "Park Service pursuant to statute" not subject to Exemption 4). Citing the D.C. Circuit's opinion in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992), FHFA maintains that the information is nonetheless "confidential" because it is not of the kind that would "customarily … be released to the public." *Id.* at 879; FHFA Br. at 18. But the Ninth Circuit adheres to a different rule: "whether the information is of a type which would normally be made available to the public, or whether the government has promised to keep the information confidential, is not dispositive under Exemption 4." *GC Micro*, 33 F.3d at 1113. "The agency bears the burden of establishing that disclosure would hinder its ability to obtain the requested information in the future, and here it cannot credibly do so." *DEA*, N.D. Cal. Case No. C 11-01997 RS at *17 (forms that drug company was required to submit to agency not covered by Exemption 4).

Nor has FHFA shown substantial, or indeed any, likelihood of competitive harm. To support such a claim, the Agency must bring forth "evidence revealing (1) actual competition and (2) a likelihood of substantial competitive injury." *GC Micro*, 33 F.3d at 1113. FHFA's declaration states only that "[r]eleasing confidential information obtained from the Enterprises would harm the business operations of the two companies.… The documents withheld here contain discussions by senior Fannie Mae and Freddie Mac executives of the issues and challenges facing the Enterprises, and should remain confidential." Wright Decl. at ¶ 18. But FHFA offers no explanation of *how* disclosure would harm either entity's business operations.

The Agency offers no evidence that Fannie Mae and Freddie Mac face "actual competition" in the secondary mortgage market. *GC Micro*, 33 F.3d at 1113. Indeed, with respect to most of their functions, Fannie and Freddie *have no competitors* because the two enterprises hold a "duopoly" over the securitization of conventional conforming mortgages. *See* Silver-Balbus Decl. at ¶ 37 & Exh. 28. Nor is there any explanation of how disclosure would give rise to any likelihood of competitive harm. In *GC Micro*, the Ninth Circuit found declarations about competitive harm too conclusory, where the documents were described as containing information about subcontracting strategy and the declarations stated that "[i]f

competitors are permitted to gain knowledge of McDonnell Douglas'" overall subcontracting strategy, they could alter their subcontracting strategies to better compete against McDonnell Douglas for future contracts." *Id.* at 1114. The Ninth Circuit found this insufficient because the documents at issue contained only a few data points about various contracts and so "would provide little if any help to competitors attempting to estimate and undercut the contractors' bids." *Id.* at 1115. The Wright declaration provides far *less* information than the declarations found too conclusory in *GC Micro.* There is no identification of the types of "issues and challenges" facing Fannie Mae and Freddie Mac discussed in these documents or how disclosure would allow competitors to gain an advantage. Documents discussing industry-wide "issues and challenges," for example, would offer competitors "little if any help [in] attempting to … undercut" Fannie Mae or Freddie Mac. *Id.* "The lack of detail substantiating the claim that disclosure would harm [either company's] competitive posture is fatal, as it is the [agency's] burden to establish the applicability of Exemption 4." *DEA*, N.D. Cal. Case No. C 11-01997 RS at *17 (declaration insufficient where it asserted, without elaborating, that disclosure would "undercut future contracts between [company] and other government agencies").[3]

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[3] FHFA also contends that two documents (Documents A36 and A37) are protected by Exemption 4 because they are attorney-client/attorney work product information. *See* FHFA Br. at 16. This argument is unavailing for two independent reasons. First, FHFA has not established the applicability of the attorney-client or work product privilege to these documents. A party asserting these privileges bears the burden of establishing numerous factual predicates as to each document (*see infra* Sections III-B-3&4) and FHFA has not done so here. In addition, the documents were authored by Fannie Mae or Freddie Mac (Wright Decl. at ¶ 16) and shared with FHFA, thus waiving any privilege. *See In re Pacific Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012) ("voluntarily disclosing privileged documents to third parties will generally destroy the privilege"). Indeed, FHFA does not event attempt to assert Exemption 5 – the FOIA exemption directly applicable to attorney-client/work product documents – to these two documents. Second, even if a document were covered by the attorney-client or work product privilege, it does not automatically fall under Exemption 4. In the two cases cited by FHFA, the court found Exemption 4 to apply because disclosure would impair the government's ability to obtain necessary information in the future. *See Margolin v. NASA*, 2011 WL 1303221, *7 (D. Nev. Mar. 31, 2011) ("disclosure of the types of information at issue would likely dissuade companies from turning over such information in the future for fear that NASA would again release the information to the public"); *Indian Law Resource Ctr. v. Dep't of Interior*, 477 F.

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3. (b)(5): FHFA Has Not Established the Elements of the Attorney-Client Privilege

FHFA has invoked Exemption 5 to withhold eight documents on the basis of the attorney-client privilege. *See* Wright Decl. at ¶ 19. Seven of these documents consist of notes or analysis on the topic of eminent domain prepared by FHFA's General Counsel, Alfred Pollard (Documents A32, A33, A38, A39, A40, A41, and A42). *See id.* The eighth is an email exchange between FHFA's General Counsel and FHFA's then-Acting Director (Document B30). *See id.* FHFA has failed to establish the elements of the privilege.[4]

FHFA bears the burden of "prov[ing] the applicability of [the] claimed privilege." *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977) (rejecting Exemption 5 assertion where agency failed to establish elements of attorney-client privilege). "The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship." *Id.* at 253. Nor does it apply to all communications between attorney and client. *See United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). Rather, it applies under the following, limited circumstances: "(1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client's instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived." *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002) (citation omitted); *see also Center for Biological Diversity v. Office of Management and Budget*, 625 F. Supp. 2d 885, 892 (N.D. Cal. 2009) (applying *Martin* test in FOIA case). The privilege extends to confidential communications from an attorney to a client (and not just communications from

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Supp. 144, 148 (D.D.C. 1979) (law firm statements "confidential" because disclosure would lead firm to submit information to agency in future in a "less comprehensive and less useful [format] for monitoring purposes than the current submissions"). In other words, even if the document falls under the attorney-client or work product privileges, the agency still bears the burden of establishing the Exemption 4 elements. For the reasons discussed above, FHFA has failed to do so here.

[4] Plaintiffs do not contest the exemption as to Document A38.

client to attorney), but only if that communication is based on confidential information provided by the client. *Mead Data Central*, 566 F.2d at 254. Boilerplate language, where "[n]o effort is made to tailor the explanation to the specific document withheld," does not meet this burden. *Wiener*, 943 F.2d at 978-79.

It bears emphasizing that all of the documents at issue were authored by Mr. Pollard. While he holds the official title of General Counsel at FHFA, he frequently advises on matters of *policy* for the Agency. *See* Silver-Balbus Decl. at ¶ 34 & Exh. 25. Where Mr. Pollard engages in policy analysis or advocacy, he acts not as a "professional legal adviser in his … capacity as such." *See Martin*, 278 F.3d at 999. Without specifying the capacity in which Mr. Pollard was acting when he authored or notated each of the withheld documents, FHFA cannot meet its burden of "establish[ing] all the elements of the privilege." *Id.* at 999-1000; *see also North Pacifica LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1128 (N.D. Cal. 2003) ("The attorney-client privilege should be narrowly construed especially where important constitutional interests and a public entity which is accountable to the citizenry are involved. Thus, the burden to prove that primary purpose was legal not business advice is on the [government agency].")

FHFA's Vaughn Index and accompanying declarations fail to explain why each document meets all of the elements of the privilege.

Document A32 is described as: "General Counsel handwritten notes" and "three pages of handwritten notes from the FHFA General Counsel assessing and analyzing issues relating to eminent domain." Wright Decl. at ¶ 19 & Exh. A at 3. Document A40 is described as "July 31, 2013 City Richmond sample letter. General Counsel's handwritten notes redacted" and "two-page sample letter from the City of Richmond regarding its proposal to modify underwater mortgages from which two sentences of handwritten notes by the FHFA General Counsel were redacted." *Id.* at ¶ 19 & Exh. A at 4. Document A41 is described as a "July 16, 2013 calendar printout. General Counsel's handwritten notes redacted" and a [o]ne-page calendar entry from which several sentences of handwritten marginalia from the FHFA General Counsel were redacted." *Id.* at ¶ 19 & Exh. A at 4. Document A42 is described as "[f]ive pages of General

Counsel handwritten notes" and a "five-page collection of handwritten notes from the FHFA General Counsel." *Id*. at ¶ 19 & Exh. A at 4.

For Documents A32, A40, A41 and A42, FHFA has not shown (1) the document was transmitted to a client and could thus be deemed a "communication"; (2) if it was transmitted, it was done so "in confidence"; (3) the notes consisted of "legal advice of any kind"; or (4) Mr. Pollard penned these notes in his capacity as a legal rather than policy adviser. *Martin*, 278 F.3d at 999. Nor has FHFA shown that (5) if the document had been communicated to the client and it contained legal advice, it was based on confidential information provided by a client. *See Mead Data Central*, 566 F.2d at 254 (Exemption 5 inapplicable where agency "has not shown that the information on which the legal opinions … were based" was "confidential information provided by the client"; "since the FOIA places the burden on the Government to prove the applicability of a claimed privilege, the court could not assume that it was confidential").

Document A33 is described as: "FHFA analysis of eminent domain with General Counsel handwritten notes" and "two pages of legal analysis of eminent domain issues prepared by the FHFA Office of General Counsel, as well as handwritten marginalia from the FHFA General Counsel." Wright Decl. at ¶ 19 & Exh. A at 3. FHFA has not shown that (1) this document was ever transmitted to a client and could thus be deemed a "communication"; (2) if it was transmitted, it was done so "in confidence"; (3) the handwritten marginalia consisted of "legal advice of any kind"; or (4) Mr. Pollard penned the marginalia in his capacity as a legal rather than policy adviser. *Martin*, 278 F.3d at 999. Nor has FHFA shown that (5) if the document had been communicated to a client, any legal analysis or handwritten marginalia was based on confidential information provided by a client. *See Mead Data Central*, 566 F.2d at 254.

Document A39 is described as "July 1, 2013 General Counsel draft memo on use of eminent domain to restructure mortgage" and "draft legal memorandum from the FHFA General Counsel providing legal analysis of issues relating to the use of eminent domain to restructure mortgages, and how these issues affected FHFA." Wright Decl. at ¶ 19 & Exh. A at 4. FHFA has failed to show that (1) this document was ever transmitted to a client and could therefore be

deemed a "communication" (indeed, its status as a draft suggests it was not transmitted); or (2) even if it was transmitted, it was done so "in confidence." *Martin*, 278 F.3d at 999. Nor has FHFA shown that (3) if the document had been communicated to a client, any legal analysis was based on confidential information provided by a client. *See Mead Data Central*, 566 F.2d at 254.

Document B30 is described as a "7/11/2012 Email between SIFMA/FHFA/Govt re: San Bernardino Matter. Contact information and agency deliberations" and a "two page email exchange regarding use of eminent domain by San Bernardino County from which deliberations between FHFA General Counsel Alfred Pollard and then-Acting FHFA Director Edward DeMarco have been redacted." Wright Decl. at ¶ 19 & Exh. A at 7. FHFA has failed to show that (1) this communication occurred "in confidence"; (2) the substance of the exchange contained "legal advice of any kind"; or (3) Mr. Pollard communicated with Mr. DeMarco in his capacity as a legal rather than policy adviser. *Martin*, 279 F.3d at 999. Nor has FHFA shown that (4) if the email contained any legal advice, it was based on confidential information provided by a client. *See Mead Data Central*, 566 F.2d at 254.

FHFA's declaration "merely restates the scope of the privilege and that the documents fall within that scope," but does not establish the elements of the privilege. *Center for Biological Diversity*, 625 F. Supp. 2d at 892; *see also National Resources Defense Council v. U.S. Dept. of Defense*, 388 F. Supp. 2d 1086, 1104 (C.D. Cal. 2005) (documents not exempt under FOIA, where defendants failed to establish documents involved the provision of legal advice, were intended to be confidential, and were kept confidential).

4. (b)(5): The Documents Are Not Work Product Because They Were Not Prepared in Anticipation of Litigation

FHFA has also invoked Exemption 5 to withhold five documents on the basis of the work product privilege. *See* Wright Decl. at ¶ 19. The Agency has failed to establish that the documents were prepared in anticipation of an identifiable prospect of litigation.[5]

The purpose of the work product privilege is to protect the adversary process by shielding

[5] Plaintiffs do not contest the exemption as to Document A38.

the "mental impressions of an attorney" in the "preparation of a client's case." *Hickman v. Taylor*, 329 U.S. 495, 510, 511 (1947). But "[t]he work-product rule does not extend to every written document generated by an attorney." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) (internal quotation marks and citation omitted) (addressing work product privilege in FOIA case). "The documents must at least have been prepared with *a specific claim* supported by *concrete facts* which would likely lead to litigation." *Id.* at 865 (emphasis added); *see also QST Energy, Inc. v. Mervyn's*, 2001 WL 777489, *5 (N.D. Cal. May 14, 2001) ("The protection applies 'if the prospect of litigation is identifiable because of specific claims that have already arisen'") (citation omitted); *Fox v. California Sierra Fin. Servs.*, 120 F.R.D. 520, 525 (N.D. Cal. 1988) ("in order for documents to qualify as attorney work-product, there must be an identifiable prospect of litigation (*i.e.*, specific claims that have already arisen) at the time the documents were prepared"). "While it may be true that the prospect of future litigation touches virtually any object of a[n] [FHFA] attorney's attention, if the agency were allowed 'to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated.'" *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 586-87 (D.C. Cir. 1987) (citation omitted) (DOJ affidavits too conclusory to justify Exemption 5/work-product as to documents prepared in course of DOJ investigation into homicide of political activists).

FHFA's declaration makes the conclusory assertion that Documents A32, A33, A39, and A42 were "prepared by attorneys in anticipation of litigation by the agency," but the underlying descriptions of each document fail to support that legal conclusion. Wright Decl. at ¶ 19; *see California v. EPA*, 2009 WL 273411, *4 (N.D. Cal. Feb. 4, 2009) (Exemption 5 inapplicable where agency "provided opinions, not facts, in … the descriptions of these documents"). The documents are respectively described as notes "relating to eminent domain"; "analysis of eminent domain issues"; legal analysis of "issues relating to the use of eminent domain"; and, simply, as handwritten notes "from the FHFA General Counsel." Wright Decl. at ¶ 19.

Eminent domain is a large and complex subject and comprises a wide range of issues,

some of which might potentially involve a concrete prospect of litigation for FHFA, but many of which do not. "The [Agency's] Declaration … simply does not say … that [these documents were] prepared at a time when litigation was anticipated …. [The] Declaration provides precious little information about what the relevant government officials anticipated, if anything, when they ordered … prepar[ation]" of these documents. *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 22 (N.D. Cal. 1985); *see also Fox*, 120 F.R.D. at 525 (privilege inapplicable where defendants failed to show that documents were "prepared in anticipation of an identifiable prospect of litigation"). If these documents had actually been prepared in anticipation of litigation, it would have been easy enough to say so. *See, e.g.*, *Donco Indus., Inc. v. United States*, 1990 WL 375613, *3 (N.D. Cal. Mar. 14, 1990) (Exemption 5 for work-product applied where agency explained that document had been generated to "assess the potential liability of the United States in the litigation [pending in state court and involving a particular accident] in which [declarant] expected the government to become a party").

5. (b)(5): The Deliberative Process Exemption does Not Apply Because FHFA Has Failed to Identify a Particular Decision

FHFA has invoked Exemption 5 to withhold nine documents on the basis of the deliberative process privilege. *See* FHFA Br. at 22; Wright Decl. at ¶ 20 (Documents A32, A33, A38, A39, A40, A41, A42, B21, B30). But the Agency has failed to meet its burden of showing that the documents are either predecisional or deliberative.

Courts have emphasized "the narrow scope of Exemption 5['s deliberative process privilege] and the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Coastal States*, 617 F.2d at 868 (D.C. Cir. 1980). "[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Id.* This requires an agency to establish that the document is both "predecisional" and "deliberative." *See also Carter v. Dep't of Commerce,* 307 F.3d 1084, 1089 (9th Cir. 2002).

With respect to the first prong, an agency must "pinpoint an agency decision or policy to

which the document contributed." *Senate of the Com. of Puerto Rico*, 823 F.2d at 585 (internal quotation marks and citation omitted); *see also Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009) (document must have been "prepared to assist an agency decision-maker in arriving at a future particular decision"). The document must "contribute to that decision." *Carter*, 307 F.3d at 1089 (internal quotation marks and citation omitted). Specificity is required: The Ninth Circuit has "rejected the application of the privilege to protect from disclosure the routine collection of data and analysis where the agency could point only to speculative or generalized purposes for which the information would be used." *Lahr*, 569 F.3d at 981. As to the second prong, an agency must show that the document "is part of the deliberative process," *National Wildlife Fed. v. United States Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988) (emphasis omitted), and that disclosure would expose decision-making processes in a way that discourages candid discussion. *Carter*, 307 F.3d at 1090.

The documents consist of the same documents the Agency seeks to withhold on attorney-client and work product grounds, as well as one page consisting of "handwritten notes and reflections of then-Acting FHFA Director Edward DeMarco from a July 18, 2013 meeting with Bank of America in which eminent domain is briefly mentioned." Wright Decl. at ¶ 20. These cursory factual descriptions are insufficient for two reasons.

FHFA has not established that the documents are "predecisional." They are described only as pertaining in an unspecified fashion to "eminent domain," but the Agency has not "pinpoint[ed] an agency decision or policy to which [each] document contributed." *Senate of the Com. of Puerto Rico*, 823 F.2d at 585. "Eminent domain" is a large topic and raises many subsidiary issues on which the Agency has not made any decision or issued any policy. In addition, while "FHFA did adopt a public position on eminent domain," Wright Decl. at ¶ 20, there is no explanation of whether or how each document contributed to that public position. *See Electronic Frontier Found. v. CIA*, 2013 WL 5443048, *12 (N.D. Cal. Sept. 30, 2013) ("Since the applicability of the deliberative process privilege depends on the content of each document and the role it plays in the decision making process, an agency's affidavit must correlate facts in

or about each withheld document with the elements of the privilege") ("*EFF*"). FHFA's declaration, exactly like the declaration found inadequate by Judge Armstrong in *EFF*, "does not identify a specific decision, if any, this particular document is predecisional to, [or] what its role, if any, in a specific deliberative process is." *Id.* at *14.

Nor has FHFA shown the documents to be "deliberative." While the declaration describes the documents as pertaining to eminent domain, they "lack sufficient detail and specificity showing how and why the [withheld] material falls within the deliberative process privilege." *Id.* Like the inadequate declaration in *EFF*, the Wright declaration "fails to explain the role played by this document in the course of a specific deliberative process or provide a particularized explanation of how the disclosure of this document or portions thereof would expose the agency's decision making process in such a way as to discourage candid discussion and thereby undermine the [Agency's] ability to perform its functions." *Id.*[6]

6. FHFA Has Not Met Its Burden of Demonstrating the Documents Are Not Segregable

Even if some of the FOIA exemptions apply to some of the information contained in the withheld documents, this does not justify withholding documents in full. FHFA bears the burden of demonstrating that the other information in these documents is not reasonably segregable. *See* 5 U.S.C. § 552(b); *Army Times Pub. Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993) ("the agency bears the burden of showing that no such segregable information exists").

FHFA contends that it has met its segregability burden by engaging in a "line-by-line" review. *See* FHFA Br. at 23. But FHFA has failed to offer any explanation of why it decided, after engaging in that line-by-line review, that the materials are not reasonably segregable. Its

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[6] FHFA relies exclusively on the legal conclusion that the documents "reflect[] internal agency deliberations," the disclosure of which "could create confusion about the actual stance of the agency." Wright Decl. at ¶ 20. But "a general description of the withheld information coupled with a generalized indication of possible consequences of disclosing the information" is insufficient. *EFF*, 2013 WL 5443048 at *13; *see California v. EPA*, 2009 WL 273411 at *4 (agency description of documents inadequate to justify Exemption 5 withholding where agency "provided opinions, not facts").

unsubstantiated conclusion that the withheld documents contained "no segregable information," *id.*, is indistinguishable from declarations found insufficient by other courts. *See, e.g.*, *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (court found "entirely insufficient" declaration that stated "'no segregation of non-exempt, meaningful information can be made for disclosure'"); *National Resources Defense Council v. Dep't of Defense*, 388 F. Supp. 2d 1086, 1105 (C.D. Cal. 2005) (court found insufficient declaration that stated "none of the withheld documents contain reasonably segregable information that is not exempt"). Moreover, FHFA's conclusory statements about the infeasibility of segregating the withheld documents make it impossible for the court to "make specific findings on the issue of segregability." *Wiener*, 943 at 988 (9th Cir. 1991) ("reversible error for the district court 'to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof'") (citation omitted).

IV. CONCLUSION

For the forgoing reasons, the Court should deny FHFA's motion for summary judgment and grant Plaintiffs' cross-motion for partial summary judgment. In particular, the Court should order the Agency to (1) search the records of Mario Ugoletti, Meg Burns, Pat Lawler, and administrative assistants to FHFA officials, (2) perform an adequate search of the records of Mary Ellen Taylor, (3) search the Agency's phone records, and (4) release the information that the Agency has withheld under Exemptions 4 and 5.

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Respectfully submitted,

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