IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF MONTANA FOUNDATION, INC.,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF THE INTERIOR, DEPARTMENT OF JUSTICE,

Defendants.

18-cv-154-DWM

PLAINTIFFS' COMBINED BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case concerns Plaintiffs' long-running and frustrated efforts to obtain information about federal, state, and local policing of expected First Amendment–protected protests against the construction of oil pipelines, including the Keystone XL Pipeline. This controversial project will traverse three plains states: Montana, South Dakota, and Nebraska. More than sixteen months ago, Plaintiffs requested four categories of records relating to this topic from a handful of federal agencies under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. It took six months to receive any records at all, and, in September 2018, Plaintiffs filed suit to enforce their rights under FOIA and compel the agencies to follow the law. Prior to the litigation, the agencies' responses were few and far between, with some agencies asserting that their searches had turned up no responsive records whatsoever. Afterward, the agencies collectively produced more than one thousand pages of responsive material. Despite this, the government is still not complying with FOIA.

In this motion, Plaintiffs narrow their challenges to the FOIA responses of three agencies: the Army Corps of Engineers ("Army Corps"); the Bureau of Land Management ("BLM"); and the Federal Bureau of Investigation ("FBI"). Both the Army Corps and BLM have handed over responsive records, but the records they and other agencies have produced make clear that the searches those two agencies

conducted were not reasonably calculated to locate all responsive records, as FOIA requires. Moreover, those agencies have invoked FOIA Exemptions 5 and 7 to withhold entire records or redact information in released documents, but those arguments simply do not hold up upon closer inspection. Finally—and incredibly—the FBI refuses to even begin searching for responsive records, relying instead on a rare FOIA device called a "*Glomar*" response. This response contends that merely acknowledging the existence of responsive records would reveal information protected by a FOIA exemption. The FBI's blanket *Glomar* response, however, is simply not credible here, most directly because the record in this case contains evidence of responsive FBI records.

For the reasons detailed below, Plaintiffs respectfully ask this Court to deny Defendants' motion for summary judgment and grant Plaintiffs' cross-motion for partial summary judgment. Plaintiffs further request that the Court issue an order directing: (1) the Army Corps, BLM, and the FBI to conduct new, adequate searches and promptly release all responsive records or justify their withholding; and (2) the Army Corps and BLM to promptly release the improperly withheld or redacted material identified below.

FACTUAL BACKGROUND

Keystone XL Pipeline Proposal and Protests

In March 2017, President Donald Trump announced that he had formally approved construction of the Keystone XL Pipeline, a decision which generated intense public controversy and debate.[1] The approval alarmed people concerned about the effect the Keystone XL Pipeline might have on the environment and the tribal rights and lands of Indigenous people living along the 1,179-mile pipeline route running from Hardisty, Alberta, Canada through Montana, South Dakota, and Nebraska.[2] Environmentalists, Native American Tribes, and landowners immediately called for protests of the pipeline, similar to protests called for by the Standing Rock Sioux Tribe against the Dakota Access Pipeline in 2016.[3]

[1] President Donald J. Trump, Remarks by the President in TransCanada Keystone XL Pipeline Announcement (Mar. 24, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-transcanada-keystone-xl-pipeline-announcement.

[2] *See, e.g.*, Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, Nat'l Geographic, Jan. 25, 2017, https://news.nationalgeographic.com/2017/01/impact-keystone-dakota-access-pipeline-environment-global-warming-oil-health; Press Release, Stand with Standing Rock, Standing Rock Sioux Chairman Responds to Keystone Pipeline Permit Approval (Mar. 24, 2017), http://standwithstandingrock.net/standing-rock-sioux-chairman-responds-keystone-pipeline-permit-approval; TC Energy, Keystone XL Route Maps, https://www.keystone-xl.com/kxl-101/maps.

[3] *See* Michael McLaughlin, *Keystone XL Protestors Won't Back Down After Trump Approval*, Huffington Post, Mar. 24, 2017, https://www.huffingtonpost.com/entry/keystone-xl-protesters-trump-approval_us_58d55333e4b02a2eaab3819e.

The Dakota Access Pipeline protests were met with a sustained response from law enforcement to shut down protest encampments, surveil protest activity, and prosecute protestors.[4] Of particular note, this law enforcement response involved collaboration between federal and state or local law enforcement entities, and between governmental entities and private security companies.[5]

Plaintiffs have obtained, through public-records requests to state and local entities, documentation that demonstrates coordination and collaboration with federal agencies in preparation for the Keystone XL Pipeline, in many cases citing the DAPL protests and response as a model.[6] Examples of collaboration include:

- an anti-terrorism training hosted by the United States Department of Justice in August, 2018, *see* Emails from Jeffrey Gates, Field Officer, Montana Disaster & Emergency Services (Apr. 25, 2018 & Apr. 29,

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[4] Sam Levin, Nicky Woolf & Damian Carrington, *North Dakota Pipeline: 14 Arrests as Protestors Pushed Back From Site*, Guardian, Oct. 28, 2016, https://www.theguardian.com/us-news/2016/oct/27/north-dakota-access-pipeline-protest-arrests-pepper-spray; Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, Guardian, Feb. 10, 2017, https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access.

[5] Alleen Brown, Will Parrish & Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies*,*"* Intercept, May 27, 2017, https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies.

[6] *See* Press Release, ACLU, Concerns of Militarized Tactics and Violence Prompt Public Records Requests (Mar. 15, 2018), https://www.aclu.org/press-releases/aclu-montana-demands-information-government-surveillance-pipeline-protesters.

2018) (attached as Exhibit 1 to Declaration of Emerson Sykes ("Sykes Decl."));

- a June 2018 "large incident planning meeting" at the BLM offices in Miles City, *see* Electronic Calendar Invitation from Jeffrey Gates, Field Officer, Montana Disaster & Emergency Services (June 12, 2018) (attached as Sykes Decl. Ex. 2);

- "Field Force Operations" trainings in Sidney, Glendive and Billings conducted by the Center for Domestic Preparedness through the Federal Emergency Management Agency ("FEMA"), *see* Email from Jeffrey Gates, Field Officer, Montana Disaster & Emergency Services (Sept. 13, 2017) (attached as Sykes Decl. Ex. 3); Email from Clayton Calkins, Training Specialist, Center for Domestic Preparedness, Federal Emergency Management Agency (Feb. 7, 2018) (attached as Sykes Decl. Ex. 4); and

- trainings on "mass-arrest procedures," "instruction in protest types and actions," and "crowd control methods" to which numerous federal, state, and local agencies were invited to attend, *see* Sykes Decl. Ex. 3.

These and other records, in addition to news reporting, raise questions about the Defendants' level of collaboration with state and local governments and with private security companies in anticipation of Keystone XL protests. Governmental surveillance of protests, and undue scrutiny of political speech, is a matter of great public concern. Despite this public concern, little is currently known about the level of collaboration between federal, state, local, and private entities in preparing for Keystone XL protests. Limited publicly available evidence, including memoranda and email correspondence, confirms that federal and local agencies

have been preparing for these protests,[7] but the scope and objectives of that preparation—and its accounting for First Amendment and tribal rights—remains unclear.[8]

Plaintiffs' FOIA Request & Agency Responses

In order to fill that gap, Plaintiffs sought wider disclosure of information about law enforcement coordination and collaboration concerning pipeline protests through a FOIA request ("Request"). On January 23, 2018, Plaintiffs submitted identical requests to seven federal agencies.[9] *See* Request at 6, ECF No. 37-1. The Request sought records created after January 27, 2017, concerning four general categories:

> (1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests . . . ; and

[7] Will Parrish & Sam Levin, *'Treating Protest as Terrorism': US Plans Crackdown on Keystone XL Activists*, Guardian, Sept. 20, 2018, https://www.theguardian.com/environment/2018/sep/20/keystone-pipeline-protest-activism-crackdown-standing-rock (discussing public-records requests).

[8] Jordan Verdadeiro, *Law Enforcement Meets Prior to Keystone XL Pipeline Construction*, KFYR TV, Apr. 25, 2019, https://www.kfyrtv.com/content/news/Law-enforcement-meets-prior-to-Keystone-XL-Pipeline-construction-509071641.html.

[9] The agencies are the FBI, the Army Corps, BLM, FEMA, the Transportation Security Administration ("TSA"), the Office of Intelligence and Analysis within the Department of Homeland Security ("I&A"), and the Department of Justice's Office of Legal Counsel ("OLC"). Only the responses of the first three agencies are still at issue in this litigation.

> (2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and
>
> (3) Meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and
>
> (4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests.

Id.

Although Plaintiffs requested expedited processing, none of the seven agencies conducted searches or produced responsive documents within the mandatory statutory timeframe. 5 U.S.C. § 552(a)(6)(A)(i). When they did respond, several agencies initially claimed that they had few or no responsive records, only to later produce far more documents after they were named Defendants in this lawsuit. For example, the Army Corps initially took six months to produce seven pages, *see* Army Corps *Vaughn* Index, ECF No. 21-1, but after Plaintiffs filed suit in September 2018, the Army Corps produced a total of 68 pages, *see* Amended Army Corps *Vaughn* Index, ECF No. 30-1. BLM did not produce any records at all until April 2019, but eventually produced 184 pages of responsive records from the agency's Montana office alone. *See* Decl. of Sally

Sheeks, BLM ¶ 4, ECF No. 31 ("Sheeks Decl."); BLM *Vaughn* Index, ECF No. 31-1. Most strikingly, the FBI only responded to the Request twelve months after receiving it, but refused to confirm or deny the existence of responsive records—a so-called "*Glomar*" response, *see* ECF No. 32-5—even though other agencies have produced FBI records in this very litigation. *See, e.g.*, USA_BLM_00060–63, ECF No. 35-2. To date, the Defendant agencies have collectively produced more than a thousand pages of records, mostly consisting of emails. *See* Joint Rec., ECF No. 35. Based on news reports, Plaintiffs' state public-records requests, and Defendants' own productions, the record does not come close to representing the full universe of responsive documents, and the agencies have withheld information that must be public under FOIA.

While the Request was sent to seven agencies, Plaintiffs now only challenge the responses of three of them in this litigation.[10] Specifically, they challenge: (1) the adequacy of the searches performed by the Army Corps and BLM; (2) the redaction and withholding of documents by the Army Corps and BLM under Exemptions 5 and 7; and (3) the blanket *Glomar* response issued by the FBI.[11]

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[10] Without conceding that their responses were lawful under FOIA, Plaintiffs have no further claims against FEMA, TSA, I&A, or OLC.

[11] In addition to claims regarding the agencies' failure to produce responsive records under FOIA, Plaintiffs also sued several Defendant agencies for failing to grant Plaintiffs expedited processing and a fee waiver under the statute. Those claims are no longer at issue in this litigation.

LEGAL STANDARDS

Purpose of FOIA and Governing Principles

Congress enacted FOIA to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012) (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). The statute is designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quotation marks and citation omitted). "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *John Doe Agency*, 493 U.S. at 151–52 (quotation marks omitted).

Upon receipt of a FOIA request, a federal agency "shall make the records promptly available," 5 U.S.C. § 552(a)(3)(A), and "shall make reasonable efforts to search for the records" responsive to a request. *Id.* § 552(a)(3)(C)–(D). Agencies must respond to FOIA requests within twenty business days of receipt, *id.* § 552(a)(6)(A)(i), and disclose responsive documents unless one or more of FOIA's exemptions apply. These exemptions are to be narrowly construed. *Shannahan*, 672 F.3d at 1148; *Rose*, 425 U.S. at 361; *Milner v. Navy*, 562 U.S.

562, 565 (2011); *Mead Data Cent., Inc. v. Air Force*, 566 F.2d 242, 259 (D.C. Cir. 1977). An agency bears the burden of establishing that an exemption applies. *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009). "Any reasonably segregable portion of a record shall be provided" to the FOIA requester. 5 U.S.C. § 552(b).

Summary Judgment in FOIA Cases

FOIA requires *de novo* review of an agency's FOIA response. *Id.* §552(a)(4)(B). The "typical standard for summary judgment is not sufficient in a FOIA proceeding," which instead "generally requires a two-stage inquiry." *L.A. Times Commc'ns, LLC v. Army*, 442 F. Supp. 2d 880, 893 (C.D. Cal. 2006) (quotation marks and citations omitted). First, the government must "demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents." *Lahr*, 569 F.3d at 986. Second, "FOIA's 'strong presumption in favor of disclosure' means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents." *Id.* at 973 (citation omitted).

"Courts must apply [the government's] burden with an awareness that the plaintiff, who does not have access to the withheld materials, is at a distinct disadvantage in attempting to controvert the agency's claims." *Maricopa Audubon*

Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997) (quotation marks and citation omitted). For this reason, "the underlying facts and possible inferences are construed in favor of the FOIA requester." *L.A. Times*, 442 F. Supp. 2d at 894 (citations omitted).

ARGUMENT

I. The Army Corps of Engineers and the Bureau of Land Management failed to conduct adequate searches.

As explained below, the Army Corps and BLM failed to meet the burden imposed on them by FOIA to conduct reasonable searches for responsive records, largely because they failed to search in places where it was clear that responsive records were likely to exist.

A. Searches for responsive FOIA records must be reasonably designed to locate all responsive records under the specific circumstances of a given request.

"An inadequate search for records constitutes an improper withholding under the FOIA." *Dean v. DOJ*, 141 F. Supp. 3d 46, 48 (D.D.C. 2015). When a plaintiff challenges the adequacy of an agency's search, the agency "'must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Schoenman v. FBI*, 764 F. Supp. 2d 40, 45 (D.D.C. 2011) (quoting *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)); *accord Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995). Adequacy-of-search claims are guided by a "standard of reasonableness,"

but are dependent on the particular circumstances of a given case. *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985). While FOIA does not require agency searches to be perfect, 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) (quoting *Founding Church of Scientology of D.C. v. NSA,* 610 F.2d 824, 837 (D.C. Cir. 1979)). "While there is no requirement that an agency search every record system, . . . the search must be conducted in good faith using methods that are likely to produce the information requested if it exists." *Lawyers' Comm. for Civil Rights of S.F. Bay Area v. Dep't of Treasury*, 534 F. Supp. 2d 1126, 1130 (N.D. Cal. 2008) (citations omitted). Finally, "[i]f conducting a more thorough search would *not* result in an undue burden, [an] agency must conduct the search." *Tarzia v. Clinton*, No. 10 Civ. 5654, 2012 WL 335668, at * 9 (S.D.N.Y. Jan. 30, 2012).

B. The Army Corps did not conduct an adequate search.

First, the Army Corps' search was unreasonable because it was only directed at the Army Corps' "headquarters" in Washington, D.C., and not to regional offices where responsive records would more likely be. *See, e.g.*, *Jefferson v. DOJ*, 168 F. App'x 448, 450 (D.C. Cir. 2005) ("[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested."). An agency may search only one office or database if the agency's

declaration makes clear that "official records are maintained . . . at . . . Headquarters" and "separate systems are not maintained at field office locations." *Hronek v. DEA*, 16 F. Supp. 2d 1260, 1268 (D. Or. 1998). But that does not appear to be the case here, and Defendants' declaration makes no such assertion.

Plaintiffs' Request specifically and exclusively concerned "oil pipeline protests." *See* Request at 6, ECF No. 37-1. Any reasonable search for records would take account of the fact that on-the-ground protest preparations would most likely occur at the site of pipeline construction; with respect to Keystone XL, those sites would be in Montana, South Dakota, and Nebraska. And the Army Corps has regional offices throughout the country, including in nearby cities like St. Paul, Minnesota, Omaha, Nebraska, and Walla Walla, Washington. *See* U.S. Army Corps of Engineers, Where We Are, https://www.usace.army.mil/locations.aspx. Yet the Army Corps did not direct a search for records responsive to the Request to regional or district offices in the potentially impacted areas. Instead, it limited its search to a single office in Washington, D.C., and it further narrowed its search to just *two* employees. *See* Declaration of Michelle Bartlett, Army Corps ¶ 7, ECF No. 21 ("Bartlett Decl.") (explaining that one staff member "advised that his office was the primary point of contact for the requested information" and then identified "the only individual other than himself that should be included in a search"). The failure to design a search to cover obvious offices and agency employees that

would likely possess responsive records, and instead rely on an assertion by one employee that two employee searches would cover the waterfront, renders the agency's search unreasonable.

Second, the Army Corps was on notice—via its own production and BLM's—that its initial searches were inadequate, and it did not address (let alone remedy) its failures. *See, e.g.*, *Brennan Ctr. for Justice v. DOJ* ("*Brennan II*"), No. 17 Civ. 6335, 2019 WL 1932757, at *4 (S.D.N.Y. Apr. 30, 2019) (explaining that "marked" disparity in search protocols among recipient agencies can "make clear the unreasonableness" of an agency's search for records under FOIA). When agencies become aware of information during the course of their FOIA searches that "suggest[s] the existence of documents that it could not locate without expanding the scope of its search," they must adjust on the fly in order to comply with FOIA. *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998); *see Judicial Watch, Inc. v. Dep't of Energy*, 310 F. Supp. 2d 271, 307 (D.D.C. 2004) (justifying reasonableness of search by explaining that an agency "became aware of missed documents and a department that had not been searched, and so it conducted further searches"), *aff'd in part, rev'd in part on other grounds and remanded*, 412 F.3d 125 (D.C. Cir. 2005).

Examples abound indicating that the Army Corps violated FOIA by unreasonably refusing to expand or adjust its search for responsive records to

include additional offices and employees. The Army Corps originally produced only twelve pages of documents after conducting its search. *See* Bartlett Decl. ¶ 5, ECF No. 21. However, on March 29, 2019, BLM notified the Army Corps that it had located four documents originating with the Army Corps that were not uncovered in the Army Corps' search. *See* Amended Declaration of Michelle Bartlett, Army Corps ¶ 8, ECF No. 30 ("Amended Bartlett Decl."). The Army Corps then reviewed and released those four records in part, which demonstrate that protest activity is likely to be staged on land managed by the Army Corps. *See, e.g.*, USA_ACE_00058, ECF No. 35-1. But the agency failed to conduct an additional search to account for the new information. And there are other indications in the Army Corps' production that it was aware that additional responsive records exist:

- On May 15, 2018, the Army Corps sent an email related to an upcoming meeting on the Keystone XL pipeline stating: "Please see the attached agenda for the upcoming Keystone meeting on Thursday." USA_ACE_00018, ECF No. 35-1. But the agency did not produce any such attachment. *See Am. Oversight v. Gen. Servs. Admin.*, 311 F. Supp. 3d 327, 340 (D.D.C. 2018) ("While the FOIA request does not explicitly refer to attachments, the scope of the request for 'all records reflecting communications' plainly covered parts of email communications that were in the form of an attachment. [The agency's] blinkered literalism, distinguishing emails from email attachments, is at odds with the agency's 'duty to construe a FOIA request liberally.'" (quoting *People for the Ethical Treatment of Animals v. Nat'l Insts. of Health*, 745 F.3d 535, 540 (D.C. Cir. 2014)) (citing supporting cases)).

- On June 1, 2017, an Army Corps official says "I am the right guy" in response to a query regarding interagency coordination regarding pipeline

security—yet the agency produced no additional documents related to the exchange. USA_ACE_00019, ECF No. 35-1.

- On June 8, 2017, an Army Corps employee emailed a BLM official regarding a point of contact on security issues, but the agency produced no follow-up communications from the ensuing two years. USA_ACE_00021, ECF No. 35-1.

Moreover, a host of BLM documents make clear that the Army Corps' role in pipeline planning activities was extensive, and it was unreasonable to presume that the agency's responsive records would plausibly be limited to the files of just two individual employees at headquarters. Within the 184 pages that BLM produced are dozens of references to the Army Corps personnel in Montana. *See, e.g.*, USA_BLM_ 00017-1, 00017-3, 00017-6, 00017-7–9, 00017-13, 00017-15, 00020–26, 00032–37, 00041, 00044–45, 00052, 00055, 00057, 00062–63, 00065–68, 00080–082, 00084–85, 00091, 00093, 00104, 00130–31, 00135, 00137, 00140, 00143, 00167, ECF No. 35-2. For example:

- On February 22, 2017, TransCanada met with the State Department and Cooperating Agencies to discuss, among other things, "heightened public interest" and "situational awareness." USA_BLM_00017-13, ECF No. 35-2. Army Corps personnel in Montana attended that meeting. *Id.*

- On September 21, 2018, Army Corps personnel were copied on an email from BLM noting a pipeline protest training in Montana. *See* USA_BLM_00052, ECF No. 35-2.

- On August 2, 2018, BLM sent Army Corps personnel an email about an upcoming meeting in Montana "to ensure that we are approaching this with one unified effort," and mentioning a "Pipeline Security Initiative." USA_BLM_00067, ECF No. 35-2.

- The Army Corps is listed as a participant among a law enforcement "subgroup" to address, among other things, "coordination with Trans Canada security personnel," "additional training needs to deal with protest activity," and "social media issues." USA_BLM_00091, ECF No. 35-2.

Given all of this, the agency's more generalized assertions concerning the adequacy of its search cannot carry its burden. *See Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009) (deference to agency declarations is not due when "controverted by contrary evidence in the record" (citation omitted)). For example, the agency asserts that its search was reasonably designed to uncover all responsive records because the subject of the Request made it reasonable to limit its search only to its Insider Threat Operations and Civil Works units. *See* Defs.' Br. in Support of S.J. ("Gov't Br.") at 7, ECF No. 42. But even if the custodian for Insider Threat Operations records "knew" that his unit "had not been involved with or received information responsive to" the Request, *id.* at 8, the mounting agency productions should have made clear that that was not enough, and additional searches would be required to uncover "all relevant documents," *Schoenman*, 764 F. Supp. 2d at 45 (quotation marks omitted).

Similarly, the Army Corps claims that it "possesses no documents pertaining to traveling to meetings or speaking engagements about pipeline protests—or materials distributed at such meetings—because no interagency meetings came to fruition." *Id.* (paraphrasing Second Supplemental Declaration of Michelle Bartlett,

Army Corps ¶¶ 4–5, ECF No. 36 ("Second Suppl. Bartlett Decl.")). But the record proves this assertion to be false. In fact, on February 16, 2017, Montana Disaster and Environmental Services hosted a "Pipeline Planning Meeting" in Miles City, Montana— and an official with the Army Corps signed the sign-in sheet. *See* USA_BLM_00167, ECF No. 35-2. Clearly, an adequate search would at the very least include searching the files of the Army Corps official who signed in at the Miles City meeting to see if that person (or that person's office) had any further records.

And last, the Army Corps justifies its failure to uncover records responsive to the Request's prong seeking "legal and policy analysis relating to funding and staffing for law enforcement around the pipeline protests," by asserting that the agency "cannot and does not serve in any 'law enforcement' capacity, conducted no legal or policy analysis surrounding such law enforcement, and possessed no document pertaining to such analysis." Second Suppl. Bartlett Decl. ¶ 3, ECF No. 36 (discussing Request at 6, ECF No. 37-1). But that general assertion is again belied by the agency's own records. For example, USA_ACE_00021, ECF No. 35-1, is an email dated June 8, 2017, from the Operational Protection Division Chief at the Army Corps' headquarters in Washington, DC. Responding to a query from Ryan Sklar of BLM, the Chief specifically mentions that "my *Law Enforcement Chief* doesn't come on board until July 1," and that until then, the Chief would

liaise with Sklar instead. *Id.* (emphasis added).[12] The agency declaration's bald assertion that the Army Corps does not serve in a law enforcement capacity cannot render reasonable the agency's apparent decision to excuse itself from searching for an entire category of records sought by the Request.

C. BLM did not conduct an adequate search.

Defendants claim that BLM "conducted an adequate search reasonably calculated to locate *all* relevant documents." Gov't Br. at 9 (emphasis added). But this is by no means the case, and BLM's search was deeply flawed from the outset.

First, BLM's search was inadequate because it improperly focused on the Montana office exclusively, despite the fact that the Request was not specific to Montana.[13] *See* Sheeks Decl. ¶ 4, ECF No. 31. Rather, the Request was a national inquiry and was not limited to Montana agencies or offices (though it included them). Defendants claim that the Request was "routed . . . to its Montana State Office ('BLM-MT'), the component *most* likely to have potentially responsive records." Gov't Br. at 9 (emphasis added). But this statement misunderstands the agency's obligation under FOIA. BLM is required to search all locations where responsive records are reasonably likely to be found, not only the location where

[12] Another apparent employee of the Army Corps was "loop[ed] into this conversation," suggesting there may be additional agency employees working on related issues. USA_ACE_00021, ECF No. 35-1.

[13] In a sense, this is the mirror image of the first problem with the Army Corps' search, described above.

they are "most likely." *See, e.g.*, *Hall v. CIA*, 881 F. Supp. 2d 38, 59 (D.D.C. 2012) (rejecting search as inadequate where agency had "only searched systems 'most likely' to contain responsive documents, and did not search all systems 'likely to produce responsive documents'"). Here, at the very least, the agency should have searched for records in offices in states with oil pipelines or potential pipeline projects, or belonging to personnel based in those states, including South Dakota and Nebraska in addition to Montana.

And records produced by the Army Corps make clear that BLM entities outside of Montana were in fact involved in pipeline planning processes, and therefore would likely have records responsive to the Request. *See, e.g.*, *Ctr. for Biological Diversity v. EPA*, 279 F. Supp. 3d 121, 141–42 (D.D.C. 2017) (finding agency search inadequate where evidence showed agency interaction with other federal and state agencies but search did not cover such entities). For example, on May 15, 2017, Linda Thurn, an executive assistant in BLM's Washington, D.C. office, sent an agenda for an upcoming interagency coordinating meeting regarding a Keystone XL meeting. *See* USA_ACE_00018, ECF No. 35-1. Since BLM limited its search to the Montana office, this document was produced by the Army Corps, which was one of the invited agencies, but not BLM. In addition, an email from the Army Corps entitled "Keystone XL – PAO Coordination" states, "BLM DC has Quick response teams set up to assist to BLM local," USA_ACE_00064,

ECF No. 35-1, indicating that there are likely BLM records held by the agency's Washington, D.C. employees. Beyond that, Al Nash of BLM stated in an email with the subject line "KXL Pipeline – communications update" that "[t]here's a need to establish a good relationship *in both states*," USA_ACE_00065, ECF No. 35-1 (emphasis added), suggesting that BLM was focusing pipeline planning efforts beyond Montana.

Indeed, BLM's own production makes clear that agency employees in *at least* Nevada and Washington, D.C., would likely have responsive records. BLM employees in Nevada are referenced repeatedly. *See, e.g.*, USA_BLM_00017-1–9, ECF No. 35-2 (emails from Jim Stobaugh, a BLM project manager in Nevada sent in an effort to coordinate a Keystone XL Pipeline meeting); USA_BLM_00017-10–15, ECF No. 35-2; and USA_BLM_00038, ECF No. 35-2.[14] Defendants claim that "BLM-MT has therefore met its search burden under FOIA," Gov't Br. at 10, but the Request was sent to BLM writ large, and that entity has fallen far short of its search obligations under FOIA.

Second, as with the Army Corps, BLM did not expand its search after becoming aware of the existence of additional records requiring additional or expanded searches. For example, in a June 1, 2017 email with the subject line

[14] Incredibly, BLM used "Stobaugh" as a search term, but only searched records in the Bureau of Land Management's Montana office, rather than the office in which Mr. Stobaugh works (Nevada).

"[Non-DoD Source] Keystone XL – status update," Ryan Sklar, Acting Senior Litigation Specialist for BLM based outside of Montana, initiated "an interagency team that would plan for safety and security concerns related to project approval and construction." USA_ACE_00020, ECF No. 35-1. Later that morning, in a follow-up email to the Army Corps, Sklar stated that "[t]he team will also be comprised of members of the Bureau of Land Management." USA_ACE_00022, ECF No. 35-1. Despite this, BLM did not search Sklar's email nor use "Sklar" as a search term. *See* Sheeks Decl. ¶¶ 4, 7–8, ECF No. 31. It is unreasonable for BLM to have neglected to search Sklar's email account given his apparently central role in organizing interagency collaboration in preparation for Keystone XL construction and protests. Additionally, the Army Corps produced a "Communication Plan" for the Keystone XL Pipeline that identified the Bureau of Land Management as the "lead federal agency for communications." USA_ACE_00057–58, ECF No. 35-1. Even still, BLM did not expand its search to include agency headquarters or use "Communication Plan" as a search term. *See* Sheeks Decl. ¶¶ 4, 7, 8, ECF No. 31.

Finally, the BLM custodians' used inconsistent search terms to conduct their various searches, and the search terms were not "reasonably calculated" to locate all responsive records. Some record custodians employed somewhat comprehensive search terms: for example, the Acting State Director searched

"Keystone," "pipeline," "protest," and "law enforcement," *id.* ¶ 7, and the Miles City Field Manager searched "Oil pipeline protest," "oil pipeline protests," "Pipeline," "protests," "law enforcement," and "Keystone protest," *id.* But other agencies' searches were far narrower. *See Brennan II*, 2019 WL 1932757, at *4 ("overly narrow search terms" by certain agencies "responding to essentially the same request" can render searches inadequate). For example, the Chief of Fluid Mineral Branch searched only "Keystone"; the Acting Branch Chief of Realty, Lands, and Renewable Energy searched "KXL law enforcement," "KXL situational awareness," and "law enforcement and gas pipeline"[15]; the Realty Specialist searched "Agenda," "meeting notes," "security," and "Stobaugh"; and the Field Manager of Dickenson Field Office searched only "DAPL." Sheeks Decl. ¶ 7, ECF No. 31. At the very least, every custodian should have reasonably included both "Keystone" and "KXL" among their search terms because the two formulations are used commonly. *See, e.g.*, *Judicial Watch, Inc. v. DOJ*, No. 17-CV-02682, 2019 WL 1116899, at *3 (D.D.C. Mar. 11, 2019) ("The FBI's failure to search for these obvious synonyms and logical variations ran afoul of its obligation to construe FOIA requests liberally and conduct a search reasonably likely to produce all responsive documents."). The use of narrower search terms by

[15] The Keystone XL Pipeline is a crude oil pipeline, not a gas pipeline.

these custodians indicates that BLM has not carried its FOIA burden to conduct an adequate search.

II. The Army Corps of Engineers and the Bureau of Land Management failed to adequately justify certain withholdings.

Plaintiffs challenge the Army Corps' and BLM's reliance on FOIA Exemptions 5 and 7 to withhold one record in whole and four in part.[16]

A. Agencies must provide detailed and specific justifications to lawfully invoke FOIA exemptions.

In general, "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014) (citation omitted). Courts accord "substantial weight" to government declarations in FOIA cases, but that deference is due only when the government's declarations contain "reasonably detailed explanations"

[16] Should the Court have any doubt about the propriety of ordering the release of any record or portion thereof, Plaintiffs respectfully request that it review the withheld documents in camera to ensure the government's claimed exemptions apply. *See, e.g.*, *PHE, Inc. v. DOJ*, 983 F.2d 248, 252 (D.C. Cir. 1993) ("[I]n camera review is appropriate when agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims."). Under FOIA, judges have broad discretion to "examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions." 5 U.S.C. § 552(a)(4)(B). Courts "often . . . examine the document in camera . . . in an effort to compensate" for the information imbalance between FOIA requestors and the government in FOIA litigation. *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973). Finally, in camera review is appropriate where, as here, "the number of records involved is relatively small." *ACLU v. DOJ*, No. 12-cv-7412, 2014 WL 956303, at *3 (S.D.N.Y. Mar. 11, 2014). Out of hundreds of documents, Plaintiffs have narrowed their substantive challenges to agency withholdings to just a handful of pages.

substantiating the exemptions it has invoked, *N.Y. Times Co. v. DOJ* ("*N.Y. Times*"), 756 F.3d 100, 112 (2d Cir. 2014) (quotation marks omitted), and when they are not "controverted by contrary evidence in the record or by evidence of bad faith," *Wilner*, 592 F.3d at 68 (alteration and quotation marks omitted). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. DOS*, 565 F.3d 857, 864 (D.C. Cir. 2009).

In order to properly invoke a FOIA exemption, an agency must provide "detailed" and "specific" justifications for why the claimed exemption applies. *See generally Vaughn,* 484 F.2d at 826 ("[C]ourts will simply no longer accept conclusory and generalized allegations of exemptions."). Even if parts of a responsive record are properly exempt, the agency must "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552 (a)(8)(A)(ii)(II); *FBI v. Abramson*, 456 U.S. 615, 626 (1982) (agencies and courts must "differentiate among the contents of a document rather than to treat it as an indivisible 'record' for FOIA purposes"). "The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Cent.*, 566 F.2d at 260. Courts have broad discretion to review in camera any agency record

that the government seeks to withhold to assess the validity of claimed exemptions. *See* 5 U.S.C. § 552 (a)(4)(B).

Exemption 5

Under this exemption, the government may withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." *Id.* § 552 (b)(5). The government relies on two Exemption 5 privileges: deliberative process and attorney–client.

Deliberative Process Privilege

"In light of 'the strong policy of the FOIA that the public is entitled to know what its government is doing and why,' exemption 5 is to be applied 'as narrowly as consistent with efficient Government operation.'" *Maricopa*, 108 F.3d at 1093 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)). To establish that the privilege applies, an agency must show that the document is both "'predecisional,' *i.e.*, 'prepared in order to assist an agency decisionmaker in arriving at [their] decision,'" and "'deliberative,' *i.e.*, 'actually . . . related to the process by which policies are formulated.'" *Brennan Ctr. for Justice v. DOJ* ("*Brennan I*"), 697 F.3d 184, 194 (2d Cir. 2012) (citation omitted). Documents fall within this privilege if they "would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Coastal States*, 617 F.2d at 866.

Critically, "even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Id.* Exemption 5 "shields those documents, and only those documents, normally privileged in the civil discovery context." *Lahr*, 569 F.3d at 979 (quotation marks omitted).

To meet its burden, the agency should, at a minimum, describe: (1) the roles of the author and recipient of each document; (2) the document's function and significance in a decision-making process; and (3) the document's subject matter and the nature of the deliberative opinion. *See Senate of P.R. v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987); *Coastal States*, 617 F.2d at 868; *Nat'l Day Laborer Org. Network v. ICE*, 811 F. Supp. 2d 713, 743 (S.D.N.Y. 2011).

Attorney–Client Privilege

The attorney–client privilege, which is "strictly construed," applies only 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); *see Ctr. for Biological Diversity v. OMB*, 625 F. Supp. 2d 885, 892 (N.D. Cal. 2009) (applying *Martin* test in FOIA

case); *see also Brennan I*, 697 F.3d at 207. Of course, "[t]he fact that a person is a lawyer does not make all communications with that person privileged." *Martin*, 278 F.3d at 999. When courts determine if a communication was "for the purpose of obtaining or providing legal advice, as opposed to advice on policy" (which is not privileged), they consider the "predominant purpose of the communication." *In re Cty. of Erie*, 473 F.3d 413, 419–20 (2d Cir. 2007). If the predominant purpose is not to solicit or convey legal advice, agencies have an alternative to withholding in full: they should redact any "legal advice that is incidental to the nonlegal advice." *Id.* at 421 n.8.

Exemption 7(A)

Exemption 7 relates to "records or information compiled for law enforcement purposes" and contains several subparts. Plaintiffs challenge withholdings under Exemption 7(A), which pertains to records that "could reasonably be expected to interfere with law enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). "Congress intended that Exemption 7(A) would allow the federal courts to determine that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings." *Shannahan*, 672 F.3d at 1150 (quoting *Lewis v. IRS*, 823 F.2d 375, 380 (9th Cir. 1987)).

To justify withholding under Exemption 7(A), the Government must demonstrate that the disclosure could reasonably be expected to interfere with proceedings that are "pending or reasonably anticipated." *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

B. The Army Corps has failed to justify certain withholdings.

Withheld Email With Subject Line
"[EXTERNAL] Re: Keystone XL, Ft. Peck"
& Attachment

First, the Army Corps has not justified the withholding of one email and an attachment in full under Exemptions 5 and 7(A).[17] *See* Amended Army Corps *Vaughn* Index at 2, ECF No. 30-1 (describing three-page withheld email with subject line "[EXTERNAL] Re: Keystone XL, Ft. Peck"); Amended Bartlett Decl. ¶ 12, ECF No. 30 (revealing that the email has an attachment).[18] The agency's *Vaughn* Index describes this record as a December 17, 2016 email "contain[ing] a discussion between the Chief of the Operational Protection division for the Directorate of Contingency Operations and an Intelligence Specialist with the District of Montana's US Attorney's Office." *Id.* The agency says the email

[17] Plaintiffs do not challenge the Army Corps' withholding of information in this email under Exemption 6. Nor do they challenge any withholding of "contact information of law enforcement personnel," Amended Bartlett Decl. ¶ 12, ECF No. 30.

[18] The Army Corps appears to have withheld a partial duplicate of this email as well. *See* Amended Army Corps *Vaughn* Index at 3, ECF No. 30-1 (describing two-page withheld email with subject line "Re: Keystone XL, Ft. Peck").

"reflects interagency precoordination efforts concerning potential security threats including protests and possible sabotage concerns." *Id.*[19]

The Army Corps asserts that this entire email and attachment may be withheld in full under Exemption 5's deliberative-process privilege, but the agency has not come close to justifying an invocation of that privilege. As an initial matter, the agency has not even attempted to justify its withholding of the attachment—nor has it described the attachment at all. For that reason alone, the Court should require the agency to process the attachment and justify its withholding. Moreover, the agency cannot prevail on its Exemption 5 claim because it has not described the email's function and significance in a specific decision-making process. *See, e.g.*, *Senate of P.R.*, 823 F.2d at 585. The agency asserts that it is sufficient under Exemption 5 that the email and attachment are "being exchanged between government agencies to inform future decisions related to security." Amended Army Corps *Vaughn* Index at 2, ECF No. 30-1. But an agency seeking to withhold a record under the deliberative process privilege "must identify a specific decision to which the document is pre-decisional." *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 911 F.3d 967, 979 (9th Cir. 2018) (quotation marks omitted). That rule exists for good reason: without the need for specificity,

[19] The government does not address this document in its brief. *See* Gov't Br. at 23 (discussing only one Army Corps redaction under Exemption 5, but not the document and attachment withheld in full).

"the privilege would be boundless, as any memorandum always will be 'predecisional' if referenced to a decision that possibly may be made at some undisclosed time in the future." *Lahr*, 569 F.3d at 981 (alteration and quotation marks omitted); *see Maricopa*, 108 F.3d at 1094 (explaining that the rule excludes records that were "merely part of a routine and ongoing process of agency self-evaluation"). Here, there does not appear to be any specific decision as to which the purposes of Exemption 5 would apply—and the agency's vague invocation of "future decisions related to security" raises the very concern that the specificity rule is meant to address. Finally, the email is from 2016, suggesting that the status of the email may have changed since then. Even if the email was initially deliberative and predecisional, if the agency subsequently circulated and relied upon the email (or the attachment), the documents could lose their predecisional character, thus stripping them of the privilege. *See Coastal States*, 617 F.2d at 866.

Further, the agency fails to satisfy Exemption 7(A) to withhold portions of the email (and perhaps the attachment, though it does say explicitly whether its arguments under the exemption reach the attachment, as well). The agency asserts that release of the email "may degrade federal agencies' ability to anticipate, prevent, and respond to certain criminal threats to oil pipelines" because it "reveals areas of infrastructure" that may be "vulnerab[le] to sabotage." Amended Bartlett Decl. ¶ 12, ECF No. 30. Paradoxically, the Army Corps asserts that it "cannot and

does not serve in any 'law enforcement' capacity." Second Suppl. Bartlett Decl. ¶ 3, ECF No. 36. Exemption 7(A) is not a catch-all to prevent the release of any information in public records that "may" impact certain law enforcement functions. *See, e.g.*, *Poss v. NLRB*, 565 F.2d 654, 657 (10th Cir. 1977) (explaining that Exemption 7(A) does not logically apply when "[t]here isn't going to be any case in court" (quotation marks omitted)). Instead, it permits the withholding of information only to the extent that its release "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A), that are "pending or reasonably anticipated." *Mapother*, 3 F.3d at 1540; *accord Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985). But nowhere does the agency even hint that the information related, either then or now, to any conceivable "enforcement proceeding." The agency has fallen short of its burden under Exemption 7(A).[20]

USA_ACE_00065

Second, the Army Corps has failed to justify the withholding of certain information in USA_ACE_00065—a June 12, 2017 email regarding communications topics related to the Keystone XL Pipeline—under Exemption 5's deliberative-process privilege. *See* USA_ACE_00065, ECF No. 35-1 (attached as

[20] Of course, the agency also bears the burden of segregating any information in the email and attachment not properly protected by a FOIA exemption. *See* 5 U.S.C. § 552(a)(8)(A)(ii)(II); *see also Abramson*, 456 U.S. at 626.

Sykes Decl. Ex. 5). The agency asserts that the withheld passage "contains [the] author's characterization of editorial remarks made by [Al] Nash [of BLM] during interagency discussions." Amended Army Corps *Vaughn* Index at 4, ECF No. 30-1. But as above, the agency's Exemption 5 justification is cursory and does not hold up. The deliberative-process privilege does not permit agencies to withhold any and all "editorial remarks." It allows withholding of "pre-decisional" material that relates to a "specific decision," *Sierra Club*, 911 F.3d at 979. The agency has not pointed to any decision at issue, instead invoking potential future "final decisions . . . to address potential security concerns." Amended Army Corps *Vaughn* Index at 4, ECF No. 30-1. And the context of the redaction at issue further suggests that the agency cannot justify the privilege here. The redacted text appears to be three or four lines in a list of bullet points that are otherwise not protected. The combination of the selective redaction of individual lines of text and the agency's concern for the potential disclosure of "editorial comments" suggests that the redactions are unlawful. *See, e.g.*, *Nat'l Day Laborer Org. Network*, 811 F. Supp. 2d at 749.

C. BLM has failed to justify certain withholdings.

BLM has not justified the withholding of portions of records under Exemption 5's attorney–client privilege and deliberative-process privilege.

USA_BLM_00017-2 & USA_BLM_00057–58

First, BLM invokes the attorney–client privilege to withhold information in a number of documents but relies on vague and conclusory statements that fall short of establishing the privilege. *See* USA_BLM_00057–58, ECF No. 35-2 (attached as Sykes Decl. Ex. 6); USA_BLM_00017-2, ECF No. 35-2 (attached as Sykes Decl. Ex. 7).[21] As explained above, the privilege is "strictly construed," and applies only to communications in which "legal advice of any kind is sought . . . from a professional legal adviser in his or her capacity as such." *Martin*, 278 F.3d at 999. Moreover, the communications must be made and kept in confidence. *See id.*; *Brennan I*, 697 F.3d at 207 (To properly invoke the privilege, the government must show that the communications are "(1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance."). The agency has not met this bar with respect to the two challenged documents.

The agency describes USA_BLM_00057–58 as an email regarding the cancellation of a "Federal Partners Meeting" "per attorneys direction." BLM *Vaughn* Index at 3, ECF No. 31-1. While the agency does assert that the email "contain[s] communications received from the U.S. Attorney's Office," Gov't Br. at 25, the mere fact that a lawyer's words are included do not render them

[21] Plaintiffs do not challenge BLM's withholding of information in these records under Exemptions 4, 6, or 7.

withholdable under Exemption 5. *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, No. 18-cv-47, 2019 WL 1004042, at *8 (D.D.C. Feb. 28, 2019) ("It is well-established, however, that not every communication between an attorney and a client-government or otherwise-is made for the purpose of securing legal advice or services. . . . Hence, a government attorney's 'advice on political, strategic, or policy issues, valuable as it may [be], would not be shielded from disclosure by the attorney–client privilege.'" (quoting *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998))).

As an initial matter, it is unclear whether the redacted material constitutes and relates to "legal advice." Given that the subject of the email appears to be scheduling, that proposition is doubtful. But even assuming it is legal advice, BLM's claim of privilege fails because this supposedly confidential legal advice from the U.S. Attorney's Office was shared with individuals from at least 13 agencies *and* the state government of Montana. *See* USA_BLM_00057, ECF No. 35-2 (attached as Sykes Decl. Ex. 6) (listing email addresses from BLM and the Department of Justice—as well as the Department of Homeland Security, the National Park Service, the Federal Aviation Administration, the Department of Transportation, the U.S. Fish and Wildlife Service, the Department of the Interior, the Army, the FBI, the Bureau of Indian Affairs, the Forest Service, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the state government of

Montana). The fundamental purpose of the attorney–client privilege is the "protection of confidential facts," which cannot be "made known to persons other than those who need to know them." *Coastal States*, 617 F.2d at 863. Here, the distribution of legal advice to BLM beyond the agency itself to 13 other federal agencies evaporated whatever confidentiality the advice may have enjoyed.[22] But even worse, DOJ's advice was apparently circulated to state government officials, as well. In these circumstances, BLM's claim of privilege fails.

Additionally, BLM asserts that information in USA_BLM_00017-2, ECF No. 35-2 (attached as Sykes Decl. Ex. 7), is protected by the attorney–client privilege because it contains "confidential communications between the Bureau of Land Management and counsel in the Office of the Solicitor." BLM *Vaughn* Index at 1, ECF No. 31-1. But again, the privilege does not protect any and all conversations that involve a lawyer, and the agency's minimal description is insufficient under the *Martin* test. The agency has not explained that the redacted information is "legal advice," nor has it asserted that the advice's confidentiality has been maintained. Both propositions are in doubt. The email at issue was forwarded by Karen Dunnigan—the presumed attorney in the conversation, from the Office of the Solicitor—to Donato Judice of BLM. *See* USA_BLM_00017-1,

[22] The agency does not contend that DOJ's advice was meant for any agency other than BLM. *See* Gov't Br. at 25 ("This withheld information constitutes confidential legal advice *provided to the agency* from its counsel . . . .").

ECF No 35-2. But Ms. Dunnigan's comment describes the redacted material as "Jim Stobaugh's take on further NEPA." *Id.* Mr. Stobaugh is a BLM project manager, not a lawyer, and it is difficult to understand why his "take" on some action under the National Environmental Policy Act, as relayed to an agency lawyer, could be "legal advice" at all, or qualify for the attorney–client privilege.

USA_BLM_00043

Second, BLM invokes Exemption 5's deliberative-process privilege to withhold a paragraph in a "Communication Plan" concerning the Keystone XL Pipeline. *See* USA_BLM_00043, ECF No. 35-2 (attached as Sykes Decl. Ex. 8). The agency asserts that this information qualifies for the privilege because it "includes internal speculation and concerns about law enforcement and possible impacts to communities." BLM *Vaughn* Index at 2, ECF No. 31-1. But the privilege does not protect deliberations concerning how to present government policies to the public. Indeed, such discussions are at the core of what FOIA requires to be released. *See NLRB v. Sears*, 421 U.S. 132, 151–52 (1975) (noting distinction between "predecisional communications, which are privileged, . . . and communications made after the decision *and designed to explain it, which are not*" (citations omitted and emphasis added)); *see also Nat'l Day Laborer Org. Network*, 811 F. Supp. 2d at 736 ("The privilege . . . does not extend to materials related to the explanation, interpretation or application of an existing policy, as

opposed to the formulation of a new policy." (quoting *Resolution Tr. Corp. v. Diamond*, 137 F.R.D. 634, 641 (S.D.N.Y. 1991))). Because messaging deliberations "typically do not relate to the type of substantive policy decisions Congress intended to enhance through frank discussion," they are privileged only to the extent that "their release would reveal the status of internal deliberations on substantive policy matters." *Fox News Network, LLC v. Dep't of Treasury*, 739 F. Supp. 2d 515, 545 (S.D.N.Y. 2010); *see Fox News Network, LLC v. Dep't of Treasury*, 911 F. Supp. 2d 261, 277 (S.D.N.Y. 2012) (distinguishing unprivileged documents consisting of "advice regarding messaging" from privileged documents revealing "deliberations with respect to the underlying substantive policy . . . [that] would reveal alternatives that were not chosen, and reasoning that might inaccurately reflect the ultimate rationale for a policy" (quotation marks omitted)). In other words, the privilege "does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002) (quotation marks omitted).

BLM appears to suggest that the relevant "decision" for purposes of the deliberative-process privilege is the Communication Plan itself. *See* Gov't Br. 22.[23]

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[23] The government cites *Petroleum Info. Corp. v. DOI*, 976 F.2d 1429, 1434 (D.C. Cir. 1992), for the proposition that the deliberative-process privilege protects "documents [that] were created to assist the agency decision maker in developing a

But the face of the document makes clear that is not the case. The decision to which the Communication Plan relates appears to be President's Trump's decision—made more than two months prior to the date on the "Updated" document, *see* USA_BLM_00042, ECF No. 35-2 (attached as Sykes Decl. Ex. 8) ("Updated March 27, 2017")[24]—to authorize the Keystone XL Pipeline. While the government contends that the redacted material "contain[s] government employees' input and thoughts regarding the communications plan's development," Gov't Br. 22, the document itself belies that assertion. The section surrounding the redacted paragraph does not reflect any "input" or "thoughts." Rather, the other paragraphs in the section are characterizations of various groups' publicly stated positions concerning the pipeline. *See, e.g.*, USA_BLM_00043, ECF No. 35-2 (attached as Sykes Decl. Ex. 8) ("4. The majority of the local civil population in Montana appears to view the potential project in either a neutral or

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plan for community engagement," Gov't Br. 23, but that case merely recites general standards concerning the privilege and nowhere mentions plans related to "community engagement," "communications," or "messaging."

[24] On January 24, 2017, the White House released its Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, which expedited the approval process for the Canada-to-Texas oil pipeline. *See* Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline. Two months later, President Donald Trump announced that his administration had formally approved the pipeline. *See* Elise Labott & Jeremy Diamond, *Trump Administration Approves Keystone XL Pipeline*, CNN, Mar. 24, 2017, https://cnn.it/2JJeDpW.

positive light, generally due to the possibility of positive economic influences from construction."); *see also, e.g.*, *Nat'l Day Laborer Org. Network*, 811 F. Supp. 2d at 749 ("The redacted portions are no more deliberative than those left unredacted, even if they are more embarrassing to the agency, which of course is not a relevant consideration under FOIA."). In other words, whatever is under the redaction, it is not a deliberation about the Communication Plan—it *is* the plan. That it contains assessments and reflections authored by the agency does not make it deliberative (or predecisional) under Exemption 5.[25] Instead, it makes it quintessentially unprotected by the deliberative-process privilege as a "communication[] made after [a] decision and designed to explain it." *Sears*, 421 U.S. at 151–52.

III. The FBI's Blanket *Glomar* Response Is Unlawful.

Rather than respond to the Request, the FBI issued a "*Glomar*" response based on its assertion that confirming or denying the existence or nonexistence of responsive records would reveal information protected by Exemption 7. But as explained below, the FBI's blanket refusal to search violates FOIA because that argument is not logical or plausible—and, most directly, because the record in this case contains evidence of responsive FBI records.

[25] Moreover, even if the relevant "decision" were the Communication Plan itself, apart from a missing date, there is absolutely no indication on the face of the document that it is any kind of draft—it bears no comments or tracked changes, and appears final in its form.

A. *Glomar* responses are reserved for exceptional circumstances.

In rare cases, an agency may refuse to confirm or deny the existence (or nonexistence) of responsive records. The refusal to confirm or deny is known as a "*Glomar* response," a term born out of the events giving rise to *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). "Because *Glomar* responses are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information, *see Vaughn*, 484 F.2d at 826–28, they are permitted only when confirming or denying *the existence of records* would itself cause harm cognizable under an FOIA exception." *Roth v. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (emphasis added) (quotation marks omitted); *see Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016) (explaining that a *Glomar* response asserts that merely confirming or denying the existence of records in its possession "is itself a fact exempt from disclosure"); *ACLU v. CIA* ("*Drones FOIA*"), 710 F.3d 422, 433 (D.C. Cir. 2013). An agency can only justify a *Glomar* response in "unusual circumstances, and only by a particularly persuasive affidavit." *Florez*, 829 F.3d at 182 (quoting *N.Y. Times*, 756 F.3d at 122). That is because of the unique and extreme nature of *Glomar*, and its warping effect on agencies' normal FOIA obligations. A *Glomar* response does not implicate any claims of exemption over particular, identified, responsive documents or their contents—rather, it cuts

off an agency's FOIA responsibilities at the threshold.

While it is the government's own high burden to sustain a *Glomar* response, a plaintiff can directly undermine that response in two ways.

First, a plaintiff may challenge the agency's claim that merely "confirming or denying the existence of records would itself 'cause harm cognizable under an FOIA exception.'" *Drones FOIA*, 710 F.3d at 426; *see Wilner*, 592 F.3d at 68; *see also De Sousa v. CIA*, 239 F. Supp. 3d 179, 190 (D.D.C. 2017). If responding to the Request in a normal fashion would not logically and plausibly cause such harm, the *Glomar* response is unlawful.

Second, a plaintiff can defeat a *Glomar* response by showing that the government has already disclosed information sufficient to establish "the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response is designed to protect." *Drones FOIA*, 710 F.3d at 427; *see Agility Pub. Warehousing Co. K.S.C. v. NSA*, 113 F. Supp. 3d 313, 326 (D.D.C. 2015). Under the official acknowledgment doctrine, when the government voluntarily discloses information, it waives its right to invoke a FOIA exemption with respect to that information—whether with respect to a *Glomar* response or an ordinary exemption claim with respect to a particular record. *See N.Y. Times*, 756 F.3d at 114; *Drones FOIA*, 710 F.3d at 426. When courts apply

the official acknowledgment doctrine to information found in specific responsive records, they ordinarily use a three-pronged test. *See* *N.Y. Times*, 756 F.3d at 120 ("The three-part test for 'official' disclosure" is satisfied if the information "is as specific as the information previously released . . . , it matches the information previously disclosed, and was made public through an official and documented disclosure." (alteration and some quotation marks omitted) (quoting *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009))). *But see id.* at 120 n.19 ("Although . . . *Wilson* remains the law of this Circuit, we note that a rigid application of it may not be warranted in view of its questionable provenance.").

However, when courts apply the official acknowledgment doctrine to *Glomar* responses, their inquiry is slightly different: "[W]here the official acknowledgment or prior disclosure demonstrates the existence of the records the requester seeks, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information." *Smith v. CIA*, 246 F. Supp. 3d 28, 32 (D.D.C. 2017) (quotation marks omitted) (quoting *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007)); *see Drones FOIA*, 710 F.3d at 426–27. Thus, the official acknowledgment inquiry in *Glomar* cases is not whether the government has officially acknowledged that it possesses responsive records, in those terms. Rather, the inquiry focuses on whether officially

acknowledged facts or information render the government's *Glomar* justification unsustainable because it is neither "logical" nor "plausible." *See N.Y. Times*, 756 F.3d at 119 (quotation marks omitted); *Drones FOIA*, 710 F.3d at 428–29; *see also Wolf*, 473 F.3d at 378.[26]

For example, in *Drones FOIA*, the CIA issued a *Glomar* response to a request for information concerning the United States' use of lethal drones to conduct targeted killings. 710 F.3d at 425–26. But the D.C. Circuit rejected the response as unlawful, holding that because the government had officially acknowledged "that the Agency does have an interest in drone strikes, it beggars belief that it does not also have documents relating to the subject." *Id.* at 431. Likewise, in *Wolf*, 473 F.3d 370, and in *Boyd v. Criminal Division of DOJ*, 475 F.3d 381 (D.C. Cir. 2007), the same court rejected agencies' *Glomar* responses because the agencies had officially acknowledged information sufficient to establish the existence of records about the subjects of the requests: a deceased Colombian politician, *see Wolf*, 473 F.3d at 379, and a former government

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[26] *See, e.g.*, *ACLU v. DOD* ("*Yemen Raid FOIA*"), 322 F. Supp. 3d 464, 475 (S.D.N.Y. 2018) ("A public official or agency may officially acknowledge the existence of responsive records (or lack thereof) in two ways. Most directly, that official or agency can make a statement admitting the existence of responsive records, for example, by reading excerpts of the records aloud at a congressional hearing. An official acknowledgement can also occur indirectly, when the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist." (citations and quotation marks omitted)).

informant, *see Boyd*, 475 F.3d at 389. *See also Yemen Raid FOIA*, 322 F. Supp. 3d 464; *Nat'l Sec. Archive v. CIA*, No. 99-1160, slip op. at 15–16, 19 (D.D.C. July 31, 2000), ECF No. 26; *Nuclear Control Inst. v. U.S. Nuclear Reg. Comm'n*, 563 F. Supp. 768, 772 (D.D.C. 1983).

B. The FBI cannot logically or plausibly sustain a *Glomar* response to the Request.

Here, the FBI has responded to the Request with a *Glomar* response, but the agency both misunderstands the function of that response and fails to justify it here because the record shows the agency *does* have responsive records. The FBI contends that responding to the Request "would reveal FBI capabilities and vulnerabilities to address threats and undermine its enforcement efforts related to the pipeline." Gov't Br. 33–34 (citing Declaration of David M. Hardy, FBI ¶¶ 18–21, ECF No. 32 ("Hardy Decl.")). It also argues that it may lawfully *Glomar* the Request because "acknowledging the existence/non-existence of responsive records would not only 'confirm[] or deny[] the specific triggers' for detecting threats to the pipeline, but would also disclose the FBI's actions and resources to thwart such threats." *Id.* at 34 (quoting Hardy Decl. ¶¶ 18–21). But the agency's claims are not sustainable—let alone "particularly persuasive," *Florez*, 829 F.3d at 182 (quoting *N.Y. Times*, 756 F.3d at 122), as they must be in order to sustain a *Glomar* response. This Court should order the FBI to conduct a FOIA search.

First, the FBI misunderstands its burden to justify a *Glomar* response, and as a consequence fails to meet it. The agency's various justifications for its blanket non-response to the Request are, in substance, not concerned with *generally responding* to the Request regarding the *existence or non-existence* of responsive records. Rather, those justifications focus on the potential that the disclosure of *specific responsive records* could cause harm under FOIA—and these are manifestly insufficient as a matter of law to justify the FBI's *Glomar* response.

Simply put, acknowledging whether the agency possesses records responsive to any of the highly general categories of the Request would reveal only that it has at least one record in that entire category. It would not reveal whether the agency has a record concerning a specific "threat," a particular "investigation," a special "technique," or even a specific pipeline.[27] Indeed, responding to the Request would not even disclose that those records relate specifically to activities or interests of

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[27] If the Request concerned a specific pipeline protest, the FBI might have a stronger argument that responding as required under FOIA would reveal a specific interest or activity that merited protection under a FOIA exemption. *See, e.g.*, *Wolf*, 473 F.3d at 376–77 (upholding CIA's *Glomar* response to request for records related to a specific foreign national); *Ctr. for Constitutional Rights v. DOD*, 968 F. Supp. 2d 623, 638 (S.D.N.Y. 2013) (upholding CIA's *Glomar* response to request for photographs and videos of a specific terrorist suspect); *ACLU v. DOD*, 752 F. Supp. 2d 361, 367 (S.D.N.Y. 2010) (upholding CIA's *Glomar* response to request for records related to the rendition of terrorist suspects at a specific Air Force base in Afghanistan). But this is not such a case. *See, e.g.*, *Yemen Raid FOIA*, 322 F. Supp. 3d at 478 (rejecting CIA's *Glomar* response in part because general request did not ask for records about the CIA's role in a specific operation).

the FBI itself (as opposed to those of another agency or state entity).[28] Yet those are the bases upon which the FBI seeks judicial endorsement of its refusal to search for records in this case. *See, e.g.*, Hardy Decl. ¶¶ 11–12, ECF No. 32.

As a result, those justifications are plainly insufficient to justify its blanket *Glomar* response because they do not logically and plausibly allege likely harm to an interest protected by a FOIA exemption. For example, the FBI asserts that responding to the Request "would require the FBI to confirm or deny detection of one or more *specific credible threats* to the pipeline." *Id.* ¶ 11 (emphasis added); *see id.* ("would alert those involved in potential criminal activity against the pipeline of the FBI's assessment into their activities and alert them their activity(ies) triggered a *specific investigation* to thwart potential threats" (emphasis added)); *id.* ¶ 12 (would "tip[] off criminals that *certain activities* (and perhaps not others) have been detected and thus allow them the ability to take countermeasures to avoid further detection and/or potential prosecution" (emphasis added)). But the Request nowhere asks for records concerning how law enforcement has addressed "threats," nor does it ask about investigations or criminal activity—it asks for records concerning preparations for lawful First Amendment–protected protests. *See* Request at 6, ECF No. 37-1. Likewise, the agency purports to justify its

[28] *See Drones FOIA*, 710 F.3d at 428 ("The CIA has proffered no reason to believe that disclosing whether it has any documents at all about drone strikes will reveal whether the Agency itself—as opposed to some other U.S. entity such as the Defense Department—operates drones.").

extreme *Glomar* response on the basis that responding "would disclose law enforcement techniques or procedures used by the FBI," Hardy Decl. ¶ 12, ECF No. 32, would reveal that "investigative activity is occurring," *id.* ¶ 15, would make public "the specific triggers that result in detection of a recent or current credible threat to the pipeline" and the "specific actions the FBI anticipates taking to thwart such a threat," *id.* ¶ 18, and would "disclose the scope of the FBI's investigative capabilities and vulnerabilities," *id.* ¶ 20. But again, while it is conceivable that the disclosure of *particular* records (or information in those records) could plausibly implicate these reasons for withholding, that is irrelevant to the FBI's burden here. And there is no sense in which responding that the agency does or does not have "[l]egal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests," Request at 6, ECF No. 37-1, would reveal any "specific trigger[]" for "investigative activity," or even that "investigative activity is occurring," or disclose the "scope" of any FBI capability, Hardy Decl. ¶¶ 15, 18, 20. The same is true of the other categories of the Request.

Second, the FBI cannot meet its *Glomar* burden because the record in this case makes clear that the FBI does, in fact, have records responsive to the Request. Indeed, the FBI appears in numerous responsive documents produced by BLM. Not only that, BLM revealed that the FBI *does* have responsive records: both

USA_BLM_00060 and USA_BLM_00061 indicate that they are "FBI Document[s] addressed in its response" to the Request. Of course, the FBI did not respond to the Request at all with anything other than a *Glomar* response. By itself, the government's revelation that the FBI has records responsive to the Request defeats its *Glomar*. *See Yemen Raid FOIA*, 322 F. Supp. 3d at 475 (explaining that the "[m]ost direct" way to defeat a *Glomar* response is to show that an agency has "ma[d]e a statement admitting the existence of responsive records").

Yet there is more. Additional responsive records produced by BLM in this litigation show that the FBI has, at the very least, been party to conversations and meetings concerning the topics sought by the Request, undermining whatever interest in secrecy the agency seeks to protect through its blanket *Glomar* response. At least some individuals employed by the FBI appear on email chains concerning an "upcoming meeting" concerning "the joint efforts currently underway at the national, state and local levels to ensure we are approaching this with one unified effort." USA_BLM_00063, ECF No. 35-2; *see also* USA_BLM_00055, USA_BLM_00057, USA_BLM_00059, USA_BLM_00062, ECF No. 35-2 (emails received by FBI regarding scheduling a "federal partners planning meeting" for September 2018). The FBI is listed as a "Guest" at "another" planned "Large Incident Planning meeting" hosted by a state agency, the Montana Disaster and Emergency Services Division. *See* USA_BLM_00027, ECF No. 35-2. The FBI has

received updates from BLM concerning public records obtained by one of the Plaintiffs in this lawsuit through a Montana state records request. *See* USA_BLM_00052, ECF No. 35-2.

And it gets worse. An FBI employee *wrote* an email to a large group of federal officials identifying him- or herself as being "assigned to the Pipeline Security Initiative," and as the "primary point of contact between the FBI HQ and the pipeline industry"—someone whose role it is to "examine the challenges and best practices associated with the protection of oil and natural gas critical infrastructure with locally based federal, state and municipal officials." USA_BLM_00067, ECF No. 35-2. It is identified as part of an "LE"—law enforcement—"sub group" whose goal it was to "talk[] about issues that the state may face due to pipeline construction and hear some lessons learned from agencies that assisted in North Dakota." USA_BLM_00091, USA_BLM_00093, ECF No. 35-2. And it also identified as part of an "Intelligence" "work group" concerning a "Pipeline Planning" meeting in June 2017. USA_BLM_00152, ECF No. 35-2; *see also* USA_BLM_00107, USA_BLM_00136, USA_BLM_00138, ECF No. 35-2.

Finally, Plaintiffs' state-based public-records requests indicate that Nicolette Rose of the FBI was invited to attend a "Field Force Operations" training conducted by the Department of Homeland Security and FEMA. *See* Email from Jeffrey Gates, Field Officer, Montana Disaster & Emergency Services (Sept. 13,

2017) (attached as Sykes Decl. Ex. 3). The Montana Department of Justice solicited "security information" from Ms. Rose. *See* Email from Anne Dormady, Montana Department of Justice (May 30, 2018) (attached as Sykes Decl. Ex. 9). And again, Ms. Rose was invited to attend a "social media training." *See* Emails from Jeffrey Gates, Field Officer, Montana Disaster & Emergency Services (Apr. 25, 2018 & Apr. 29, 2018) (attached as Sykes Decl. Ex. 1). Michael Rankin, an intelligence specialist with the U.S. Attorney's Office, described that event as an "anti-terrorism training." *Id.* It is unclear whether the "social media training" is the same as a "Social Networking and Cyberawareness training" that was the subject of a flyer also circulated to Ms. Rose. *Id.*

It is irrelevant that other entities—BLM, Lewis and Clark County, and Dawson County—and not the FBI, revealed these FBI records. In evaluating whether the agency has met its "logical and plausible" burden, any evidence deemed "relevant" under the Federal Rules of Evidence may be brought to bear on evaluating the legitimacy of an agency's Glomar response. *Florez*, 829 F.3d at 185–87. In *Florez*, the Second Circuit addressed the relevance of the affidavits of other agencies to its "logical and plausible" evaluation of the CIA's *Glomar* response, and refused to "place an arbitrary limitation on the range of evidence a district court may consider in assessing the sufficiency of an agency affidavit filed in support of a Glomar response." *Id.* at 187; *see id.* ("It defies reason to instruct a

district court to deliberately bury its head in the sand to relevant and contradictory record evidence solely because that evidence does not come from the very same agency seeking to assert a Glomar response in order to avoid the strictures of FOIA."); *see also Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) ("The test is . . . whether *on the whole record* the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility . . . ." (emphasis added)).

In the face of these acknowledgments of FBI involvement in precisely the types of activities that would produce records responsive to the Request, the FBI cannot justify its blanket *Glomar* response. In short, it is simply not logical or plausible that the agency cannot acknowledge whether or not it has records responsive to the Request. In light of BLM's productions, such an assertion "beggars belief," *Drones FOIA*, 710 F.3d at 431, and the Court should order the FBI to conduct a FOIA search.[29]

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[29] *See, e.g.*, *Roth*, 642 F.3d at 1181 (rejecting government's justifications for *Glomar* response under law-enforcement exemptions); *Jefferson v. DOJ*, 284 F.3d 172, 178–79 (D.C. Cir. 2002) ("[A]s the case giving rise to 'the *Glomar* response' itself makes clear, the Department cannot rely on a bare assertion to justify invocation of an exemption from disclosure . . . . [Here,] a *Glomar* response was inappropriate in the absence of an evidentiary record produced by [the agency] . . . ."); *see also, e.g.*, *Judicial Watch, Inc. v. U.S. Secret Serv.*, 579 F. Supp. 2d 182, 186 (D.D.C. 2008) (rejecting agency's *Glomar* response because its "argument that knowledge of the mere existence or absence of [records] poses a security risk does not hold water"); *ACLU v. DOD*, 389 F. Supp. 2d 547, 561, 566 (S.D.N.Y. 2005)

CONCLUSION

For the reasons above, Plaintiffs respectfully ask this Court to deny Defendants' motion for summary judgment and grant Plaintiffs' cross-motion for partial summary judgment. Plaintiffs further request that the Court issue an order directing: (1) the Army Corps, BLM, and the FBI to conduct new, adequate searches and promptly release all responsive records or justify their withholding; and (2) the Army Corps and BLM to promptly release the improperly withheld or redacted material identified above.

DATED this 22nd day of May, 2019.

/s/ Emerson Sykes
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(rejecting CIA *Glomar* response as to one category of requested records because the fact of their existence was not properly classified).

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E) and this Court's Order , the attached brief is proportionately spaces, has a typeface of 14 points and contains 12,848 words, excluding the caption and certificates of service and compliance.

DATED this 22nd day of May, 2019.

/s/ Emerson Sykes
Emerson Sykes

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2019, a true and correct copy of the above and foregoing document was duly served upon the following counsel of record and interested parties by CM/ECF:

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