

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
NEW YORK TIMES)	
COMPANY, <i>et al.</i> ,)	
)	
	Plaintiffs,)	
)	
v.)	Civil Action No. 19-3562 (ABJ)
)	
OFFICE OF MANAGEMENT)	
AND BUDGET,)	
)	
	Defendant.)	
_____)	

ORDER

This matter involves a Freedom of Information Act (“FOIA”) request sent from the New York Times and its reporter Charlie Savage to the Office of Management and Budget (“OMB”) seeking:

all email correspondence between Michael Duffey [OMB’s Principal Associate Director for National Security Programs] and Robert Blair [an Assistant to the President and Senior Advisor to the White House Chief of Staff] from May 1 to the present.

Ex. A to Aff. of David E. McCraw [Dkt. # 10-1] (“McCraw Aff.”); *see also* Compl. [Dkt. # 1] ¶ 7. The agency identified twenty-one responsive records and withheld all of them pursuant to FOIA Exemption 5. Decl. of Heather V. Walsh [Dkt. # 23-1] (“Walsh Decl.”) ¶ 11.

On March 29, 2021, the Court granted in part and denied in part the parties’ cross motions for summary judgment. Order of Mar. 29, 2021 [Dkt. # 35] (“March 29 Order”). After conducting an *in camera* review, it ordered the production of Documents 1, 2, 3 (in part, excluding the 8/23/19 email from Blair to Duffey), 4, 5, 11, 19, 20, and 21 (in part, excluding the first paragraph of the 7/17/19 email from Duffey to Blair under the presidential communications

privilege and the second paragraph of both emails in the chain under the deliberative process privilege). *Id.* at 14. The Court also held that Documents 3 (in part, including the 8/23/19 email from Blair to Duffey), 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, and 21 (in part, including the first and second paragraphs of the 7/17/19 email) were justifiably withheld under the presidential communications privilege. *Id.* at 14–15.

At that point, however, the Court called for additional information with respect to Documents 7, 9, 10, 14, 15, and 17 and the finding to be made under FOIA’s foreseeable harm provision, 5 U.S.C. § 552(a)(8)(A). That section provides that records that are otherwise protected from disclosure under an exemption must be still be released unless the agency “reasonably foresees that disclosure would harm an interest protected by the exemption.” *See* March 29 Order at 4. On April 16, the parties notified the Court that they had reached an agreement regarding Documents 9, 10, 14, 15, 17, and 21. *See* Joint Notice [Dkt. # 37].

The Court held a hearing on April 19, 2021 and set out the reasons for its determinations with respect to each document on the record. *See* Tr. of Hr’g, *New York Times Co. v. OMB*, No. 19-3562 (Apr. 19, 2021) (“Hr’g Tr.”) at 17:15–24:4, 24:11–32:14, 32:20–35:9.

After all of those developments, one document remains at issue in this case: Document 7. *See* Min. Entry (Apr. 19, 2021).

Document 7 was an attachment to Document 6, a September 2019 email from Duffey to Blair transmitting information that Blair had requested in connection with providing advice to the President, and the Court determined that both documents were covered by the presidential communications privilege and could be lawfully withheld under Exemption 5. *See* March 29 Order at 14; Hr’g Tr. at 9:2–12:5, 30:21–33:7. It reiterated, though, that it had concerns about whether the agency had shown the harm to the interests underlying the privilege that could flow from

disclosure since the record was only a copy of a notification that another agency would transmit to Congress.

The document transmitted to Blair from Duffey at OMB emanated from the Department of State, and OMB took the position that it was a draft, which was also covered by the deliberative process privilege. The Court then permitted the parties to file supplemental submissions addressing the issue of whether the release of Document 7 would cause any harm to privileges protected under FOIA's Exemption 5. Min. Order (Apr. 9, 2021).

The parties have filed supplemental memoranda,¹ and the defendant has also submitted a declaration from Eric F. Stein, the Director of the Office of Information Programs and Services ("IPS") at the State Department. Decl. of Eric F. Stein [Dkt. # 38-1] ("Stein Decl.") ¶ 1. He avers that Document 7 was sent from State to OMB as part of a pre-clearing process, Stein Decl. ¶, 8, and that differs from the final version published on September 11, 2019. *Id.* ¶ 9. He submits that the document should be withheld under the deliberative process privilege as it is a pre-decisional, inter-agency draft, *id.* ¶¶ 11–12, and that ordering its production would harm the agency's interest in open communication and consultation about pending funding decisions. *Id.* ¶¶ 13–14.

The Court has reviewed parties' submissions, and it has compared Document 7 with the final public version eventually issued in September of 2019. It finds that the document is covered by the deliberative process privilege that covers not only intra-agency, but inter-agency communications, and that the State Department's declarant has sufficiently articulated the harm that would flow from publicly disseminating what was only a draft at the time Duffey had access to it and sent it to Blair. While the text of the draft was largely incorporated into the publicly

¹ Def.'s Suppl. Brief in Supp. of Withholding Doc. 7 [Dkt. # 38] ("Def.'s Suppl."); Pls.' Suppl. Mem. of Law in Opp. to Withholding of Doc. 7 [Dkt. # 39] ("Pls.' Suppl.").

available final version, the final version contained additional provisions that were not included as of the time the draft was sent to OMB. Revealing those changes would reveal intra- and inter-agency deliberations, and developments in the State Department's thinking, and those matters are entirely outside the scope of the FOIA request at issue in this case in any event.

For these reasons, the Court finds that defendant has made the required showing under section 552(a)(8)(A). And with the Court's resolution of the status of Document 7, this case comes to a close.

Therefore, based on this Court's review of the entire record, including the documents *in camera*, and for the reasons stated on the record on April 19, 2021, and herein, it is hereby **ORDERED** that the following records must be produced:

- Document 1
- Document 2
- Document 3 [in part: release all but the 8/23/19 email from Blair to Duffey]
- Document 4
- Document 5
- Document 11
- Document 19
- Document 20

It is further ordered that the withholding of the following documents or portions of documents was justified under the Presidential communications privilege (unless otherwise noted):

- Document 3 [in part: Blair 8/23/19 email to Duffey was properly withheld under Presidential communications privilege]
- Document 6
- Document 7 [also covered by the deliberative process privilege]
- Document 8
- Document 12
- Document 13
- Document 16
- Document 18

The issues the Court identified in its March 29 Order regarding Documents 9, 10, 14, 15, 17, and 21 were resolved by the parties' agreement of April 16, 2021 and are now moot. *See* Joint Notice.

This is a final, appealable order.



AMY BERMAN JACKSON
United States District Judge

DATE: May 18, 2021