UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff	)	
v.	)	No. 1:08-cv-01468 (EGS) Hon. Emmet G. Sullivan
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

UNITED STATES DEPARTMENT OF JUSTICE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

The Department of Justice ("DOJ") has declined to release to plaintiff documents that record the interview that the Vice President provided in a DOJ criminal investigation, because the Attorney General has concluded that release of these documents could undermine law enforcement investigations. Specifically, the Attorney General has concluded that the release of the documents could have a chilling effect on voluntary cooperation by future Presidents, Vice Presidents, and senior White House officials in cases involving the White House. This in turn, the Attorney General has concluded, could significantly impair the integrity and effectiveness of criminal investigations involving official conduct of the White House.

Plaintiff offers no basis to rebut the Attorney General's judgment, as the chief law enforcement officer of the United States and head of the Department of Justice, as to the deleterious effect that release could have on DOJ's law enforcement interests. Instead, plaintiff argues that, regardless of the important law enforcement interests at issue, no Freedom of

Information Act ("FOIA") exemption applies. Plaintiff is mistaken. FOIA Exemption 7(A) specifically protects against release of law enforcement records where release could impair a reasonably anticipated law enforcement investigation. In addition, Exemption 5 incorporates all civil discovery privileges, including the law enforcement privilege, which serves to protect information whose release could damage DOJ investigations. Plaintiff's remaining arguments regarding DOJ's other claimed exemptions are also without merit for reasons set forth below. For these reasons, DOJ's Motion for Summary Judgment should be granted and plaintiff's Motion for Summary Judgment should be denied.

I. The Declaration of Steven Bradbury Fully and Adequately Explains the Factual Bases for the Claimed Exemptions

Plaintiff's assertion that the Bradbury declaration is "conclusory," Pl's Opp'n at 7, is entirely without merit. As demonstrated below, Mr. Bradbury's declaration provides sufficient factual bases for each of the exemptions claimed. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) ("[W]e focus on the functions of the *Vaughn* index, not the length of the document descriptions, as the touchstone of our analysis."). Indeed, plaintiff can cite examples of supposedly "conclusory" passages only by taking phrases out of context and ignoring preceding passages.

Plaintiff first asserts: "Mr. Bradbury states, without any explanation or elaboration, that 'DOJ's ability to conduct future law enforcement investigations that might require White House cooperation would be significantly impaired' if any portion of the disputed material is released." Pl's Opp'n at 8 (emphasis omitted). In fact, Mr. Bradbury's conclusion on this point is preceded by an extensive, fact-based analysis:

> For the reasons the Attorney General set forth in his letter to the President, releasing the investigative interview report and notes of the interview with the Vice President, which include discussion of confidential internal White House deliberations, could significantly undermine future Department of Justice criminal investigations involving official White House activities. Their release could deter senior White House officials from participating fully and frankly in voluntary interviews in such investigations. Alternately, rather than risk having notes or summaries from interviews disclosed to congressional committees or FOIA requesters, the officials might insist on disclosing information only pursuant to a grand jury subpoena in order to ensure the secrecy protections of Rule 6(e) of the Federal Rules of Criminal Procedures. The Attorney General determined that under either scenario, the Department's ability to conduct future law enforcement investigations that might require White House cooperation would be significantly impaired.

Bradbury Decl. ¶ 9. The basis for DOJ's concern for the effectiveness of its law enforcement investigations is thus clear. If White House officials at the highest level of government believe that the content of their voluntary interviews with DOJ investigators will become "potential item[s] of discovery and front page news," *Dep't of the Interior v. Kamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001), they might be deterred from offering their voluntary cooperation. This, the Attorney General has concluded, could significantly impair DOJ's ability to conduct law enforcement investigations that require the cooperation of the White House.

Plaintiff's only other example of a supposedly "conclusory" assertion by Mr. Bradbury is that "Mr. Bradbury offers the categorical and conclusory opinion that '[d]isclosing . . . sensitive conversations involving the President, the Vice President, and other senior White House officials could impair effective presidential decisionmaking.'" Pl's Opp'n at 8. Again, plaintiff widely misses the mark. This statement also follows a fact-based discussion of the nature of the communications at issue. *See* Bradbury Decl. ¶ 14. Moreover, Mr. Bradbury's supposedly "conclusory opinion" that disclosing sensitive presidential communications could impair

effective presidential decisionmaking is identical to findings of the Supreme Court and the D.C. Circuit. *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (noting that the Supreme Court has ruled that confidentiality of discussions of presidential advisers related to advising the President is "necessary to guarantee the candor of presidential advisors and to provide a President and those who assist him with freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately" (quotation and alterations omitted)).[1]

Plaintiff's attack on Mr. Bradbury's declaration is thus without merit.

II. The Withheld Documents Are Protected by Exemption 7(A)

FOIA Exemption 7(A) exempts from disclosure documents that were (1) "compiled for law enforcement purposes" and (2) whose disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Plaintiff concedes that the records at issue were compiled for law enforcement purposes. Pl's Opp'n at 8. Thus, the only remaining issue is whether the production of these records "could reasonably be expected to interfere with enforcement proceedings." As Mr. Bradbury's declaration explains, the Attorney General has concluded, as set forth in his letter to the President, that, by deterring future cooperation from a

[1] In a later section of its brief, plaintiff cites *Morley v. CIA*, 508 F.3d 1108, 1122-23 (D.C. Cir. 2007), for the prospect that an agency must correlate the bases for exemptions with the exempted material. *See* Pl's Opp'n at 11. *Morley* deals with an agency's obligation to correlate its reasons for redactions with those redactions. *See Morley*, 508 F.3d at 1122 (noting that "a categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate" (quotation and alteration omitted)). This rule has no application here as all documents were withheld in full and thus there are no redactions to explain. Indeed, it would be impossible to correlate reasons with redactions as there are no redactions. *See Judicial Watch*, 449 F.3d at 147 (finding that description of "the kinds of information withheld and how they related to the exemptions" was sufficient).

frequently important source – the White House, release could interfere with DOJ enforcement proceedings. *See* Bradbury Decl. ¶¶ 9-10. Plaintiff nowhere disputes this potential chilling effect nor provides any reason to doubt the Attorney General's judgment. Moreover, the Court should defer to this judgment by the chief law enforcement officer of the United States and the head of the Department of Justice.

Plaintiff bases its opposition to this claim of exemption entirely on plaintiff's contention that Exemption 7(A) "require[s] the existence of an ***ongoing*** investigation or enforcement proceeding." Pl's Opp'n at 8 (emphasis in original). This is simply an incorrect statement of the law. While Exemption 7(A) claims are normally made in the context of an ongoing law enforcement investigation, *e.g.*, *Juarez v. Dep't of Justice*, 518 F.3d 54 (D.C. Cir. 2008), the D.C. Circuit has made it clear that Exemption 7(A) can apply so long as an enforcement action is "***reasonably anticipated***." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (emphasis in original). In *Mapother*, the court addressed records relating to the exclusion of Kurt Waldheim from the United States for past Nazi-related activities. The plaintiffs in that case argued (and the district court concluded) that it was highly unlikely that Waldheim would challenge his exclusion, and thus no proceeding could be reasonably expected. The D.C. Circuit rejected this argument, holding that it was error to focus only on the specific likelihood of a challenge by Waldheim, and that DOJ could assert Exemption 7(A) because it was reasonable to expect that at some point some alien excluded for Nazi-related activity would bring a challenge:

> The critical question facing us, then, is not whether Mr. Waldheim is likely to appeal his listing, but whether, in the run of cases involving persons excluded from the United States [for Nazi-related activity], there is a reasonable likelihood of a challenge. Although the district court did not direct its attention to this issue, we think it plain that the prospect of such a challenge is not so unreasonable as to

> permit us to affirm the district court's ruling. The desire of many tens of thousands of aliens to enter the United States is too manifest, and the crimes committed by the Nazis too heinous, to permit the assumption that an exclusion order will not be challenged. We hold, then, that in such cases and therefore this one–Exemption 7(A)'s requirement that enforcement proceedings be reasonably anticipated is met.

Id. at 1542.

Following the reasoning of *Mapother*, the critical question facing this Court is not, as plaintiff contends, whether there is an "ongoing investigation," but whether "in the run of cases" going forward "there is a reasonable likelihood" that DOJ will require the voluntary cooperation of the White House. DOJ submits that, given the regularity in which we have seen investigations that involve the White House, "it is plain that the prospect of [a need for voluntary White House cooperation] is not so unreasonable" as to deny application of Exemption 7(A).

III. The Documents Are Protected by the Law Enforcement Privilege

Plaintiff's contention that the law enforcement privilege is a "novel invention" of this case is simply incorrect. Pl's Opp'n at 13. As the Court is aware, FOIA Exemption 5 protects those documents that are "normally privileged in the civil discovery context." *Schiller v. Nat'l Labor Relations Bd.*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Thus the only question in this case is whether there is a law enforcement privilege that would protect the documents at issue from discovery in civil discovery. While the Sixth Circuit law on which plaintiff relies may be different, *see* Pl's Opp'n at 14, the D.C. Circuit has clearly and repeatedly recognized a law enforcement privilege applicable in civil discovery. *E.g.*, *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000); *Tuite v. Henry*, 98 F.3d 1411 (D.C. Cir. 1996); *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). Given that Exemption 5 incorporates civil discovery privileges and

that the D.C. Circuit has recognized a law enforcement privilege in civil discovery, it necessarily follows that Exemption 5 incorporates the law enforcement privilege.

Furthermore, while it may be true that the law enforcement privilege is not commonly asserted in the Exemption 5 context, this case presents unique facts in which the Attorney General has determined that a significant and specific institutional law enforcement interest would be undermined by the release of the documents at issue. *See* Bradbury Decl. ¶¶ 9-10; *id.* Ex. B. As this Court has recently described it, "[t]he law enforcement investigatory privilege is 'designed to prevent disclosure of information that would be contrary to the public interest in the effective functioning of law enforcement.'" *Tri-State Hospital Supply Corp. v. United States*, 238 F.R.D. 102, 106 (D.D.C. 2006) (quoting *Tuite v. Henry*, 181 F.R.D. 175, 176 (D.D.C. 1998)). Here, plaintiff has given no reason to doubt the Attorney General's judgment related to the public interest in the effective functioning of law enforcement in a small but important subset of cases–those involving the White House. As such, DOJ's assertion of law enforcement privilege should be sustained.

IV. The Executive Branch Has Not Waived the Deliberative Process and Presidential Communications Privileges

Plaintiff's contention that the Executive Branch waived deliberative process and presidential communications privileges when the Vice President provided information to the Department of Justice is baseless. As the D.C. Circuit has held, because executive privileges such as the deliberative process privilege and presidential communications privilege exist "to aid the government decisionmaking process, a waiver should not be lightly inferred." *In re Sealed Case (Espy)*, 121 F.3d 729, 741 (D.C. Cir. 1997). Indeed, it is precisely because these privileges

exist to assist in ***government*** decisionmaking, that they can apply to inter-agency, as well as intra-agency, materials. *E.g.*, *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004) (privileges applied to documents passed between DOJ and White House). As such, neither the purposes of these executive privileges nor the efficient operation of the government would be served by holding that the voluntary, non-public sharing of information between an official exercising executive functions and executive branch investigators waives the privileges that attaches to that information. Indeed, the D.C. Circuit has held that executive privileges are not waived even when the information is sent to Congress. *See Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001); *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979). If disclosures between separate coordinate branches of the government do not waive executive privileges, then surely such privileges are not waived by disclosure between officials exercising executive functions.

Unsurprisingly, plaintiff can cite no case where a court has found a waiver of deliberative process privilege or presidential communications privilege from the sharing of information by two officials exercising executive functions. The case plaintiff relies on, *Espy*, found a limited waiver over a document that the White House had publicly released and a document that the White House had provided to the private counsel of a former government official. *See* 121 F.3d at 741-42. Here, the Executive Branch has not released the information at issue to the public or to a private party. Hence, there has been no waiver.

V. Portions of the Documents Are Subject to the Deliberative Process Privilege

Plaintiff opposes DOJ's assertion of deliberative process privilege on two grounds. First, plaintiff argues that a description of predecisional deliberations is not protected when it is recorded after the decision. Second, plaintiff argues that the deliberative process privilege does not protect the description of predecisional deliberations because, plaintiff contends, such description is "purely factual." Both of these contentions are entirely without merit.

A. These Portions Set Forth Predecisional Deliberations

The deliberative process privilege "allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Espy*, 121 F.3d at 737. In assessing whether material is subject to the privilege, "what matters is whether a document will expose the predecisional and deliberative processes of the Executive Branch." *Judicial Watch, Inc. v. United States Dep't of Energy*, 412 F.3d 125, 131 (D.C. Cir. 2005). Indeed, the deliberative process privilege "serves to protect the deliberative process itself, not merely documents containing deliberative material." *Mapother*, 3 F.3d at 1537.

Against this legal backdrop, plaintiff's assertion that descriptions of predecisional, deliberative discussions are not protected when the deliberations were memorialized after the decision clearly fails. Plaintiff correctly notes that an "after-the-fact explanation of a decision" will generally not be protected by the deliberative process privilege. Pl's Opp'n at 16. But what is at issue here is not an after-the-fact explanation, but a recounting of the predecisional deliberative process itself. *See* Bradbury Decl. ¶ 13. Courts have held that where a post-decisional document reflects predecisional deliberations, the recounting of the predecisional

deliberations is privileged. *See N. Dartmouth Properties, Inc. v. United States Dep't of Housing & Urban Dev.*, 984 F. Supp. 65, 68 (D. Mass. 1997) (holding that "a document that was generated after the agency's decision was made, but which nonetheless reiterated the agency's pre-decisional deliberations" was protected); *Electronic Privacy Information Ctr. v. DHS*, No. 04-1625, 2006 U.S. Dist. LEXIS 94615, at *22-*24 (D.D.C. Dec. 22, 2006) (holding that description of predecisional deliberations set forth after decision was protected)). Indeed, the need for confidentiality of deliberative materials does not depend on when the deliberations were recorded. *See N. Dartmouth*, 984 F. Supp. at 68 (description of predecisional deliberations generated after decision "must be protected to avoid revealing the 'ingredients of the decision-making process'" and "the deliberative process privilege must apply, so that other agency employees will not be deterred from expressing their own opinions in the future" (quoting *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975))); *EPIC v. DHS*, 2006 U.S. Dist. LEXIS 94615, at *24 (protection necessary "disclosure of this information could deter agency employees from being candid in the future" regardless of whether information was recorded before or after decision). The deliberative process privilege is thus applicable to the descriptions of predecisional deliberations at issue here.

B. This Material Is Deliberative

Plaintiff's contention that the deliberative material at issue is not subject to the deliberative process privilege because it is "purely factual" is similarly without merit. The "purely factual" exception applies where documents contain underlying facts that do not reflect the government entity's decision-making process. It does not apply to material that would provide a reflection on the decision-making process. As the D.C. Circuit has held:

> Many exemption five disputes may be able to be decided by application of the simple test that factual material must be disclosed but advisory material, containing opinions and recommendations, may be withheld. The test offers a quick, clear, and predictable rule of decision, but courts must be careful not to become victims of their own semantics. Exemption five is intended to protect the deliberative process of government and not just deliberative material.

Mead Data Central, Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977). The key question in identifying deliberative material," therefore, "is whether disclosure of the information would discourage candid discussion within the agency." *Access Reports v. Department of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991). Where that would be the case, courts have held documents to be exempt from disclosure "[e]ven where the requested material is found to be factual." *Quarles v. Department of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990).

Here the material is not only intertwined with the decision making process, it is the deliberative process:

> Portions of the withheld documents reflect or describe ***frank and candid deliberations*** involving, among others, the Vice President, the White House of Chief of Staff, the National Security Adviser, the Director of the Central Intelligence Agency, and the White House Press Secretary. These deliberations concern, among other things, the preparation of the President's January 2003 State of the Union Address, possible responses to media inquiries about the accuracy of a statement in the President's address and the decision to send Ambassador Joseph Wilson on a fact-finding mission to Niger in 2002, the decision to declassify portions of the October 2002 National Intelligence Estimate, and the assessment of the performance of senior White House staff.

Bradbury Decl. ¶ 13 (emphasis supplied). In other words, what plaintiff calls "purely factual material," is the "fact" that the deliberations occurred and the "factual" content of those deliberations. This is core deliberative material that is protected by the deliberative process privilege.

VI. Portions of the Documents Are Subject to the Presidential Communications Privilege

As the very authority quoted by plaintiff states, the presidential communications privilege "applies to communications that [presidential] advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters." *Espy*, 121 F.3d at 752. The material at issue here fits squarely within this definition: "Portions of the withheld documents summarize communications among the Vice President and senior presidential advisers in the course of preparing information or advice for potential presentation to the President." Bradbury Decl. ¶ 14. Plaintiff's implication that the material at issue relates to "governmental operations that do not call ultimately for direct decisionmaking by the President," Pl's Opp'n at 19 (quotation omitted), is entirely belied by the factual record in this case which demonstrates that the material relates to potential advice to the President. The communications regarding the preparation of advice for the president by senior presidential advisors is at the core of the presidential communications privilege and therefore the privilege applies here.

VII. The Withheld Personal Information Is Protected by Exemptions 6 and 7(C)

Plaintiff concedes that personal information, including the names of private citizens, may normally be withheld under Exemptions 6 and 7(C). *See* Pl's Opp'n at 21. Plaintiff claims, however, that the general rule should yield here because (1) there was "undisputed illegal activity that gave rise to the underlying FBI interview" of the Vice President, and (2) information about "the Plame leak investigation" is already in the public domain. Neither of these contentions justifies a Court order to release this personal information.

Regarding plaintiff's first contention, it is neither correct nor relevant that the interview of the Vice President resulted from "undisputed illegal activity." The interview of the Vice President was part of a Special Counsel investigation that sought to determine whether there was illegal activity in the disclosure of Valerie Plame Wilson's status as a CIA employee. However, the only illegal activity that was ever charged by the Special Counsel related to conduct by I. Lewis Libby during the investigation itself. In any event, whether there was potential or actual illegal activity that led to the interview of the Vice President is irrelevant. Indeed, it will be the case with virtually all documents that were "complied for law enforcement purposes" (a threshold requirement for the applicability of Exemption 7(C)), that their creation or collection will relate to the possibility of underlying illegal activity. That argues in favor of, and not against, the privacy interests of identified individuals. *E.g.*, *Bast v. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). The exception that plaintiff asserts, applies only when the information is necessary to confirm or refute compelling evidence that the agency invoking the exemption is itself engaged in illegal activity – not when the agency was engaged in investigating the potential illegal activity of others. *See Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (disclosure must be "necessary in order to confirm or refute compelling evidence that ***the agency*** is engaged in illegal activity" (emphasis supplied) (quotation omitted)). Thus, this exception could only apply if plaintiff had evidence that the Special Counsel was engaged in illegal activity in the conduct of the interview. This, of course, plaintiff does not allege.

Finally, even if plaintiff could use possible illegal activity as a basis to override personal privacy interests, plaintiff's argument would still fail, as plaintiff has no basis to assert that the

names plaintiff seeks are "necessary to confirm or refute" any claim of illegal activity on the part of any part of the government. *Schrecker*, 349 F.3d at 661. Indeed, the declaration of Mr. Bradbury, based on a personal review of the material, confirms the opposite, noting that the disclosure of this information "would shed no light on official government activities." Bradbury Decl. ¶ 15.

Plaintiff's contention that Exemptions 6 and 7(C) do not apply because there is information regarding the investigation in the public domain is also without merit. The case relied on by plaintiff holds only that an individual may lose his privacy protection under Exemption 7(C) by voluntarily bringing information about himself and the investigation into the public domain. *See Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995). There is no similar forfeiture of privacy protection where some information has been released into the public domain by the government. *See, e.g., Sherman v. United States Dep't of the Army*, 244 F.3d 357, 363-64 (5th Cir. 2001) (government cannot waive Exemption 6 privacy protection which exists to protect individuals); *Davis v. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (disclosure waives protection only for information that specifically duplicates what was disclosed); *United States Student Ass'n v. CIA*, 620 F. Supp. 565, 571 (D.D.C. 1985) (same). As plaintiff has made no claim that any particular private individual has voluntarily placed his or her association with the investigation in the public domain, there is no waiver of Exemptions 6 and 7(C).

VIII. Portions of the Documents Are Protected by Exemptions 1 and 3

Given the nature of the information over which DOJ is claiming Exemptions 1 and 3, it is clear that there is sufficient factual information in the record to sustain DOJ's judgment pursuant

to the standard prescribed by the D.C. Circuit. *See Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (relevant question is whether "on the whole record, the Agency's judgment objectively survives the test of reasonableness, good faith, specificity and plausibility in the field of foreign intelligence"). Mr. Bradbury's declaration states, based on a personal review of the material, that the material consists of intelligence source information that "relates to foreign government information and liaison relationships" and intelligence methods information that "relates to the practices and procedures that the CIA uses to assess and evaluate intelligence and to inform policymakers." Bradbury Decl. ¶ 16. While the national security importance of some classified information may require extensive explanation, the importance of confidential information regarding intelligence sources and methods is both obvious and reflected in statute. *See* 50 U.S.C. § 403-1(e)(1). Given the obvious importance of keeping this information confidential, and the legal obligation to do so, this Court has sufficient information on which to sustain DOJ's assertion of Exemptions 1 and 3.

CONCLUSION

For the reasons stated above and in DOJ's Opening Memorandum, DOJ's Motion for Summary Judgment should be granted and plaintiff's Motion for Summary Judgment should be denied.

November 10, 2008

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
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v.	)	No. 1:08-cv-01468 (EGS) Hon. Emmet G. Sullivan
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Defendant.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to this Court's Local Civil Rule 7(h) and Local Civil Rule 56.1, Defendant United States Department of Justice ("DOJ") hereby submits the following response to plaintiff's statement of material facts.

1. This paragraph is not disputed except to clarify that Patrick Fitzgerald had not yet been appointed as Special Counsel as of November 26, 2003. Answer ¶ 19. It is also not material.

2. The first sentence of this paragraph is not disputed. It is also not material. The second sentence of this paragraph is plaintiff's characterization. It is also not material.

3. This paragraph is not disputed. It is also not material.

4. This paragraph is not disputed except to clarify that DOJ made redacted versions of reports of FBI interviews of White House staff available for review by the Committee staff. Answer ¶ 22.

5. This paragraph is not disputed.

6. This paragraph is not disputed.

7. This paragraph is not disputed.

8. DOJ does not dispute that a draft Committee report contains the quoted passage. The opinions that are attributed to the Chairman and Ranking Member are legal conclusions that are disputed. The factual assertions in this paragraph are not material.

November 10, 2008

Respectfully submitted,

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