

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND :
ETHICS IN WASHINGTON, :

Plaintiff, :

v. :

Civil No. 10-01712 (RMC)

U.S. DEPARTMENT OF EDUCATION, :

Defendant. :

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

The mounting public evidence that Wall Street investors and outside interest groups may have improperly interfered in defendant U.S. Department of Education’s (Education) regulation of the for-profit education industry led CREW¹ to file a Freedom of Information Act (FOIA) request with Education in July 2010. CREW’s request sought records reflecting communications between Education officials and 11 enumerated entities and individuals regarding for-profit education. Education ignored the request until CREW filed its complaint in this action, and only then began the process of producing responsive records.

Now Education claims to have produced all responsive non-exempt records after a full and adequate search. Its explanation, set forth in six separate declarations, consists of sweeping conclusions unsupported by fact. Education has also described searches that are facially under-

¹ CREW is the acronym for plaintiff Citizens for Responsibility and Ethics in Washington.

inclusive, as they omit records searches of critical Education officials and offices. For example, Education conducted no search of the records of Education Secretary Arne Duncan or anyone else in the Office of the Secretary, even though CREW's FOIA request pertains to a matter of high-level interest and documents Education produced show involvement by this office. Other documents Education did find and produce demonstrate further the gross inadequacies of Education's search. In many cases, they reveal the ongoing involvement of Education officials whose email accounts were not searched. In other cases, they prove the existence of emails Education has yet to produce or otherwise account for.

In addition, Education searched only the individual departmental email accounts of a select few individuals, ignoring completely any other electronic or hard-copy files those individuals or their offices may have maintained. Education, like all other federal agencies, must comply with federal record keeping obligations, which include a requirement to maintain an active records management program that provides for the proper preservation of federal records – defined to include both paper and electronic records – in a readily accessible system that protects them from improper loss or destruction. Surely Education cannot be suggesting it has no system for preserving email records beyond individual email accounts maintained only by individual Education employees.

Moreover, Education has produced email records in a paper form that omits critical details available in their electronic form. For example, many of the emails do not include full email addresses for the senders or recipients, making it impossible to determine if government officials used government email accounts or their own personal email accounts. Such information is particularly critical here, where the subject matter of CREW's FOIA request

raises issues of improper collusion between Education officials and outside entities. If communications between the two were conducted “off-line” by using private email accounts, that fact alone would bear directly on the issue of improper collusion. Without the full email addresses there is no way to determine if this was the case.

Finally, Education’s eleventh-hour discovery of a new cache of documents, with no explanation for how and why they were produced *after* Education filed its motion for summary judgment, tops off all the other abundant evidence demonstrating the complete inadequacy of the agency’s search and compliance with the FOIA. At bottom, Education has failed to carry its burden of demonstrating it performed an adequate search. As for claimed exemptions, while most are not at issue, CREW does contest documents withheld under Exemption 5 as within the deliberative process privilege, where Education has failed to assert or otherwise demonstrate they reflect a deliberative plan that was never implemented. Having failed to carry its burden of proof, Education’s motion for summary judgment must be denied.

FACTUAL BACKGROUND

In the face of numerous news articles suggesting serious improprieties in the process Education used to promulgate regulations governing the for-profit Education industry, CREW filed a FOIA request with Education on July 23, 2010.² Those improprieties included evidence that Wall Street investors who short-sell for-profit education industry stocks were attempting to

² That request is set forth as an attachment to the declaration of Leigh Arsenault (Arsenault Decl.) filed by defendant in support of its Motion to Dismiss and for Summary Judgment (D’s Mem.), Document 7-7.

influence the regulatory process's outcome for personal gain.³

CREW's request sought communications from April 20, 2009 to the present from or between Education officials and 11 enumerated individuals and entities, specifically:

(1) Mr. Steven Eisman; (2) Any or all individuals identified as officers, directors, or employees of FrontPoint Partners, LLC; (3) Any or all individuals identified as officers, directors, or employees of Morgan Stanley Investment Management, Inc.; (4) Deputy Undersecretary of Education Robert Shireman; (5) Ms. Pauline Abernathy; (6) Any or all individuals identified as officers, directors, or employees of the Institute for College Access and Success; (7) Mr. Barmak Nassirian; (8) Any or all individuals identified as officers, directors, or employees of the American Association of Collegiate Registrars and Admissions Officers; (9) Mr. Manuel P. Asenio [sic];⁴ (10) Any or all individuals identified as officers, directors, or employees of The Alliance for Economic Stability; (1) Ms. Johnette McConnell Early.

CREW's FOIA request of July 23, 2010 (Document 7-7).

CREW also requested a waiver of fees associated with processing its request because the subject of the request concerns the operations of the federal government and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. CREW supported its fee waiver request with recent news articles cataloging attempts by some of the individuals listed in CREW's request to influence Education in its regulation of the for-profit school industry. *See id.* CREW also highlighted its

³ *See, e.g.*, Chris Frates, Short Sellers Flag School Stocks, *Politico*, June 30, 2010 (Exhibit B to CREW's FOIA request, Document 7-7); Jennifer Epstein, 'Bad Apples' or Something More?, *Inside Higher Ed*, June 24, 2010 (Exhibit C to CREW's FOIA Request, Document 7-7).

⁴ In a follow-up letter of July 26, 2010 (attached as Exhibit A), CREW clarified it was seeking records of communications with Mr. Manuel P. Asensio, correcting its initial misspelling of Mr. Asensio's name.

demonstrated interest in the subject matter with two letters CREW sent to U.S. Senate Committee on Health, Education, Labor and Pensions Chairman Tom Harkin expressing concerns about reports of efforts to manipulate the federal government into increasing regulation of for-profit colleges. *Id.* In addition, CREW requested it not be charged search or review fees because it qualifies as a representative of the news media under the FOIA. CREW explained how it routinely and systematically disseminates information to the public. *Id.*

By letter dated July 29, 2010, Linda Darby, Education's FOIA Public Liaison, advised CREW its request for a fee waiver was denied.⁵ According to Ms. Darby, CREW had failed to provide sufficient information to demonstrate its entitlement to a waiver of processing fees. Specifically, Education faulted CREW for failing to explain how copies of the requested records would contribute any new significant information to the public's understanding of Education's operations and for failing to provide evidence demonstrating public interest in the documents. *Id.*

Despite acknowledging CREW's entitlement to at least two hours of search time and 100 pages of responsive documents at no cost, Education administratively closed CREW's request "[b]ecause there will likely be fees associated with the processing of [CREW's] request and [CREW] ha[s] indicated" an unwillingness to pay fees. *Id.* Education directed CREW to respond within 15 days whether it would pay processing fees or otherwise face a formal closure of its request. *Id.* Education's denial of CREW's request for a fee waiver failed to address CREW's request to be treated as a representative of the news media.

⁵ See Letter from Linda Darby to Anne L. Weismann, July 29, 2010 (attached as Exhibit B).

Subsequently, and without any further action on CREW's part, Ms. Darby informed CREW by letter dated August 17, 2010, that Education had granted CREW's fee waiver request, reopened the FOIA request, and assigned it to appropriate offices within Education to search for responsive documents.⁶ Despite Education's claim to have initiated a search for responsive documents on August 18, 2010, when CREW filed its complaint in this matter on October 7, 2010, Education had yet to provide CREW with any documents or an estimated date by which it would complete its processing of CREW's FOIA request.

On October 21, 2010, several weeks after the complaint was filed, Education contacted CREW seeking a narrowing of CREW's request. In response, CREW clarified in addition to records reflecting external communications as described in its request, CREW is seeking "only internal communications regarding any Departmental communications with the outside entities listed in" its FOIA request.⁷

Despite this "clarification," Education did not begin producing responsive documents to CREW until November 23, 2010, when it provided CREW with 42 pages of records from the Office of Planning, Evaluation and Policy, and eight pages of records from the Office of Communication and Outreach.⁸ On December 3, 2010, Education provided CREW with what the agency termed its final response, consisting of 1,354 pages of records from the Office of Postsecondary Education, and 506 pages of records from the Office of the Undersecretary. Cook

⁶ See Letter from Linda Darby to Anne L. Weismann, August 17, 2010 (attached as Exhibit C).

⁷ See email from Robert Wehausen to Anne Weismann, October 25, 2010, and confirming email from Anne Weismann to Robert Wehausen (attached as Exhibit D).

⁸ See Declaration of Elise Cook, ¶ (Cook Decl.) (Document 7-1), submitted with D's Mem.

Decl., ¶ 9. Thereafter, on December 22, 2010, Education provided CREW with an additional document it claimed to have discovered while processing another FOIA request. *Id.*, ¶ 10.

With this final production, Education claimed it had located and processed all responsive records and the parties proposed a briefing schedule on all remaining issues. On the day defendant's motion for summary judgement was due, Education's counsel requested a one-day extension because she had not yet received "final declarations from agency officials which are required for the motion." Consent Motion for Extension of Time to File Summary Judgment Motion (Document 6). The Court granted this motion, and shortly before midnight on February 16, 2011,⁹ Education filed its summary judgment motion and supporting declarations.

In that pleading Education identified for the first time 198 additional pages of documents responsive to CREW's request. *See* Arsenault Decl. at ¶ 11. According to Education, "[o]n February 16, 2011" – the extended date by which Education's motion was due – "OUS [the Office of the Undersecretary] provided the Department's FOIA Service Center with 198 pages responsive to this FOIA request from the account of Mr. Kvaal." *Id.* Education identified ten pages it was withholding in full as within the deliberative process privilege and therefore exempt under Exemption 5. *Id.* Education offered no explanation for how these documents were identified or why this identification was made long after the agency had claimed to have identified and produced all non-exempt responsive documents. Further, while Education claimed it was attaching the documents to its motion, *id.*, it did not provide the newly discovered documents to CREW or the Court until the following day. *See* Defendant's Errata (Document 8), filed February 17, 2011.

⁹ The ECF notice reflects this filing was made on February 16, 2011, at 11:56 p.m.

STATUTORY BACKGROUND

The FOIA, 5 U.S.C. § 552, is a mandatory disclosure statute requiring federal agencies to release requested agency records to the public upon request, unless one or more of nine statutory exemptions apply. Enacted to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny,” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted), the FOIA allows citizens to know “what the government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1987), *reh’g denied*, No. 02-409, 2004 WL 108633 (U.S. May 17, 2004).

An agency must respond to a properly submitted FOIA request within 20 working days by at least notifying the requester of the agency’s determination whether or not to disclose the record(s) and of the requester’s right to appeal that determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(I). In “unusual circumstances” an agency may delay its response to a FOIA request or appeal, but must provide notice and “the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B).

An agency’s failure to comply with these time limits may be treated as a “constructive exhaustion” of administrative remedies, 5 U.S.C. § 552(a)(6)(C), allowing the requester to seek judicial relief without availing itself of the administrative appeal process. *See, e.g., Spannaus v. U.S. Dep’t of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987). Upon receipt of a FOIA complaint, the district court has jurisdiction to “enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint.” 5 U.S.C. § 552(a)(4)(B). In a FOIA action, the agency bears the burden of justifying its failure to disclose the requested documents. *Id.*

ARGUMENT

I. EDUCATION HAS NOT MET ITS BURDEN OF PROVING IT CONDUCTED AN ADEQUATE SEARCH FOR ALL RESPONSIVE RECORDS.

Here, as in every FOIA case, an agency moving for summary judgment bears the burden of demonstrating beyond material doubt it conducted a search “reasonably calculated to uncover all relevant documents.” *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). The agency meets this burden through declarations denoting “which files were searched” and “reflect[ing] a systematic approach to document location . . .” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). *See also CREW v. Nat’l Indian Gaming Comm’n*, 2006 U.S. Dist. LEXIS 30200, *5 (D.D.C. 2006). If the agency declarations fail to meet this standard, summary judgment must be denied. *Landmark Legal Found. v. EPA*, 272 F. Supp.2d 59, 66 (D.D.C. 2003). *See also Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1990); *Founding Church of Scientology v. Nat’l Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979).

When measured against these standards, Education’s declarations documenting the reasonableness of its search and the contours of that search fall woefully short in a number of material respects. As discussed below, Education failed to conduct any search for records from key offices and individuals involved in the subject matter of CREW’s request. Education also failed to produce or otherwise account for additional documents identified in those records Education did produce, particularly emails from then-Deputy Undersecretary Robert Shireman. Moreover, Education produced paper copies of emails stripped of essential data available in their electronic form. In most cases, Education failed to look beyond individual Education

employees' email maintained on their desktop computers. Finally, Education produced a cache of documents long after representing its search was complete and with no explanation for how those documents were found or why they were not found during previous searches. All of these omissions and failures add up to a patently inadequate search.

**A. Education Failed To Conduct Searches Of Key Offices
And Individuals.**

Education's motion for summary judgment and supporting declarations attest to searches of five offices within the agency: the Office of Communication and Outreach (OCO), the Office of Legislative and Congressional Affairs (OLCA), the Office of Postsecondary Education (OPE), the Office of the Undersecretary (OUS), and – at the referral of OUS – the Office of Planning, Evaluation and Policy (OPEPD). *See* D's Mem. at 2. As shown below, those searches plainly are under-inclusive.

1. Education Failed To Search The Office Of The Secretary

Conspicuously absent from the searches conducted by Education is the Office of Secretary Arne Duncan; Education neither searched for responsive records in his office nor explained why it failed to conduct such a search. Yet documents Education produced demonstrate beyond dispute the Office of the Secretary, as well as the Secretary himself, were involved in Education's regulation of the for-profit industry generally, and communicated with some of the individuals and entities enumerated in CREW's FOIA request. For example, the most recently released batch of documents includes an email from Senior Advisor to the Undersecretary James Kvaal to Phil Martin, Secretary Duncan's confidential assistant and Assistant for Financial Education and Student Aid, forwarding an email from hedge fund short-

seller Steven Eisman with the text “Let’s discuss.”¹⁰ This document alone reveals the involvement of the Office of the Secretary, yet defendant has offered no explanation for its failure to conduct any search of that office for responsive documents.¹¹

Similarly, a previous release from Education included an email from Tracy Catoe, Deputy Director of the Correspondence and Communications Control Unit in the Office of the Secretary, responding to Mr. Eisman on behalf of Secretary Duncan.¹² Another email from Assistant Secretary Carmel Martin in OPEPD to a number of Education officials that forwards a copy of Mr. Eisman’s email of May 28, 2010, states:

FYI. You may have gotten directly but just in case. I’ll take take a look to see if any of it is worth asking Maribel to give to Arne.¹³

That Education officials were contemplating sharing Mr. Eisman’s email correspondence with Secretary Arne Duncan illustrates vividly why a search should have been conducted of Secretary Duncan’s records and those of his staff, including but not limited to the records of Chief of Staff Margot Rogers¹⁴ and Phil Martin.

¹⁰ See Email from James Kvaal to Phil Martin, July 19, 2010 (Document 8-1, page 22 of 36).

¹¹ Twelve pages of emails Education already has released show Mr. Martin as a recipient of the emails, yet Education failed to conduct a search of his records. See Declaration of David Merchant (Merchant Decl.), March 17, 2011 (attached as Exhibit E), ¶ 11.

¹² See email from Tracy Catoe on behalf of Arne Duncan to Steven Eisman, re: For-Profit education industry, June 1, 2010 (attached as Exhibit F).

¹³ See email from Carmel Martin to Tony Miller, et al., re: For-Profit education industry, May 28, 2010 (attached as Exhibit G).

¹⁴ Of the emails Education already has produced, 15 pages show Ms. Rogers as a recipient, documenting her involvement in this matter. Merchant Decl., ¶ 5.

Without such a search, Education cannot establish it took steps reasonably calculated to locate all responsive documents. This failure alone requires the Court to deny defendant's motion for summary judgment.

2. Education Failed To Search The Records Of Many Key Individuals.

The declarations Education submitted in support of its summary judgment motion identify a total of 17 individuals whose emails were searched for potentially responsive records. They include eight in OCO,¹⁵ one (Kristan Adams) in OLCA,¹⁶ five in OPE,¹⁷ Zakiya Smith from OPEPD,¹⁸ and two from OUS (Robert Shireman and James Kvaal).¹⁹ But beyond these individuals, Education excluded from its search key Education officials with documented involvement in the subject matter of CREW's FOIA request.

For example, emails Education produced to CREW show significant involvement by Ann Manheimer, Director of the Management Systems Improvement Group and a detailee to OUS. Of the emails already produced to CREW, 55 pages include Ms. Manheimer as either a sender or recipient.²⁰ Yet inexplicably Education never searched Ms. Manheimer's files, instead representing falsely that beyond Robert Shireman and James Kvaal, "there are no other

¹⁵ Those eight are Peter Cunningham, John McGrath, David Hoff, Massie Ritsch, Stacey Jordan, Alberto Retano, Cynthia Dorfman, and Tim Tuten. *See* Declaration of Patricia Landis (Landis Decl.), ¶ 7 (Document 7-2).

¹⁶ *See* Declaration of Ricki Meyer (Meyer Decl.), ¶ 7 (Document 7-3).

¹⁷ Those five are Fred Sellers, John Kolotos, David Bergeron, Dan Madzelan, and Kathleen Smith. *See* Declaration of Kathleen Smith (Smith Decl.), ¶ 7 (Document 7-4).

¹⁸ *See* Declaration of Zakiya Smith (Smith Decl.), ¶ 7 (Document 7-5).

¹⁹ *See* Arsenault Decl., ¶ 7 (Document 7-6).

²⁰ *See* Merchant Decl., ¶ 16.

individuals in OUS who are reasonably likely to have records responsive to this request that have not been captured in this search.” Arsenault Decl. at ¶ 7.

One of the most glaring omissions is Education’s failure to search the records of Leigh Arsenault, a declarant who attested to the thoroughness of OUS’s search. Of the emails Education already has produced, Ms. Arsenault’s name appears on no less than 132 pages of emails as a recipient. Merchant Decl., ¶ 10. Nevertheless, Ms. Arsenault herself claimed OUS had produced all responsive non-exempt documents after searches of the email accounts of only Mr. Shireman and Mr. Kvaal, knowing full well this was untrue.

Education also ignored the records of Deputy Undersecretary Martha J. Kanter. Ms. Kanter recently wrote to CREW responding to CREW’s letter request of Secretary Duncan to investigate evidence of impropriety in Education’s regulation of the for-profit education industry, a request based largely on the documents Education released to CREW as part of the FOIA request at issue.²¹ Ms. Kanter’s selection as the most appropriate Education official to respond to CREW on Secretary Duncan’s behalf and her expressed familiarity with and vouching for the rulemaking process Education used place her within the circle of Education officials likely to have documents responsive to CREW’s request. The emails Education already has produced confirm this: 54 pages include Ms. Kanter as a recipient. Merchant Decl., ¶ 6. Yet without explanation Education failed to search her records.

OUS also failed to search the records of Senior Policy Advisor Michael Dannenberg, despite evidence he was involved in the matters at issue. Education already has disclosed 46

²¹ See Letter from Martha J. Kanter to Anne L. Weismann, March 4, 2011 (attached as Exhibit H).

pages of emails containing his name as a recipient,²² yet failed to include Mr. Dannenberg in its search. Similarly, Education conducted no search of the records of Hal Plotkin, Senior Policy Advisory to the Undersecretary, even though he is listed as a recipient on 19 pages of emails already released by Education in response to CREW's request. Merchant Decl., ¶ 14.

Education conducted a similarly under-inclusive search of records from OLCA, when it limited its search to the records of Kristen Adams claiming she "is the only employee in OLCA whose responsibilities include higher education issues." Meyer Decl. at ¶ 7. To the contrary, emails Education produced to CREW show significant involvement by Assistant Secretary Gabriella Gomez of OLCA, whose records nevertheless were not searched, although 102 pages of the emails already produced to CREW include Ms. Gomez as a recipient or sender. Merchant Decl., ¶ 17.

Education also omitted any search for records of Georgia Yuan, Deputy General Counsel for Postsecondary and Regulatory Service. Yet Ms. Yuan was included as a recipient on 33 pages of emails Education did produce from the email accounts of other Education officials,²³ providing further proof the agency conducted an inadequate search.

In addition, Education failed to search the records of Justin Hamilton, Press Secretary for Strategic Communications. Again, however, emails produced by Education demonstrate his involvement in this matter, as his name as an email recipient appears on 43 pages of emails. Merchant Decl., ¶ 12.²⁴

²² Merchant Decl., ¶ 15.

²³ See Merchant Decl. at ¶ 13.

²⁴ Education also failed to conduct searches of the records of several other individuals mentioned in the emails the agency did produce: Assistant Secretary for the Office of

Even if Education could justify its initial decision to search only the records of the 17 specified individuals – which is highly unlikely – once it gathered records documenting the involvement of many other Education officials the agency was on direct notice of the inadequacy of its initial search and required to take further action. Education, however, failed to supplement its search or to widen the circle of individuals whose records would be searched for responsive documents. This failure alone renders Education’s search inadequate and insufficient to support its motion for summary judgment.

B. Education Failed To Produce Or Otherwise Account For Responsive Records From Top Education Officials, Including Then-Deputy Undersecretary Robert Shireman.

Robert Shireman, then-Deputy Undersecretary at Education, was a pivotal figure who led the agency’s efforts to regulate the for-profit education industry. He also is a controversial figure who joined Education after serving as President of The Institute for College Access and Success (TICAS), and was criticized publicly for his continued close alignment with TICAS and non-profit education groups, even while at Education. CREW’s FOIA request included Mr. Shireman as among those individuals for whom it sought communications.

Education now claims that in response, it conducted an electronic search of those of Mr. Shireman’s emails that “were captured on a Departmental server” after his departure using specified search terms. D’s Mem. at p. 13. This search, Education states, yielded 506 pages of responsive records from Mr. Shireman’s captured email account that were released in full to

Postsecondary Education Eduardo Ochoa (whose name appears as a recipient on three pages of emails); Assistant Secretary for OPEPD Carmel Martin (whose name appears as a recipient on five pages of emails); and General Counsel Charlie Rose (who appears in the address line of 11 pages of emails). See Merchant Decl., ¶¶ 7-9.

CREW. *Id.* at 13-14. A further analysis of those 506 pages reveals that only 20 originated from his account.²⁵ Of those 20 emails, one was sent in February 2009, and the others were sent between April and June 2010. The Office of the Undersecretary (OUS) conducted no search of paper documents, claiming “there is no place where any hard copy documents responsive to the request reasonably might be found.” Arsenault Decl. at ¶ 8.

It is inherently implausible that Mr. Shireman sent a mere 20 emails on this subject, given his central role in crafting the regulations at the core of CREW’s FOIA request. Yet that is what Education essentially has represented to this Court. CREW is not simply speculating. Education produced email chains taken from the email accounts of other Education officials responding to or forward emails originally sent by Mr. Shireman.²⁶ They include, for example, an email from Mr. Shireman to Ann Manheimer with a cc to David Bergeron commenting on an analysis prepared by Height Analytics, an entity associated with Credit Suisse, of the impact of the gainful employment regulations on specific companies.²⁷ Yet this email was not produced as part of the responsive email collection from Mr. Shireman’s email account.

Equally implausible is Education’s claim that the collection of emails dumped on a server after Mr. Shireman – a high-level political appointee – left Education represents the *only* place where responsive records may be found. Under the Federal Records Act Mr. Shireman, like all Education employees, was required to maintain his records in a readily accessible system that

²⁵ Those 20, consisting of 45 pages, are attached as Exhibit I.

²⁶ These emails are attached as Exhibit J.

²⁷ See email from Bob Shireman to Ann Manheimer re: FW” Height Analytics – For-Profit Ed: Gainful Employment Means Higher Wagers & Lower Tuition, February 5, 2010 (included with Exhibit J).

protects them from improper loss or destruction.²⁸ Surely Education cannot be suggesting it has no system for preserving email records beyond individual email accounts maintained only by individual Education employees that, upon their departure, are summarily dumped onto some Departmental server. If true, this quite obviously suggests an agency problem far more severe and widespread than non-compliance with Education's statutory obligations in responding to CREW's FOIA request. At a minimum, Education should be required to search other sources for the missing emails, including hard-copy files and backup tapes of the agency's email system.

Education's last-minute production of an additional collection of emails from the account of James Kvaal also reveals gaps in Education's production of emails from the account of Education official David Bergeron. The most recently produced documents include five emails that were sent from or to David Bergeron, among others, yet they were not included as part of the production from the search of Mr. Bergeron's email account.²⁹ They include a particularly revealing email Mr. Bergeron received from short-seller Steven Eisman on July 19, 2010, just days before Education released the proposed gainful employment regulations, with the subject line: "I know you cannot respond," and the text

But just fyi. Education stocks are running because people are hearing DOE is backing down on gainful employment.³⁰

Mr. Bergeron, in turn, forwarded the email to James Kvaal and Georgia Yuan – Deputy General Counsel for Education's Postsecondary and Regulatory Service and another Education official

²⁸ See 44 U.S.C. §§ 2101, *et seq.*, 2901, *et seq.*, 3101, *et seq.*, 3301, *et seq.*

²⁹ These emails are attached as Exhibit K and also are found in Document 8-1, pages 3-4, 12-16, 22, 30-33, and Document 8-4, pages 29-30.

³⁰ See Exhibit K.

whose files were not searched for responsive documents – and Mr. Kvaal, in turn, forwarded this email to Secretary Duncan’s confidential assistant, Phil Martin (whose files, as discussed above, also were not searched).

At a minimum, these newly discovered documents should have triggered a renewed search of Mr. Bergeron’s emails and paper documents together with all other Education officials named in the email whose files have yet to be searched. But Education has not conducted any additional searches, arguing instead its searches to date fully satisfy the agency’s obligations under the FOIA. These problems, when coupled with the many other deficiencies in Education’s production of responsive records outlined herein, evidence a patently inadequate search that cannot support Education’s motion for summary judgment.

C. Education’s Production Of Emails Omits, At Least In Many Cases, Critical Information Found In Their Electronic Versions.

Although Education produced only paper documents to CREW in response to its FOIA request, those documents were derived from electronic searches of the individual email accounts of the 17 individuals identified in Education’s supporting declarations. *See* Landis Decl., ¶ 9; Meyer Decl., ¶ 11; Smith Decl., ¶ 9; Smith Decl., ¶ 8; Arsenault Decl., ¶ 8. OPE also searched its hard-copy correspondence database, Smith Decl. at ¶ 9, and OUS located an additional 198 pages of emails with no explanation for where or how they were located. *See* Arsenault Decl. at ¶ 11. But the paper copies Education produced omit critical information maintained in and available from their electronic versions.

First, many if not most of the emails lack complete email addresses for the senders or recipients, instead listing only their names. Without this information it is impossible to determine whether the emails were sent to or from Education officials at their Education email

addresses or some other, private email addresses. Given the growing body of evidence suggesting the possibility of collusion between Education officials and outside groups, including Wall Street investors, use by Education officials of private email accounts would bear directly on this issue by suggesting an attempt to conceal their actions and involvement.

Indeed, at least one document produced by Education reveals that Mr. Bergeron communicated with Mr. Shireman using a non-Education email address of Mr. Shireman's, ["Robert.Shireman@ptt.gov."](mailto:Robert.Shireman@ptt.gov)³¹ Of note, this email was forwarding a request for a meeting with Steve Eisman and two other of his associates. To the extent Mr. Shireman sent emails from this address, they would not be available by searching the cache of emails originating from his Education email account that are now stored on a department server. But if Mr. Shireman complied with his record keeping responsibilities, copies may be available in a paper form that could easily be produced to CREW.

In addition, none of the paper versions of the produced emails contains any bcc. This information is readily available to Education from the electronic versions of the emails it produced. Given Education's failure to include other critical information in the emails, it cannot reasonably be assumed there are no blind copied recipients of any of these emails. If there are none, Education should be required to state so explicitly; if bccs exist, Education should be required to produce a version that includes that information.

In other contexts, courts have recognized that "metadata is an inherent part of an electronic document, and its removal ordinarily requires an affirmative act by the producing

³¹ See email from David Bergeron to Kathleen Smith and Robert Shireman, re: Following up, April 7, 2010 (attached as Exhibit L).

party that alters the electronic document.” *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 652 (D. Kan. 2005). The D.C. Circuit held that for purposes of the Federal Records Act, an electronic version of a record must be saved separately unless its paper version “include[s] all significant material contained in the electronic records.” *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993). In the FOIA context, one district court has applied these rationales to hold that metadata is part of a record within the definition of the FOIA. *Nat’l Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 2011 U.S. Dist. LEXIS 11655, *16-*20 (S.D. N.Y. February 7, 2011). Even if this Court declines to go as far as the Southern District of New York to hold all manner of metadata must be produced under the FOIA, the additional material CREW seeks here clearly is “significant,” and without it the paper versions of the emails are merely “kissing cousins.” *Armstrong*, 1 F.3d at 1283.

**D. By Limiting Most Of Its Search To Email Records Education
Has Failed To Conduct An Adequate Search Under The FOIA.**

With very little explanation, Education limited its search almost exclusively to individual email accounts of 17 Education officials. For OCO, this decision was based on “the recollection of subject matter experts” that OCO had neither created nor received any hard-copy communications response to CREW’s request. Landis Decl., ¶ 6. OLCA justified its limited search of the email account of Ms. Adams with the blanket statement, “[t]here are no other locations where responsive records are reasonably likely to be located.” Meyer Decl., ¶ 7. For OPEPD, Ms. Smith conducted only an electronic search of her emails based on her knowledge she “did not receive any hard-copy correspondence that would be responsive to this request.” Smith Decl., ¶ 8. OUS limited its search to the electronically maintained emails of Mr. Shireman

and Mr. Kvaal because, “to the best of [Ms. Arsenault’s] knowledge OUS does not have any hard-copy correspondence records responsive to the request . . .” Arsenault Decl., ¶ 8. Only OPE included in its search a hard-copy correspondence database. Smith Decl., ¶ 9.

In each of these cases, Education failed to provide the basis for its conclusion that no additional records exist in paper form. Just as troubling, Education offered no explanation for how the agency maintains its records beyond the suggestion that record keeping is left to individual employees who maintain their records as they see fit. We do not know, for example, whether Education has a record keeping system or guidelines for maintaining emails and other electronic records. Yet such guidance would shed light on the reasonableness of Education’s search. For example, if Education employees are directed to print out all email records and save them in a paper file, then searching only their electronic email accounts clearly would be insufficient.

Unless and until Education provides these kinds of details and the basis for its summary conclusions that no responsive records exist beyond what it already has searched, the Court cannot properly conclude Education has conducted an adequate search. This is especially true given the numerous other gaps and deficiencies outlined above.

**E. Education’s Last-Minute Production Of Additional Kvaal Emails
With No Explanation Further Undermines The Adequacy Of Its
Entire Search.**

Topping off all the evidence that Education conducted a patently inadequate search for responsive records is the agency’s last-minute production of nearly 200 pages of responsive emails from the account of James Kvaal, a central figure in the agency’s regulation of the for-profit education industry. Despite Education’s previous representations it had located and

produced to CREW all non-exempt responsive records, Education inexplicably released an additional 188 pages of records from Mr. Kvaal's email account on February 17, 2011, the day after it filed its summary judgment motion here. Education withheld 10 pages in full, claiming they are protected by the deliberative process privilege and therefore exempt under Exemption 5. *See* Arsenault Decl., ¶ 11.

Education's failure to offer any explanation whatsoever for how it located these email records and why it failed to locate them during previous searches raises very troubling questions, especially considering their content. As outlined in CREW's letter of March 1, 2011, to Robert Khuzami, Director of the Securities and Exchange Commission's Division of Enforcement,³² these new emails include some startling information. For example, they reveal a plan concocted by high-level Education officials to selectively leak the contents of the upcoming proposed gainful employment regulations. They also reflect apparent collusion between Education and Mr. Eisman to manipulate the price of stocks in for-profit education companies. Their responsiveness to CREW's FOIA request cannot be denied, yet Education delayed providing these damaging emails for months.

Under these circumstances, there is a significant likelihood other responsive records exist that Education has yet to provide. Certainly with no information as to how and why these emails were found and produced, this Court cannot plausibly conclude Education's search to date satisfies its obligations under the FOIA.

³² This letter is attached as Exhibit M.

II. EDUCATION HAS FAILED TO DEMONSTRATE THE TEN PAGES OF WITHHELD KVAAL EMAILS ARE PROTECTED FROM DISCLOSURE BY EXEMPTION 5 OF THE FOIA.³³

A. Education Has Failed To Meet The Procedural Requirements Necessary To Sustain Its Burden Under The FOIA.

In *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973), the D.C. Circuit established the “procedural requirements” “an agency seeking to avoid disclosure” must follow to sustain its burden. Specifically, “when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted). An agency typically satisfies these requirements with a “*Vaughn* submission,” usually consisting of a declaration describing the basis for its withholdings and providing justifications for redactions, accompanied by an index listing responsive records and indicating the precise redactions made to the records.

The D.C. Circuit has clarified further that “[s]pecificity is the defining requirement of the *Vaughn* index” and that declarations that are “conclusory, merely reciting statutory standards, or . . . are too vague or sweeping” will not support a summary judgment motion. *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987). As the *King* court concluded, “[c]ategorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.” *Id.* at 224 (footnote omitted). *See also Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007).

³³ CREW does not challenge any of the other withholdings Education made.

Here Education has offered the classic “conclusory” declaration long rejected by the D.C. Circuit to support its withholding in full of ten pages of emails from the email account of James Kvaal. In a single paragraph, Education’s declarant essentially parrots the requirements of the deliberative process privilege, but offers no details as to how those requirements are met. The Court should therefore reject Education’s sweeping claims of exemption for these documents.

B. Education Has Not Met Its Burden Of Showing The Ten Pages of Withheld Kvaal Email Are Exempt From Disclosure Under Exemption 5.

Agencies can invoke the protections of the deliberative process privilege under the FOIA only when two prerequisites are met. First, the documents must pertain to a decision that is predecisional, and second, the documents must reflect deliberations, defined to include “recommendations or . . . opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2s at 1143-44. By contrast, documents that reflect or explain final agency decisions are not within the scope of Exemption 5. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 n.19 (1975); *Judicial Watch v. U.S. Dep’t of Health & Human Serv.*, 27 F.Supp. 2d 240, 245 (D.D.C. 1998) (“deliberative process does not protect documents that merely state or explain agency decisions”). Further, an agency invoking the deliberative process privilege must segregate and disclose factual portions of otherwise deliberative material. *See, e.g., EPA v. Mink*, 410 U.S. 73, 91 (1973).

Here, Education not only produced critical emails at the proverbial 11th hour, but withheld ten pages of those emails as within the deliberative process privilege and therefore exempt from compelled disclosure under Exemption 5. In support, Education devotes three sentences of the Arsenault Declaration to describing generally the content of the withheld emails as consisting of:

e-mail chains which reflect the agency employees' discussions among themselves concerning the plan for release of the proposed rule for gainful employment. The e-mails and attached draft rollout plans reflect internal strategies and recommendations for making the rollout, and reflect internal deliberations and political and press considerations such as who should be considered individuals of importance to contact in making the rollout. Also included in the pages are a draft press release and draft talking points.

Arsenault Decl., ¶ 11. The Arsenault Declaration goes on to state that after review, the ten pages "are subject to exemption 5 in full." *Id.*

Critically missing from Education's submissions, however, is any indication the plans and strategies discussed in the withheld emails were never implemented. Yet, as explained above, the emails are only subject to withholding if they neither reflect nor explain final agency actions. So, for example, if Education implemented any of the rollout plans discussed in the withheld emails, those portions laying out such plans would not be exempt.

Further, Education has failed to meet its burden of proving it is withholding only deliberative material. The Arsenault Declaration states only the ten pages "are subject to exemption in full," *id.*, but fails to explain why that is so. If, for example, the draft press release and draft talking points include factual material, such as the content of the proposed regulations, those factual portions would not fall within the deliberative process privilege and must be disclosed. On the record before this Court, however, there is no basis to conclude all of the withheld material is protected from disclosure by Exemption 5. Accordingly, the Court must order Education to release the ten pages of withheld Kvaal emails.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment should be denied and defendant should be directed to conduct additional searches for responsive records.

Respectfully submitted,

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