UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, Plaintiff, v. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendant.	20 Civ. 3063
DOW JONES & COMPANY, INC. and CHRISTOPHER WEAVER, Plaintiffs, v. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendant.	20 Civ. 3145

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Defendant Department of Health & Human Services ("HHS") by its attorney, Audrey Strauss, Acting United States Attorney for the Southern District of New York, respectfully submits this reply memorandum of law in further support of its motion for summary judgment, and in opposition to Plaintiffs' motion for summary judgment.

PRELIMINARY STATEMENT

As detailed in Defendant's opening brief, these consolidated cases arise out requests submitted pursuant to the Freedom of Information Act ("FOIA") to HHS by Plaintiff The New York Times Company and Plaintiffs Dow Jones & Company, Inc. and Christopher Weaver, seeking a report commissioned by the Indian Health Service ("IHS") relating to issues arising from a former pediatrician's abuse of his patients at IHS facilities. As a record that emanates from an IHS medical quality assurance review, however, the report sought by Plaintiffs is subject to 25 U.S.C. § 1675. Section 1675 unequivocally makes the report confidential and privileged and bars its disclosure under FOIA, thereby rendering the record exempt under Exemption 3, 5 U.S.C. § 552(b)(3). For the reasons stated below, the agency properly withheld the report in question, and the Court should grant its motion for summary judgment.

In opposition to the Government's motion, Plaintiffs make two arguments in support of their argument that Exemption 3 does not apply. First, despite the lack of support in the statutory language and case law that flatly contradicts such a position, Plaintiffs argue that § 1675 only covers "peer review" records. *See* Pl. Br. at 22-27. Second, again contrary to the plain meaning, Plaintiffs argue that the report is not a medical quality assurance record within the meaning of § 1675 because IHS commissioned the report, rather than an individual IHS facility, or because the review was not, in Plaintiffs' view, solely focused on the quality of medical care. Neither of

these arguments has merit.[1] Moreover, the report is also properly withheld under FOIA Exemption 5 as the report is protected by the deliberative process privilege; it served to assist IHS's efforts to identify possible failures in IHS's processes and potential corrections for those failures. For the reasons stated below and in Defendant's opening brief, the agency properly withheld the report in question, and the Court should grant its motion for summary judgment.

ARGUMENT

A. Exemption 3 Applies to the Integritas Report

1. The Integritas Report Falls Within the Scope of § 1675

FOIA Exemption 3 applies to records that are "specifically exempted from disclosure by statute . . . if that statute . . . (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In examining an agency's invocation of Exemption 3, a court must consider, first, whether the statute identified by the agency as a withholding statute, and second, whether the withheld material satisfies the criteria of the exemption statute. *See CIA v. Sims*, 471 U.S. 159, 167 (1985); *A. Michael's Piano Inc. v. Fed. Trade Comm'n*, 18 F.3d 138, 143 (2d Cir. 1994). "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents," *Wilner v. NSA*, 592 F.3d 60, 72 (2d Cir. 2009) (quotation marks and citation omitted), a court should "not closely scrutinize the contents of a withheld document; instead, [it

[1] Much of Plaintiffs' brief consists of Plaintiffs' characterizations of Weber's conduct, details regarding the subsequent criminal investigations and other inquiries, and descriptions of Plaintiffs' own investigations; these matters, however, are largely not relevant to Plaintiffs' FOIA claim at issue in this litigation.

should] determine only whether there is a relevant statute and whether the document falls within that statute," *Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993).

Here, Plaintiffs do not dispute that § 1675 is a withholding statute. Instead, Plaintiffs argue only that the Integritas Report does not fall within the scope of § 1675. *See* Pl. Br. at 22. However, as a report emanating from a medical quality assurance program carried out on behalf of IHS, the report falls squarely within the ambit of § 1675. Under the statute, the term medical quality assurance program is defined as:

> any activity carried out . . . by or for any Indian health program or urban Indian organization to assess the quality of medical care, including activities conducted by or on behalf of individuals, Indian health program or urban Indian organization medical or dental treatment review committees, or other review bodies responsible for quality assurance, credentials, infection control, patient safety, patient care assessment (including treatment procedures, blood, drugs, and therapeutics), medical records, health resources management review, and identification and prevention of medical or dental incidents and risks.

25 U.S.C. § 1675(a)(2). A "medical quality assurance record" is in turn defined as "proceedings, records, minutes, and reports that – (A) emanate from quality assurance program activities . . .; and (B) are produced or compiled by or for an Indian health program or urban Indian organization as part of a medical quality assurance program." 25 U.S.C. § 1675(a)(3). "[I]n light of the [§ 1675's] policy of encouraging medical institutions to improve their level of patient care and make appropriate corrective or preventative measures," courts have afforded a broad reading to the statute. *Soto v. United States*, No. 13 Civ. 2359, 2014 U.S. Dist. LEXIS 133134, at *8 (S.D. Cal. Sep. 22, 2014), *see also Parker v. United States*, No. 18 Civ. 123, 2020 U.S. Dist. LEXIS 24911, at *24-25 (D. Neb. Feb. 13, 2020).

Here, as set forth in Defendant's opening brief, the Integritas Report falls within § 1675's prohibition on disclosure. The report is a record emanating from the medical quality assurance

review commissioned by IHS and performed by Integritas. Specifically, the review carried out by Integritas on behalf of IHS sought to assess the impact of the agency's policies and procedures relating to the reporting of allegations of sexual abuse on patient safety and the provision of medical care. Merrell Decl. ¶ 7. The review sought to determine if and how IHS policies and procedures may have acted to deprive IHS patients of safe and high quality medical care. *Id.* In its report, Integritas detailed its factual findings, its conclusions and its recommendations relating to the safety of IHS patients and ensuring their access to proper medical care. *Id.* ¶ 14. IHS then utilized the Integritas Report to formulate and revise relevant policies and procedures within the agency. *Id.* As in *Parker*, the medical quality assurance review at issue here reflects an assessment of a "sentinel event associated with a specific practitioner, a serious practitioner-specific complaint, . . . [a] significant safety violation, or repeated or egregious unprofessional conduct," and it is "exactly the type of record emanating from an 'activity carried out . . . to assess the quality of medical care' of the IHS and are therefore protected from disclosure under § 1675." *Parker*, 2020 U.S. Dist. LEXIS 24911, at *29 (quoting 25 U.S.C. § 1675(a)(2)).

Finally, the confidentiality afforded to this medical quality assurance activity also served to encourage staff to participate in the review and provide candid information. Merrell Decl. ¶ 12. Participants had an expectation that the information they provided would be kept confidential, and disclosure of this record would have a chilling effect on future participation in these types of reviews. *Id.*

2. Plaintiffs' Argument that § 1675 Only Encompasses Peer Review Records Is Without Merit

Contrary to Plaintiffs' arguments, § 1675 is not limited to peer review activity. The statute provides that "*any* activity . . . to assess the quality of medical care" is covered in the definition of a medical quality assurance program. § 1675(a)(2) (emphasis added). Had Congress intended to limit the scope of § 1675 to peer review activities, Congress presumably would have followed the approach taken in 10 U.S.C. § 1102, the statute Congress previously enacted to govern records relating to medical care provided to Department of Defense beneficiaries. Unlike § 1675, the Department of Defense statute expressly defines "medical quality assurance program" as "any *peer review* activity carried out . . . by or for the Department of Defense to assess the quality of medical care[.]" 10 U.S.C. § 1102(j)(2) (emphasis added). Moreover, while § 1675 contemplates that "activities . . . to assess the quality of medical care" could be undertaken by "medical or dental treatment review committees," the statute goes on to expressly provide that the activity could also be undertaken by "*other* review bodies responsible for quality assurance, credentials, infection control, patient safety, patient care assessment (including treatment procedures, blood, drugs, and therapeutics), medical records, health resources management review, and identification and prevention of medical or dental incidents and risks" in its definition of a medical quality assurance program. 25 U.S.C. § 1675(a)(2) (emphasis added).[2]

Plaintiffs essentially argue that the Court should ignore the statutory language of § 1675, including the significant distinction between the text of § 1675 and the Department of Defense statute. Instead, Plaintiffs take the position that the Court should look to the statement of a

[2] Nor is language of § 1675 limited to records emanating from activities conducted by "review bodies" as such. Rather, the statute provides that "any activity . . . to assess the quality of medical care" is covered by the statute, and indicates that this "includ[es]" activities conducted by review bodies. 25 U.S.C. § 1675(a)(2).

witness who testified before the Senate Committee as evidence in the legislative history of Congressional intent to limit § 1675 to peer review activity. Pl. Br. at 25-26. First, "[i]t is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous." *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999) (internal citations omitted). Moreover, the statement quoted by Plaintiffs is merely an observation by a testifying witness that the statute would indeed cover peer review activities. The statement does not support a conclusion that the statute *only* cover peer review activities.[3]

The cases cited by Plaintiffs also fail to bolster their argument that § 1675 is limited to peer review records. More to the point, the decisions upon which they rely expressly the opposite, *i.e.* that § 1675 is *not* limited to peer review records. For instance, Plaintiffs neglect to point out that, in *Parker*, the court expressly held that § 1675 "does *not* limit the privilege solely to peer review activities." *Parker*, 2020 U.S. Dist. LEXIS 24911, at *28 (emphasis added). The court explained that § 1675 "applies to '*any activity* . . . to assess the quality of medical care,' and although peer review activities may be encompassed within that definition, the statute's language does not limit the privilege solely to peer review activities." *Id.* (emphasis in original). The court accordingly applied § 1675 to the credentialing records, among others, at issue in *Parker*. *Id.*

In *Soto*, the court similarly did not restrict the scope of the § 1675 to peer review records. Rather, the court concluded that, not only would records emanating from the quality assurance

[3] Similarly, Plaintiffs' reference to language regarding peer reviews on an IHS website page plainly does not limit the scope of § 1675.

staff (in addition to the medical staff) fall within the ambit of § 1675, but "information obtained to facilitate the quality assurance program's review, whether that information be obtained from the internet, as occurred in this case, or some other source" are also covered by § 1675. *Soto*, 2014 U.S. Dist. LEXIS 133134, at *8. The court emphasized that "in light of the statute's policy of encouraging medical institutions to improve their level of patient care and make appropriate corrective or preventative measures, the Court views the definition of 'records' broadly[.]" *Id.* at 8.[4]

As Plaintiffs themselves ultimately acknowledge, § 1675 encompasses records "generated by a peer review process *or* . . . records that doctors or medical institutions produce to assess medical quality." Pl. Br. at 23 (emphasis added). The Integritas Report was commissioned by IHS to assess various issues related to the quality of medical care being provided to IHS patients, and it falls within the scope of § 1675.

3. Plaintiffs' Remaining Arguments Regarding § 1675 Similarly Lack Merit

In addition to arguing that § 1675 is not a peer review record, Plaintiffs assert that the Integritas Report is not a medical quality assurance record because the Indian Health Service itself is not an Indian health program within the meaning of § 1675 or, alternatively, because – in Plaintiffs' view – the report does not reflect an assessment of medical care, but rather is only an investigation into criminal behavior. These arguments similarly lack merit.

[4] In *Kulik*, also cited by Plaintiff, the court merely concluded that certain witness statements requested by the HHS Office of General Counsel expressly for litigation purposes did not fall within the scope of § 1675. Specifically, the court held that the agency could not "retroactively transform its litigation activities into a medical quality assurance program's activities merely by forwarding the claimant's records to risk management for medical review." *Kulik v. United States*, No. 14 Civ. 0054, 2016 U.S. Dist. LEXIS 84802, *7 (D. Alaska June 28, 2016). In the instant case, the Integritas Report was not a litigation activity, nor do Plaintiffs assert it was. The holding in *Kulik* is inapposite.

First, Plaintiffs' assertion that the Indian Health Service, an agency that is directly responsible for providing federal health services to American Indians and Alaska Natives (*see* Merrell Decl. ¶ 3), is not an Indian health program within the meaning of § 1675 borders the absurd. IHS is "the principal federal health care provider" for these populations. *Id.*; *see also* 25 U.S.C. § 1661 ("In order to more effectively and efficiently carry out the responsibilities, authorities, and functions of the United States to provide health care services to Indians and Indian tribes . . . there is established within the Public Health Service of the Department the Indian Health Service."). Moreover, Plaintiffs' efforts to exclude medical quality assurance reviews conducted by IHS itself from the scope of § 1675 would also lead to the illogical result whereby a record emanating from an individual IHS facility would be covered by the statute, but a medical quality assurance review relating to an issue broader than one facility (and thereby requiring that the review be conducted at the national level) would not be covered.

Second, contrary to Plaintiffs' assertions, the review conducted by Integritas was not a criminal investigation. Rather, the review sought to identify remedial measures IHS could take to correct the patient safety and medical care issues that came to light as a result of Weber's abuse of patients in the care of IHS. *See* Merrell Decl. ¶ 9. In order to do so, IHS commissioned Integritas to (1) conduct a thorough review and analysis of the agency's compliance with existing laws, regulations, and policies regarding patient safety and protection of patients from sexual abuse and assault, (2) identify facts relating to IHS's policies and procedures regarding the reporting of allegations of sexual abuse of IHS patients by clinical staff, (3) identify any possible process or system failures and the contributing causes of any such process or system failures, and (4) identify improvements IHS could implement to better protect patients and provide quality medical care. Merrell Decl. ¶ 9.

While Plaintiffs' assertion that the issues relating to Weber were "administrative and criminal" in nature is an accurate one, this does not alter the fact that the abuse Weber inflicted on his patients also undeniably affected patient safety and the quality of medical care at IHS facilities. It is these patient safety and quality of care issues that IHS sought to address in its medical quality assurance review. The presence of criminal conduct, or a separate criminal investigation, does not preclude the undertaking of a medical quality assurance review.[5] Nor, as Plaintiffs assert, does § 1675 lack a limiting principle. Rather, as noted above, the broad scope of the statute reflects the "policy of encouraging medical institutions to improve their level of patient care and make appropriate corrective or preventative measures." *Soto*, 2014 U.S. Dist. LEXIS 133134, at *8.

Plaintiffs again attempt to rely on *Parker* and *Soto* to support their overly narrow reading of § 1675, but once again distort the courts' rulings in those cases. With respect to *Parker*, Plaintiffs argue that the Integritas Report "is most closely parallel to the records that the *Parker* court ordered disclosed," including audits, evaluations, and investigations into the medical staff. Pl. Br. at 30. But, as Plaintiffs' acknowledge (Pl. Br. at 31), the court made clear that it was permitting the disclosure of those records only "to the extent those documents [were] not solely kept in a separate medical quality assurance file." *Parker*, 2020 U.S. Dist. LEXIS 24911, at *38. Plaintiffs themselves summarize this holding in *Parker* by asserting that "the court recognized

[5] The decision by the Court of Appeals of Alaska in a criminal matter, *Grandstaff v. State*, 171 P.3d 1176 (Alaska Ct. App. 2007), on which Plaintiffs rely, is inapposite. Not only did the decision address a state peer review privilege, the court made it clear that "[t]he issue in this case is the scope of the privilege created by this statute – in particular whether the privilege applies in all cases, both civil and criminal, or only in civil cases." *Id.* at 1193. The court expressly observed that "if this were a civil case, the answer would be clear: . . . any statements . . . previously made to the review committee would be privileged." *Id.* at 1194.

that investigative documents that were not a part of a discrete medical quality assurance program lie outside the scope of the statute." Pl. Br. at 31. Here, there are no investigative documents sought by Plaintiffs that are separate from the medical quality assurance review itself, namely the Integritas Report.

Lastly, Plaintiffs' argument that the Integritas Report is not a medical quality assurance record because the principal of Integritas Creative Solutions, LLC – the contractor commissioned to conduct the medical quality assurance review – did not have a medical background. This argument simply rehashes Plaintiffs' flawed argument that § 1675 is restricted to peer reviews by medical professionals, again misconstruing the scope of the statute. As detailed above, no such limitation governs § 1675. Here, IHS and the Office of Quality, which is specifically responsible for quality assurance, commissioned a medical quality assurance review to assess issues relating to patient safety and the quality of patient care. As such, it was plainly within the scope of § 1675.

B. Exemption 5 Applies to the Integritas Report

As set forth in Defendant's opening brief, FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). Exemption 5 encompasses the "'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84; *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the

detriment of the decisionmaking process" (quotation marks omitted)). "Congress adopted Exemption 5 because it recognized that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl." *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 194 (2d Cir. 2012) (quoting *Wolfe v. HHS*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc)). An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citations omitted). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). "A document is 'deliberative' when it is actually related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (quotation marks and alteration omitted).

Plaintiffs' arguments that the Integritas report is neither predecisional nor deliberative are contradicted by the Merrell Declaration and the relevant case law. First, Plaintiffs' argument that "the agency's affidavit says nothing about how the Report relates in any way to agency decision-making" is simply incorrect. As set forth in the declaration, by commissioning the Integritas report, IHS sought "to determine what steps IHS could take to correct the patient safety and medical care issues." Merrell Decl. ¶ 7. IHS' goals, among other things, included "identify[ing] improvements IHS could implement to better protect patients and provide quality medical care." *Id.* at 9. Merrell further explained that IHS did ultimately use the Integritas Report "to formulate and revise policies and standard operating procedures[.]" *Id.* ¶ 15. The report is thus predecisional because it "was prepared to assist [agency] decisionmaking on a specific issue," *Sears*, 421 U.S. at 151 n.18, and it is deliberative because it reflects IHS' efforts to, among other things, to identify possible failures in IHS's processes and identify potential corrections for those

failures. Merrell Decl. ¶ 9. In other words, the report "'reflect[s] advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84-85 (quoting *Sears*, 421 U.S. at 150).

Second, that the Integritas report was drafted by a third-party contractor commissioned by IHS does not prohibit the application of Exemption 5, as Plaintiffs' imply. It is well established that outside consultants' recommendations to an agency are regularly deemed protected under exemption 5. *See Tigue v. DOJ*, 312 F.3d 70, 77-78 (2d Cir. 2002); *see also Nat'l Inst. of Military Justice v. DOD*, 512 F.3d 677, 684 (D.C. Cir. 2008) ("When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." (quoting *Ryan v. DOJ*, 617 F.2d 781, 789-90 (D.C. Cir. 1980))); *Fox News Network LLC v. Dep't of Treasury*, 739 F. Supp. 2d 515, 540 (S.D.N.Y. 2010). Plaintiffs' argument that this "consultants corollary" does not apply to the Integritas Report because the report "has little to do with rulemaking or formulating policy," Pl. Br. at 36, once again ignores that simple fact that the Integritas report sought to "determine what steps IHS could take to correct the patient safety and medical care issues," Merrell Decl. ¶ 7, "identify improvements IHS could implement to better protect patients and provide quality medical care," and "to formulate and revise policies and standard operating procedures," *id.* ¶¶ 7, 9, 15.[6]

[6] The case law cited by Plaintiffs fails to offer any support for their argument that the consultants corollary does not apply under the circumstances presented here. Instead, the case law merely addresses whether the communications of third parties, who represent their own interests as opposed to those of the government agency, fall within the "consultants corollary." *See e.g.*,

Lastly, Plaintiffs' argument that the agency failed to identify a foreseeable harm that would result from disclosure again ignores express language in the agency's declaration. As set forth therein, the purpose of ensuring that this type of record is kept confidential is to encourage people to participate and provide candid information; should the report be disclosed, it will have a chilling effect on future participation. Merrell Decl. ¶ 12. Plaintiffs admit as much, stating that "an agency might plausibly allege that release of internal deliberative documents generated by employees might discourage current and former employees from participating in future deliberations." Pl. Br. at 34-35.

Plaintiffs' argument that the risk of harm in this case is "non-existent" because the review in question, according to Plaintiffs, was a "one-time study done by an outside vendor," *id.*, is similarly without merit. *Id.* Plaintiffs fail to acknowledge that Integritas interviewed former and current IHS employees, among others. Participants had an expectation that the information they provided would be kept confidential, *see* Merrell Decl. § 4, and a breach of this confidentiality would discourage their and others' participation in all manner of inquiries and assessments that IHS may choose to conduct in the future, *id.*

Intellectual Prop. Watch v. USTR, 134 F. Supp. 3d 726, 748 (S.D.N.Y. 2015) ("[T]he law in this Circuit is unsettled as to whether an outside consultant, not acting as pure objective proxy for the agency but rather advising expressly as an interested party meant to advocate for its own interests, qualifies for protection under the consultant corollary."); *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (2001) (observing that "the fact about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it"). Here, the third party that drafted the Integritas Report plainly did so at the behest of IHS, and Plaintiffs do not assert that that the third party represented some separate interest of its own.

C. Exemption 6 Would Apply to Certain Names and Other Personal Information Contained in the Integritas Report

As explained in Defendants' opening brief, not only do Exemptions 3 and 5 apply, but Exemption 6 also exempts certain information contained in the report from disclosure. Exemption 6 exempts from disclosure information from personnel, medical, or other similar files where disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). The Integritas Report contains information about patients, staff and other individuals, the disclosure of which would plainly be an unwarranted invasion of personal privacy.

D. An *In Camera* Review Not Warranted

Finally, contrary to Plaintiffs' suggestion that the Court should conduct an *in camera* review, such a review is both unnecessary and disfavored. "In FOIA cases, a court should conduct *in camera* review only as a last resort." *ACLU v. Nat'l Sec. Agency*, No. 13 Civ. 9198, 2017 WL 1155910, at *22 (S.D.N.Y. Mar. 27, 2017), *aff'd*, 925 F.3d 576 (2d Cir. 2019); *see also Knight First Amendment Inst. at Columbia Univ. v. U.S. Dep't of Homeland Sec.*, 407 F. Supp. 3d 311, 333 (S.D.N.Y. 2019). "*In camera* review is appropriate where the government seeks to exempt entire documents but provides only vague or sweeping claims as to why those documents should be withheld. Only if the government's affidavits make it effectively impossible for the court to conduct *de novo* review of the applicability of FOIA exemptions is *in camera* review necessary." *Associated Press v. United States Dep't of Justice*, 549 F.3d 62, 67 (2d Cir. 2008) (internal citations omitted). "Records should not be reviewed *in camera* as a substitute for

requiring an agency to explain its claimed exemptions in accordance with *Vaughn*." *Knight*, 407 F. Supp. 3d at 334 (citing *ACLU v. DOJ*, 210 F. Supp. 3d 467, 485 (S.D.N.Y. 2016)). Instead, in such circumstances, courts allow the government to supplement its submissions. *See e.g.*, *ACLU*, 2017 WL 1155910, at *22; *Knight First Amendment Inst.*, 407 F. Supp. 3d at 333.

Here, the agency declaration provides more than adequate information to determine that the record sought by Plaintiffs is exempt from disclosure. Plaintiffs do not, and cannot, assert that there is anything "vague or sweeping" in the agency declaration; on the contrary, Plaintiffs' request for an *in camera* review does not mention the declaration at all. Even were the Court to conclude that the government's submissions did not adequately support the application of the exemptions asserted here, the Court should invite the government to supplement its submissions rather than resort to *in camera* review.

CONCLUSION

For the reasons stated herein and in the Government's opening brief, the Government's motion for summary judgment should be granted in its entirety, and Plaintiffs' motion for summary judgment should be denied.

Dated: October 12, 2020
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Respectfully submitted,

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