NO. _____

IN THE
Supreme Court of the United States

NEW HAMPSHIRE RIGHT TO LIFE,
Petitioner,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Freedom of Information Act requires disclosure of public records subject to one of nine statutory exemptions. Respondent awarded a non-competitive grant to Planned Parenthood of Northern New England. Petitioner sought documents concerning this grant. Respondent withheld and redacted documents under FOIA exemptions 4 and 5.

This Court has not interpreted exemption 4, which exempts "trade secrets and commercial or financial information." Courts have interpreted it to exempt documents that would substantially harm a third party's competitive position. While the District of Columbia, Fourth and Ninth Circuits require evidence of actual competition, the First Circuit requires only speculative future competition.

This Court has held that exemption 5 does not shelter communications made after a decision for the purpose of explaining it. Nonetheless, the First Circuit held it shields Respondent's post-decision communications regarding its public justification for its action. The questions presented are:

1. Whether exemption 4 permits nondisclosure due to speculative future competition and likelihood that disclosure would substantially harm the competitive position of a grant applicant.
2. Whether Exemption 5 shields documents and discussions about the agency's public justification for prior decisions.

RULE 29.6 STATEMENT

Petitioner New Hampshire Right to Life ("NHRTL") is a New Hampshire not-for-profit corporation that has no parent company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner New Hampshire Right to Life ("NHRTL") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

The public has a right to know how its government acts and how its government decides to spend taxpayer dollars. An agency cannot secretly award contractors millions of dollars in public funds without public scrutiny of that spending. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 was adopted "to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). An agency cannot pick and choose what documents it will and will not release to the public. Congress has determined that unless a specific statutory exemption, narrowly construed, applies, the documents must be released for public scrutiny. *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 351-52 (1979).

Contrary to the precedents of its sister circuits, the First Circuit has held that Exemption 4 to FOIA may be applied to exempt disclosure any time it is alleged that there may be future potential competition for a government grant. In addition, contrary to the precedents of this Court, the First Circuit has held that an agency may, under

Exemption 5 to FOIA, keep secret documents related to the agency's drafting of press releases and discussion as to how best to publicly justify its prior decisions. The First Circuit's holdings are contrary to Congress's purpose in adopting FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

DECISIONS BELOW

The decision of the United States Court of Appeals for the First Circuit, published as *N.H. Right to Life v. U.S. Dep't of HHS*, 778 F.3d 43 (1st Cir. 2015), is reprinted in the Appendix at Appx. 1a. The decision of the United States District Court for the District of New Hampshire, published as *N.H. Right to Life v. U.S. Dep't of HHS*, 976 F.Supp.2d 43 (D.N.H. 2013), is reprinted in the Appendix at Appx. 24a.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Freedom of Information Act, 5 U.S.C. § 552, and in particular Exemptions 4 and 5 which provide:

(b) This section does not apply to matters that are. . .

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT OF THE CASE

I. Statutory Background

The Freedom of Information Act, 5 U.S.C. § 552, ["FOIA"] requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Merrill,* 443 U.S. at 351-52. Under FOIA, each federal agency must "disclose records on request, unless they fall within one of nine exemptions." *Milner v. Dep't of Navy*, 562 U.S. 562, 562 (2011). "[C]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *see also FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed"). Moreover, these "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is [FOIA's] dominant objective." *Rose*, 425 U.S. at 361. There are two of the nine exemptions that are at issue in this case.

Exemption 4 allows an agency to withhold documents when the agency is able to show that the

documents contain "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The Supreme Court has not yet interpreted what constitutes confidential commercial information under Exemption 4. Nevertheless, several courts of appeals, including the First Circuit, have held that the agency must demonstrate that the withheld or redacted documents would substantially harm the competitive position of the person who submitted the information. *9 to 5 Org. v. Bd. of Governors*, 721 F.2d 1, 8 (1st Cir. 1983); *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996).

The District of Columbia, Fourth and Ninth Circuits require that a government agency demonstrate actual competition prior to withholding documents under Exemption 4. *CNA Fin. Corp.*, 830 F.2d at 1152 (Exemption 4 requires a showing of "actual competition"); *Hercules, Inc.,* 839 F.2d at 1030 (4th Cir. 1988) (where there is no competition for the contract, there can be no competitive harm); *Frazee*, 97 F.3d at 371 (9th Cir. 1996) (must show "actual competition"); *see also Raher v. Fed. Bureau of Prisons*, 749 F.Supp.2d 1148, 1157 (D.Ore. 2010) (if the agency cannot point to any unsuccessful bidders, then there is no actual competition).

The First Circuit, however, allows withholding under Exemption 4 on a mere allegation of a

"potential future competitor." Appx. at 14a. This greatly expands the circumstances in which documents could be withheld under Exemption 4.

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 has been interpreted to include the deliberative process privilege. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The deliberative process privilege protects from disclosure pre-decisional and deliberative intra-agency communications but does not protect "communications made after the decision and designed to explain it." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975). Stated another way:

> [B]oth Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not.

Renegotiation Board v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975).

Nevertheless, contrary to established Supreme Court precedent, the First Circuit has broadly held that post-decisional documents relating to "how and

what to communicate to the public" can be withheld under Exemption 5. Appx. at 20a.

II. Factual Background

For many years, the State of New Hampshire applied for and was awarded federal Title X family planning grants which the state would then award to subgrantees with a combination of federal and state funds. Planned Parenthood of Northern New England ("PPNNE") was, for many years, a subgrantee of the state. In June 2011, the state decided not to award a subgrant to PPNNE. The decision was at least partially based on the state's belief that PPNNE was improperly using the funds to subsidize its abortion business. The New Hampshire Executive Council complained that there was not enough transparency as to how PPNNE was spending the grant funds and that the state should seek other grant recipients which would not improperly use family planning funds to subsidize abortion services.

Only one other entity, Manchester Community Health Clinic, inquired about applying for the funds, but that provider ultimately decided not to apply. After several months of looking for other potential grantees, the state returned the funds to the HHS in August 2011. HHS responded by deciding to award

a sole source non-competitive replacement grant directly to PPNNE in mid-August 2011.[1]

During the summer of 2011, there was much public discussion about the decision not to award family planning grants to abortion providers. Cognizant of the public scrutiny of its actions, HHS spent considerable time between mid-August and mid-September 2011 developing a public relations strategy to justify its decision to fund Planned Parenthood over the objections of the State of New Hampshire. Communications and other documents relating to how to justify HHS's decision to the public culminated in its September 9, 2011 public announcement.

On September 28, 2011, the New Hampshire Executive Council formally objected to HHS's decision to bypass the state and award the Title X grant funds directly to Planned Parenthood. HHS internally discussed but ultimately decided not to publicly respond to the New Hampshire Executive Council's formal protest.

On October 7, 2011, NHRTL made a FOIA request to HHS for documents relating to HHS's

[1] The timing of the decision to award the sole source grant was litigated before both the District Court and the First Circuit. While NHRTL argued that the decision was made on or before August 10, 2011 when the White House was briefed on HHS's intentions, the First Circuit held that the decision was not made until August 19, 2011, the date the HHS officer signed the formal memo justifying the decision to award the non-competitive grant to Planned Parenthood.

decision to award a sole source non-competitive grant to Planned Parenthood. This request was later amended to include all grant application materials, including the Planned Parenthood policies and procedures for how it intended to spend the HHS grant funds. HHS characterized these documents, and in particular PPNNE's Medical Manual, as the blue print for how to operate a Title X federally-funded family planning clinic. These policies and procedures were required by HHS as a condition of obtaining grant funding.

The purpose of NHRTL's requests was to expose what it considered an improper and potentially unlawful funding decision by HHS. While the New Hampshire Executive Council's decision not to fund Planned Parenthood was made publicly and with the opportunity for public input, HHS's decision to award Planned Parenthood a direct non-competitive grant was made hastily, in secret, and contrary to the usual protocols for awarding grants. Documents released by HHS showed that HHS was paying Planned Parenthood for birth control pills at nearly four times what Wal-Mart charged customers for the same pills. In addition, NHRTL suspected, as had the New Hampshire Executive Council, that Planned Parenthood was unlawfully using federal funds to subsidize abortion services, and that HHS knew that these federal funds were being used to subsidize abortions.

After HHS failed to produce any documents within the twenty days provided in the FOIA

statute, NHRTL brought suit on December 22, 2011 in the U.S. District Court for the District of New Hampshire. While the case was pending in district court, HHS began producing some of the responsive documents. Also, while the FOIA case was pending, HHS's sole source grant at issue in this case was set to expire. In the fall of 2012, HHS opened up the family planning grants for competitive bidding but only the state of New Hampshire and Planned Parenthood applied for grants. Both the state and Planned Parenthood were awarded grants in January 2013. There were no commercial competitors. There have never been commercial competitors for federal Title X grants in the state of New Hampshire.

The parties filed cross motions for summary judgment on the claimed FOIA exemptions and, on September 30, 2013, the District Court ordered additional documents to be produced while affirming some of HHS's claimed exemptions. Appx. at 24a. NHRTL appealed the District Court's rulings as to Exemptions 4 and 5 to the First Circuit. The First Circuit affirmed the District Court's decision on February 4, 2015. Appx. at 1a.

III. The First Circuit's Decision

A. The First Circuit's Expanded Exemption 4 Test Conflicts With Rulings By the D.C., Fourth and Ninth Circuits.

In its decision, the First Circuit affirmed the withholding and redaction under Exemption 4 of the policy and procedures for how Planned Parenthood intended to spend the HHS grant funds. The court recognized that its sister circuits and its own precedents provide that Exemption 4 only applies when the agency proves that there was actual competition and a likelihood that release of the documents would substantially harm the competitive position of the submitter. But the First Circuit broadly interpreted Exemption 4 to hold that the actual competition requirement can be satisfied by speculating about the possibility of competition in the future:

> Although Planned Parenthood admittedly did not compete for the federal grant in 2011, it certainly does face actual competitors-community health clinics-in a number of different arenas, and in future Title X bids. This satisfies the "actual competition" requirement. . . A potential future competitor could take advantage of the institutional knowledge contained in the Manual, and the letter describing the Manual, to compete with Planned Parenthood for patients, grants, or other funding.

Appx. at 13a-14a.

The First Circuit's expansive Exemption 4 holding to apply to a hypothetical "potential future competitor" in this case is in conflict with the holdings of the Courts of Appeals for the D.C., Fourth and Ninth Circuits, which all require a showing of actual competition. See *CNA Fin. Corp.*, 830 F.2d at 1152**;** (Exemption 4 requires a showing of "actual competition")**;** *Hercules, Inc.*, 839 F.2d at 1030 (where the "contract is not awarded competitively, the prospect of competitive injury from releasing [the documents] is remote.")**;** *Frazee*, 97 F.3d at 371 (must show "actual competition")**;** *see also Raher*, 749 F.Supp.2d at 1157 (if the agency cannot point to any unsuccessful bidders, then there is no actual competition).

In *Frazee*, the Ninth Circuit looked at the requirement of actual competition and substantial competitive harm together and held that although Frazee had actual competition in bidding for the government program, that Frazee's plan of operation of how to operate if awarded a lease by the agency would not likely result in substantial competitive harm. 97 F.3d at 371. In *CNA*, the District of Columbia Circuit also recognized the need to show actual competition and held that CNA's assertion that disclosure of its plan would substantially harm its competitive possession was without merit. 830 F.2d at 1152. In *Hercules*, however, the Fourth Circuit never reached whether disclosure would harm Hercules' competitive position as there were no

actual competitors for the federal contract at issue in that case. 839 F.2d at 1030. Likewise, in *Raher*, the court recognized that if one cannot identify a single unsuccessful bidder then there is no need to analyze any competitive harm as there is no competition for the contract. 749 F.Supp.2d at 1157. *Cf. Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (specifically identifying by name two corporations as competitors for Gulf and Western for the contract at issue in that case).

The First Circuit departed from its sister circuits by holding that any unidentified "potential future competitor" is sufficient to withhold documents under Exemption 4. See Appx. at 14a. By allowing speculation regarding future competition to suffice, the First Circuit has allowed Exemption 4 to effectively swallow the general rule of full disclosure.

In addition, the First Circuit's broad interpretation of Exemption 4 is contrary to the Supreme Court's admonition that "FOIA exemptions are to be narrowly construed." *Abramson*, 456 U.S. at 630. By expanding Exemption 4 to exempt grant application materials from disclosure anytime they may be helpful to a "potential future competitor" the First Circuit has allowed agencies to keep grant funding decisions secret and prevent public scrutiny of the agency's actions.

B. The First Circuit Greatly Expands Exemption 5 to Exempt Post-Decisional Justification Documents.

Following its decision to award a sole source noncompetitive grant to Planned Parenthood in mid-August 2011, HHS officials discussed the best strategies for communicating and justifying their decision to the public. NHRTL requested the documents generated during that process as part of its FOIA request. HHS refused to produce these documents in response to NHRTL's FOIA request, claiming that they were exempt from disclosure under Exemption 5 and the deliberative process privilege. NHRTL argued that many of the documents withheld were not privileged because they did not predate the decision to award Planned Parenthood the grant funds. The First Circuit held that HHS could withhold documents both relating to the decision to award the grant funds as well as documents relating to the discussions about how to publicly justify the decision it had already made:

> August 19-the date the OASH executive signed the approval line on the Sole Source Justification memorandum — [w]as the date the decision was made to proceed with a direct award process. . . . *Vaughn* index categories 23–25 relate to and pre-date the September 9 public announcement that the Department intended to directly award a grant to Planned Parenthood. *These documents deal with the*

> *Department's decision of how and what to communicate to the public, which is a decision in and of itself.*

Appx. at 19a-20a (emphasis added).

The First Circuit's decision that Exemption 5 broadly exempts post-decisional documents relating to the public justification of a decision already made is directly contrary to the purpose of FOIA and long established Supreme Court precedent. The deliberative process privilege protects from disclosure only pre-decisional and deliberative intra-agency communications and not "communications made after the decision and designed to explain it." *Sears, Roebuck & Co.*, 421 U.S. at 152 (1975).

> [B]oth Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not.

Renegotiation Bd., 421 U.S. at 184.

Nevertheless, the First Circuit ignored this Court's holdings in *NLRB* and *Renegotiation Board*, concluding that the documents generated during deliberations on how to publicly justify a decision already made can themselves be withheld under the deliberative process privilege.

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Ruling Creates a Circuit Conflict Regarding the Application of Exemption 4 of FOIA

The Freedom of Information Act, 5 U.S.C. § 552, was first adopted in 1966. *Rose*, 425 U.S. at 366. Under FOIA, each federal agency must "disclose records on request, unless they fall within one of nine exemptions." *Milner,* 562 U.S. at 562. For the first fifteen years following the adoption of FOIA, the courts of appeals developed various tests to determine what constituted confidential commercial information. The courts vacillated from a "promise of confidentiality test" to an "expectation of confidentiality test." *See 9 to 5 Org.*, 721 F.2d at 8-10.

In 1983, the First Circuit adopted the test devised by the D.C. Circuit in *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Some, but not all, of the other circuits have also adopted the *Nat'l Parks* test. Pursuant to this test, commercial information is confidential if disclosure is likely to "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.*

Other circuits that have adopted the *Nat'l Parks* test require an agency to show actual competition

prior to asserting that disclosure of the information would be likely to cause substantial harm to the submitter's competitive position. *CNA Fin. Corp.*, 830 F.2d at 1152 (Exemption 4 requires a showing of "actual competition"); *Hercules, Inc.*, 839 F.2d at 1030 (where the "contract is not awarded competitively, the prospect of competitive injury from releasing [the documents] is remote."); *Frazee,* 97 F.3d at 371 (must show "actual competition"); see also *Raher*, 749 F.Supp.2d at 1157 (if the agency cannot point to any unsuccessful bidders, then there is no actual competition and documents cannot be withheld under Exemption 4).

Nevertheless, in this case, the First Circuit held that actual competition did not require showing that the submitter had competitors for the federal grant at issue. Instead, the First Circuit held that a hypothetical "potential future competitor could take advantage of the institutional knowledge contained in the Manual" showing how Planned Parenthood intended to spend the federal grant funds and that this theoretical concern was sufficient to exempt the documents from disclosure under FOIA. Appx. at 14a. This holding prevents the public from knowing how their government is spending their tax dollars. "[T]he protection of the public fisc is a matter that is of interest to every citizen." *Brock v. Pierce County*, 476 U.S. 253, 262 (1986). The very purpose of FOIA is to enable citizens to know what their government is doing.

Furthermore, there is no statutory basis for expanding the confidentiality of federal grant applications to any time that there may be a different federal grant applicant in the hypothetical future. FOIA's exemptions must be narrowly construed to effectuate its overall purpose of public disclosure. Finally, this holding of the First Circuit has created a conflict with holdings from the D.C., Fourth and Ninth Circuits. The Court should grant certiorari to resolve this conflict.

II. The Supreme Court Has Never Interpreted Exemption 4 of FOIA

Over the past fifty years since FOIA's enactment, there have been dozens of Supreme Court cases interpreting the parameters of other FOIA exemptions. Nevertheless, the Supreme Court has not yet interpreted Exemption 4 of FOIA.

The purpose of FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA's exemptions were "explicitly made exclusive, and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. The purpose of these narrow exemptions was to counteract the "vague phrases, such as that exemption from disclosure 'any function of the

United States requiring secrecy in the public interest'" of FOIA's predecessor statute. *Mink*, 410 U.S. at 79 (interior citation omitted).

Unfortunately, the text of Exemption 4 does not give much guidance as to its application. The exemption simply states that FOIA does not apply to materials that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The statute does not define what constitutes confidential commercial information exempt from disclosure under Exemption 4. This Court should grant certiorari and narrowly define confidential commercial information so as to effectuate FOIA's goal of broad disclosure.

III. The First Circuit's Application of Exemption 5 is Directly Contrary to Established Supreme Court Precedent and the Purpose of FOIA

Forty years ago, the Supreme Court held that although pre-decisional deliberative documents relating to the formation of agency policy may be withheld under Exemption 5, post-decisional "communications made after the decision and designed to explain it" cannot be withheld under FOIA. *Sears, Roebuck & Co.*, 421 U.S. at 152. To the extent there was any ambiguity in *NLRB*, the Supreme Court held in its companion case:

> [B]oth Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an

> agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not.

Renegotiation Bd., 421 U.S. at 184.

The rule established by this Court is clear. Nevertheless, the First Circuit's ruling below has greatly expanded the scope of Exemption 5 and exempted from disclosure documents that the First Circuit found related to "the Department's decision of how and what to communicate to the public" after an agency decision has been made. The central purpose of FOIA is "to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361. No government agency should be allowed to cherry pick what information it will disclose in order to most effectively sell the agency's chosen policy choices. FOIA requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Merrill*, 443 U.S. at 351-52. Documents relating to HHS's discussions regarding of how and what to communicate to the public are not exempt under the statutory language of Exemption 5.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant review.

Respectfully submitted,

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April 21, 2015

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 14-1011

NEW HAMPSHIRE RIGHT TO LIFE,

Plaintiff, Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Before Torruella, Howard, Kayatta, Circuit Judges.

Michael J. Tierney, with whom Wadleigh, Starr & Peters, PLLC, was on brief, for appellant.

Seth R. Aframe, Assistant United States Attorney, with whom John P. Kacavas, United States Attorney, was on brief, for appellee.

February 4, 2015

KAYATTA, Circuit Judge. In 2011, the Department of Health and Human Services ("Department") awarded federal grant funds directly to Planned Parenthood of Northern New England ("Planned Parenthood"). New Hampshire Right to Life ("Right to Life") then filed a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and ultimately this lawsuit, seeking documents related to the award of that federal grant. The Department produced some documents, but withheld others, citing FOIA exemptions for confidential commercial information, id.§ 552(b)(4) (Exemption 4), and inter- or intra-agency memoranda, id. § 552(b)(5) (Exemption 5). We affirm the district court's ruling that the Department properly withheld the subject documents under FOIA Exemptions 4 and 5.

I. Background

A. Direct Award Of Federal Grant To Planned Parenthood

Prior to 2011, the Department historically awarded Title X[1] federal grants to New Hampshire, which in turn dispersed a combination of federal and state funds through subgrants to various entities. Title X federal grants "assist in the establishment

[1] Title X refers to Title X of the Public Health Services Act, created by the Family Planning Services and Population Research Act of 1970. Pub. L. 91–572, § 6(c), 84 Stat. 1504, 1506–08, *codified as amended at* 42 U.S.C. §§ 300--300a-6.

and operation of voluntary family planning projects which . . . offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). Planned Parenthood historically received one of these subgrants, including Title X federal funds, from New Hampshire. As of July 1, 2011, Planned Parenthood operated clinics in six different New Hampshire municipalities: Manchester, Derry, Keene, Exeter, West Lebanon, and Claremont.

In June 2011, the New Hampshire Executive Council chose not to award any subgrant to Planned Parenthood, expressing concern that taxpayer funds were being used to subsidize abortions.[1] New Hampshire's decision meant that unless a new provider received the funds, large portions of the state would no longer have access to Title X services. In July 2011, the Department asked New Hampshire for information on how it would ensure continued provision of Title X services in areas previously served by Planned Parenthood. In mid-August 2011, the New Hampshire Department of Health and Human Services informed the Department that they could not find a replacement provider for those areas. New Hampshire then relinquished what would have been Planned Parenthood's portion of the federal funds.

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[1] New Hampshire's Executive Council had this concern despite the fact that Title X prohibits the use of its funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

The Department considered alternative options, including bypassing New Hampshire's Executive Council, and directly awarding Title X funds to Planned Parenthood. On August 19, 2011, Marilyn Keefe, the Deputy Assistant Secretary of the Department's Office of Population Affairs ("OPA"), signed a memorandum titled, "Sole Source Justification for Replacement Grant in New Hampshire." This memorandum "request[ed] approval [from the Department's Office of the Assistant Secretary of Health ("OASH")] of a sole source replacement grant to [Planned Parenthood] for a period of 16 months." The memorandum "noted an urgent need to reinstate services in [the affected] areas with an experienced provider that is familiar with the provision of Title X family planning services and applicable laws . . . and has a history of successfully providing services in this area of the state." The memorandum explained that, upon approval of its recommendation, "[the OPA] will reach out to the proposed replacement grantee to determine if the organization is willing to take on this project as a directly funded federal grantee." The memorandum also stated that "[t]he Director of the OASH Grants Management Office has consulted with the Office of the General Counsel, which has determined that the use of the replacement grant process is legally justified in this case." The OASH Executive Officer approved the OPA's recommendation by countersigning the memorandum on that very same day – August 19, 2011.

On September 1, 2011, Planned Parenthood applied for the direct award grant. The Department

then prepared a "Technical -4- Review" document, evaluating Planned Parenthood's application. On September 9, the Department announced, via its website, its intent to directly issue a replacement grant to Planned Parenthood. On September 13, the Department formally provided a Notice of Grant Award to Planned Parenthood. The notice required Planned Parenthood to submit to the Department, by December 15, 2011, additional "institutional files" on "a variety of policies and procedures[.]" Responding to this notice, Planned Parenthood submitted its Manual of Medical Standards and Guidelines ("Manual") as well as information on its fee schedule and personnel policies.

B. Right To Life's FOIA Challenge And District Court Decision

On December 22, 2011, Right to Life filed a lawsuit under the FOIA, seeking documents related to the Department's decision to proceed with a direct award process, documents that Planned Parenthood submitted as part of its grant application, and documents related to the Department's decision to award that grant to Planned Parenthood. After being sued, the Department released more than 2,500 pages of documents. The Department determined that some portions of the Manual were exempt from disclosure under the FOIA, but intended to release the remainder, and so informed Planned Parenthood. Planned Parenthood responded by arguing that its entire Manual constituted confidential commercial information, and thus was exempt from disclosure under the FOIA. See 5 U.S.C. § 552(b)(4). The Department rejected this

argument. Planned Parenthood countered by commencing an action in district court, seeking to enjoin the Department from releasing any portion of the Manual.

The district court remanded the matter to the Department to "reconsider its FOIA determination in light of additional information provided by [Planned Parenthood] about specific portions of the [M]anual, and produce a more comprehensive explanation for any determination that portions of the [M]anual are subject to disclosure despite [Planned Parenthood's] objections." Upon reconsideration, the Department decided to withhold or redact additional portions of the Manual. The Department also continued to withhold various other documents or portions of documents, invoking FOIA Exemptions 4, 5, and 6. The Department gave Right to Life a Vaughn Index, correlating withheld documents to particular FOIA exemptions.[3] Right to Life and the Department then filed cross motions for summary judgment, see Fed. R. Civ. P. 56, to

[3] A Vaughn index is "[a] comprehensive list of all documents that the government wants to shield from disclosure in Freedom of Information Act (FOIA) litigation, each document being accompanied by a statement of justification for nondisclosure. . . . The name derives from Vaughn v. R[osen], 484 F.2d 820 (D.C. Cir. 1973)." Black's Law Dictionary 1693 (9th ed. 2009). A Vaughn index is necessary in FOIA litigation, as "only the party opposing disclosure will have access to all the facts." Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 228 (1st Cir. 1994).

determine whether the Department properly invoked these FOIA exemptions.

The district court partially granted and partially denied both parties' motions for summary judgment. The district court found that the "vast majority" of documents were properly withheld under FOIA exemptions, but that the Department did not meet its burden to justify withholding a few categories of documents. The district court found that Exemption 4 applied to the Manual, the letter describing the Manual's standards and guidelines, the Fees and Collections Policies, and a document titled "Steps in Establishing our Fee Schedule."

The district court found that Exemption 5 applied to an e-mail chain between Department employees and attorneys relating to the legality of the direct award process, an e-mail chain about the rationale for the replacement grant's funding amount, and multiple drafts of a public announcement of the Assistant Secretary's intent to issue a replacement grant to Planned Parenthood. The district court also found that the Department met its burden for invoking the attorney-client and work product privileges, as recognized by Exemption 5, for various documents.

Right to Life appeals, seeking disclosure of the following documents that are either partially redacted or entirely withheld: the Manual (Vaughn index category 38); a letter describing the Manual (Vaughn index category 39); Planned Parenthood's Fees and Collection Policies (Vaughn index category 37); "Steps to Establishing our Fee Schedule"

document (Vaughn index category 35); and various internal Department communications (Vaughn index categories 11, 15–16, 18–19, 23–25, 30, 33). [BB 19-20, 22, 28-29, 31.]

II. Standard of Review

We review de novo the district court's determination that the Department was entitled to summary judgment based on its Vaughn index and affidavits. Carpenter v. United States Dep't of Justice, 470 F.3d 434, 437 (1st Cir. 2006). The government bears the burden of demonstrating that a claimed exemption applies. Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 228 (1st Cir. 1994).

III. Analysis

The FOIA obligates federal agencies to "make 'promptly available' to any person, upon request, whatever 'records' the agency possesses unless those 'records' fall within any of nine listed exemptions." *Id.* (*quoting* 5 U.S.C. §§ 552(a)(3), (b)). The FOIA's primary purpose is to "open agency action to the light of public scrutiny", "ensur[ing] an informed citizenry, vital to the functioning of a democratic society." Id. (internal quotation marks and citations omitted). The FOIA is the legislative embodiment of Justice Brandeis's famous adage, "[s]unlight is . . . the best of disinfectants[.]" Louis D. Brandeis, Other People's Money 92 (Frederick A. Stokes Co. 1914); see also Aronson v. I.R.S., 973 F.2d 962, 966 (1st Cir. 1992) (noting that the FOIA's basic aim is -8- "sunlight"). "The policy underlying [the] FOIA is

thus one of broad disclosure, and the government must supply any information requested by any individual unless it determines that a specific exemption, narrowly construed, applies." Church of Scientology, 30 F.3d at 228.

Here, the Department relies on FOIA Exemptions 4 and 5 only. Exemption 4 shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Exemption 5 shields from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Id. § 552(b)(5). As explained below, we hold that the Department met its burden to show that Exemption 4 applies to Planned Parenthood's submitted documents. We also hold that the Department met its burden to show that Exemption 5 applies to its withheld internal documents.

A. Planned Parenthood Documents

The Department invokes Exemption 4 to prevent disclosing portions of the Manual, a letter describing the Manual, the Fees and Collections Policies, and a document titled "Steps in Establishing our Fee Schedule." In order to properly invoke Exemption 4, the Department must demonstrate that the information it seeks to protect is both commercial and confidential.[4] See id. § 552(b)(4). The FOIA does

[4] The Department is not asserting that the submitted information is financial or privileged under Exemption 4. We

not define the term "commercial," so courts have given the term its ordinary meaning. See Pub. Citizen Health Research Grp. v. Food & Drug Admin., 704 F.2d 1280, 1290 (D.C. Cir. 1983); Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (noting that "commercial" in the FOIA context "surely means pertaining or relating to or dealing with commerce."). Commercial information is confidential if disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 9 to 5 Org. for Women Office Workers v. Board of Governors, 721 F.2d 1, 8 (1st Cir. 1983) (quoting Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted))[5]

Right to Life makes two arguments for why Exemption 4 does not apply to the requested information: (1) Planned Parenthood, as a non-profit, cannot possess commercial information; and (2) even if Planned Parenthood can possess commercial

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thus focus only on whether the submitted information is commercial and confidential.

[5] 9 to 5 Org. expressly left open, as do we here, the possibility that information can be confidential if disclosure would harm interests other than the two interests identified in Nat'l Parks. 9 to 5 Org., 721 F.2d at 9 (noting that "[i]f it can be demonstrated with particularity that a specific private or governmental interest will be harmed by the disclosure of commercial or financial information, the Government should not be precluded from invoking the protection of [E]xemption 4 merely because the asserted interest is not precisely one of those two identified in National Parks").

information, disclosure of the requested information poses no likelihood of substantial harm to Planned Parenthood's competitive position.

1. Non-profits may possess commercial information.

Right to Life argues that because Planned Parenthood is a non-profit organization, it cannot be said to possess commercial information within the meaning of Exemption 4. We disagree. If accepted, this argument would amount to a per se exclusion of nonprofit entities from protection under Exemption 4. Neither the language of the statute nor common sense lean in Right to Life's favor here. The term "commercial" as used in the statute modifies "information" and not the entity supplying the information. See 5 U.S.C. § 552(b)(4). All sorts of non-profits – hospitals, colleges, and even the National Football League – engage in commerce as that term is ordinarily understood. How the tax code treats income from that commerce is a separate issue that has no bearing on our inquiry here.

Apart from arguing that non-profits cannot possess commercial information, Right to Life does not claim that the information in the documents is somehow not otherwise commercial.[6] These documents – the Manual, the letter describing the

[6] Right to Life does make a fall back argument that, even if a non-profit can possess commercial information, information tendered in order to get a federal grant (i.e., getting a check for rendering services) is somehow per se non-commercial. But no precedent supports such a claim. Nor can we see any reason why the nature of the information somehow changes when supplied to get such a grant.

Manual, the fees and collections policies, and the "Steps in Establishing our Fee Schedule" document – outline Planned Parenthood's operations and fees. That is to say, they outline the amounts Planned Parenthood charges customers for its services, and how it produces those services for sale. These documents thus surely pertain or relate to commerce as that term is ordinarily understood. See, e.g., Pub. Citizen Health Research Grp., 704 F.2d at 1290.

2. The subject documents are confidential.

We turn now to the question of whether this undoubtedly commercial information is also 'confidential' under FOIA Exemption 4. See 9 to 5 Org., 721 F.2d at 8; 5 U.S.C. § 552(b)(4). Commercial information is confidential under Exemption 4 if disclosure is likely to either: (1) "impair the Government's ability to obtain necessary information in the future"; or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained." 9 to 5 Org., 721 F.2d at 8 (quoting Nat'l Parks, 498 F.2d at 770). The Department is not arguing the first prong. When evaluating the second prong, "the -12- court need not conduct a sophisticated economic analysis of the likely effects of disclosure." Pub. Citizen Health Research Grp., 704 F.2d at 1291. But "[c]onclusory or generalized allegations" will not suffice. Id. Parties opposing disclosure need not demonstrate actual competitive harm; instead, they need only show actual competition and a likelihood of substantial competitive injury in order to "bring [that] commercial information within the realm of confidentiality." Id.; accord Sharkey v. Food & Drug

Admin., 250 F. App'x 284, 288 (11th Cir. 2007); Lion Raisins Inc. v. United States Dep't of Agric., 354 F.3d 1072, 1079 (9th Cir. 2004); Utah v. United States Dep't of Interior, 256 F.3d 967, 970 (10th Cir. 2001); Natural Res. Def. Council, Inc. v. United States Dep't of Interior, No. 13 Civ. 942(PAE), 2014 WL 3871159, at *13 (S.D.N.Y. Aug. 5, 2014).

For the purposes of awarding the grant in 2011, both New Hampshire and the Department determined that Planned Parenthood was the only Title X provider in the region. Right to Life contends that the Department cannot change positions and now argue against disclosure on the ground that Planned Parenthood would likely face substantial competitive harm. Right to Life's view of actual competition is myopic, focusing only on the ad-hoc, non-competitive grant process that took place in 2011. The district court aptly noted that Planned Parenthood faces plenty of competition from other entities for patients. Many of Planned Parenthood's services are also provided by hospitals and health clinics. Further, the Title X grant process in New Hampshire will be open to other bids in the future. Even in 2011, a potential competitor – the Manchester Community Health Center – requested information from the Department about applying for the same grant. Although Planned Parenthood admittedly did not compete for the federal grant in 2011, it certainly does face actual competitors – community health clinics – in a number of different arenas, and in future Title X bids. This satisfies the "actual competition" requirement. See, e.g., Utah, 256 F.3d at 970–71.

Having established that the documents contain commercial information, and that Planned Parenthood faces actual competition in a variety of contexts, we turn to the specific documents Right to Life wants disclosed, and whether disclosure of those documents would likely cause substantial competitive harm to Planned Parenthood.[7]

The Manual, and thus the letter that describes it, "provides a model for operating a family planning clinic and for providing . . . services consistent with [Planned Parenthood's] unique model of care." The National Medical Committee of Planned Parenthood Federation of America developed the Manual, in collaboration with local affiliate chapters, like the Northern New England branch. Planned Parenthood treated these documents as confidential information not generally available to the public. A potential future competitor could take advantage of the institutional knowledge contained in the Manual, and the letter describing the Manual, to compete with Planned Parenthood for patients, grants, or other funding. We therefore agree with the district court that the Department met its burden for invoking Exemption 4 for the Manual and Medical Standards, and the letter containing descriptions of the same – Vaughn index categories 38 and 39.

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[7] We gauge the risk of substantial harm to Planned Parenthood's competitive position as of the time of the district court decision. See, e.g., N.Y. Times Co. v. United States Dep't of Justice, 756 F.3d 100, 110 n.8 (2nd Cir. 2014). Requiring an agency to update its FOIA responses "based on post-response occurrences could create an endless cycle of judicially mandated reprocessing." Bonner v. United States Dep't of States, 921 F.2d 1148, 1152 (D.C. Cir. 1991).

The Fees and Collections Policies and the "Steps in Establishing our Fee Schedule" documents contain information that "identifies cost differentials between services, identifies all services provided[,] and sets forth the fee scale." Planned Parenthood treated these documents as confidential information not generally available to the public. Pricing information like that contained in these documents is undoubtedly valuable information for competitors. Nor is there any suggestion that competitors have access to this information (other than perhaps anecdotally and incompletely). We thus agree with the district court that the Department met its burden for establishing a likelihood of substantial competitive harm from the disclosure of Planned Parenthood's "Steps in Establishing our Fee Schedule" document and its Fees and Collections Policies – Vaughn index categories 35 and 37.[8]

B. Department Documents

Right to Life also seeks internal Department documents that are withheld under Exemption 5. Exemption 5 shields documents that are normally immune from civil discovery, including those protected by the deliberative process and attorney-client privileges. See Nat'l Labor Relations Bd. v.

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[8] The district court applied the lessened standard to voluntary submissions, enunciated in Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992). See New Hampshire Right to Life v. Dep't of Health and Human Serv., 976 F.Supp.2d 43, 54 (D. N.H. Sept. 30, 2013). We decline at this time to adopt that lessened standard for voluntary submissions.

Sears, Roebuck & Co., 421 U.S. 132, 149-55 (1975); see also Elec. Frontier Found. v. United States Dep't of Justice, 739 F.3d 1, 7 (D.C. Cir. 2014) (Exemption 5 applies "to documents that are predecisional and deliberative, meaning they reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated") (quotations and citations omitted); Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977) (Exemption 5 "is intended to protect the quality of agency decision-making by preventing the disclosure requirement of the FOIA from cutting off the flow of information to agency decisionmakers. Certainly this covers professional advice on legal questions which bears on those decisions."). Exemption 5 protects government "agencies from being 'forced to operate in a fishbowl.'" Id. (quoting Envtl. Prot. Agency v. Mink, 410 U.S. 73, 87 (1973)). It facilitates government decision making by: (1) assuring subordinates will feel free to provide uninhibited opinions, (2) protecting against premature disclosure of proposed government policies, and (3) preventing confusion among the public that may result from releasing various rationales for agency action. Providence Journal Co. v. United States Dep't of Army, 981 F.2d 552, 557 (1st Cir. 1992)(quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

Right to Life advances two arguments for rejecting the Department's reliance on Exemption 5: First, it argues that some of the documents that are outside the scope of the attorney-client privilege are also not predecisional as a matter of simple

chronology; and, second, it argues that the Department waived any objection to producing the documents that reflect the opinions of Department lawyers because the Department adopted the opinions of legal counsel as policy of the Department. We address each argument in turn.

1. The withheld documents are all predecisional.

To fit within Exemption 5, the Department must demonstrate that the communications were both "predecisional" and "deliberative." Providence Journal, 981 F.2d at 557 (internal quotation omitted). Right to Life argues that the documents are not deliberative only because they are not predecisional, so we limit our inquiry to whether they are indeed predecisional. A document is predecisional if the agency can: "(1) pinpoint the specific agency decision to which the document correlates, (2) establish that its author prepared the document for the purpose of assisting the agency official charged with making the agency decision, and (3) verify that the document precedes, in temporal sequence, the decision to which it relates." Id. (internal quotation marks and citations omitted). The dispute here centers on the temporal sequence of Department documents and decisions, and on identifying the decisions to which the particular documents relate. The following chronology outlines the relevant decisional timeline.

On August 8, 2011, there was an e-mail chain (Vaughn index category 11) between Department employees and Office of General Counsel attorneys regarding whether the Department could legally

issue a replacement grant. On August 9, Secretary Sebelius was briefed on the issue. Subsequently, on August 10, the White House was also briefed on this alternative plan. Right to Life -18- asserts that this briefing constituted "approval from the White House." Right to Life cites as evidence of White House "approval" an informal e-mail stating, "[t]he WH was briefed and they are getting down to pennies and nickels." On August 12, there was an e-mail chain (Vaughn index category 15) discussing a draft document regarding funding for the replacement grant. On August 18, there was another e-mail chain addressing funding for the replacement grant (Vaughn index category 18). Finally, on August 19, OASH's executive officer signed a blank line indicating "Approve" underneath the heading "Decision" on the Sole Source Justification memorandum.

On September 28, 2011, three out of five members of the New Hampshire Executive Council filed a letter protesting the Department's decision with the Government Accountability Office ("GAO"), carbon copying Kathleen Sebelius, Department Secretary. In a letter dated October 5, 2011, the GAO declined to review the Executive Council members' protest for lack of jurisdiction. The Department later decided not to provide its own response.

Right to Life contends that the decision to directly award Title X funds to Planned Parenthood was made at the White House briefing on August 10, 2011. If this were true, all pertinent documents created after that date would be postdecisional, and

thus not exempt from disclosure under Exemption 5. See id. The record, however, does not support Right to Life's contention. On its face, the e-mail Right to Life cites as evidence of White House approval indicates that a decision, while perhaps close, had not yet been finalized. The phrase "getting down to pennies and nickels" plainly suggests a pending decision, not a final decision for Exemption 5 purposes. That leaves August 19 – the date the OASH executive signed the approval line on the Sole Source Justification memorandum – as the date the decision was made to proceed with a direct award process.[9] We therefore reject Right to Life's argument that Vaughn index categories 15–16 and 18–19, all created prior to August 19 were post-decisional documents.

[10] We turn next to the documents covered by Vaughn index categories 23–25 and 33. All of these

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[9] Throughout its brief, Right to Life touts the title of the "Sole Source Justification" memorandum, and suggests that it indicates that the substance of the memorandum itself is "a post hoc justification of a decision that had been made several days earlier." Read as a whole, the document's substance makes clear that it is a recommendation letter, seeking approval from a superior: "I recommend that you approve this request for a sole source replacement grant to Planned Parenthood of Northern New England."

[10] Categories 16 and 19 are undated, but, given their content, necessarily predate the August 19 decision. Category 16 covers drafts of a rationale for the grant funding amount. Category 19 covers early drafts of the Sole Source Justification memorandum.

documents post-date the August 19 decision to proceed with a non-competitive sole-source grant process. Therefore, Right to Life argues, they are not predecisional. The problem with this argument is that there were other relevant decisions made on or after August 19, including: (1) the Department's decision on September 9 to publicly announce its intent to issue the grant award to Planned Parenthood, and (2) the Department's decision to not provide a separate response to New Hampshire's protest of that direct award.

Vaughn index categories 23–25 relate to and pre-date the September 9 public announcement that the Department intended to directly award a grant to Planned Parenthood. These documents deal with the Department's decision of how and what to communicate to the public, which is a decision in and of itself. Vaughn index categories 23–25 are not post-decisional. Right to Life simply misidentifies the decision to which these documents relate.

Similarly, the documents included in Vaughn index category 33 involve communications between Department employees and attorneys relating to whether the Department should also respond to the New Hampshire Executive Council's protest. This e-mail chain necessarily predates any decision by the Department to withhold a separate response to the protest. We are satisfied that the Department appropriately met its burden for withholding these documents under Exemption 5.

2. The Department Did Not Waive Its Privileges By Adopting Counsel's Legal Advice.

In responding to Right to Life's FOIA request, the Department revealed that an attorney in the Office of General Counsel had advised the Director of the OASH Grants Management Office that it was legal to issue a replacement grant. The Department redacted any material that revealed the basis or reasoning behind such advice. The Department never publicly announced either the advice or the reasoning behind the advice. Nor does it rely on the advice in this litigation.

Right to Life advances a single argument for finding that the Department must now produce the communication with OCG counsel. It claims that, by issuing the replacement grant, the Department adopted counsel's advice as "policy of the Agency."[11]

The record provides no factual support for this claim unless one presumes that every time an agency acts in accord with counsel's view it necessarily adopts counsel's view as "policy of the Agency." As a categorical rule this makes no sense, especially where counsel's legal advice is simply that there is no impediment to the agency doing what it wants to do.

For precedent, Right to Life points only to Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421

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[11] Right to Life does not argue that the Department waived its privilege by failing to redact from the Sole Source Justification memorandum the short description of the conclusion of counsel.

U.S. 132 (1975), and Brennan Center v. United States Dep't of Justice, 697 F.3d 184 (2nd Cir. 2012). Each of these opinions, however, hinged disclosure of legal counsel's advice on whether the agency actually adopted the reasoning behind counsel's opinion as its own. See Renegotation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184–85 (1975-22-(companion case to Sears, holding that "[if] the evidence utterly fails to support the conclusion that the reasoning in the reports is adopted by the Board as its reasoning, even when it agrees with the conclusion of a report, . . . the reports are not final opinions and do fall within Exemption 5."); Brennan Center, 697 F.3d at 197 ("[T]he fact that the agencies acted in conformity with the . . . memoranda [does not] establish that the agencies adopted their reasoning."). Here, the Department never adopted, or even mentioned, counsel's reasoning.

"Mere reliance on a document's conclusions – at most what we have here – does not necessarily involve reliance on a document's analysis; both will ordinarily be needed before a court may properly find adoption or incorporation by reference." National Council of La Raza v. Dep't of Justice, 411 F.3d 350, 358 (2nd Cir. 2005); Elec. Frontier Found. v. United States Dep't of Justice, 739 F.3d 1, 10–11 (D.C. Cir. 2014) ("[T]he Court has refused to equate reference to a report's conclusions with adoption of its reasoning, and it is the latter that destroys the privilege.")

It is a good thing that Government officials on appropriate occasion confirm with legal counsel that what the officials wish to do is legal. To hold that the

Government must turn over its communications with counsel whenever it acts in this manner could well reduce the likelihood that advice will be sought. Nothing in the FOIA compels such a result.

IV. Conclusion

For the foregoing reasons, we affirm the district court's rulings.

So ordered.

NH Right to Life v. US DHHS CV-11-585 9/30/13

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

New Hampshire Right to Life

v. Civil No. 11-cv-585-JL
Opinion No. 2013 DNH 132

Department of Health and
Human Services

MEMORANDUM ORDER

This action presents several questions over the application of various exceptions to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or "the Act"). Invoking the Act, the plaintiff, New Hampshire Right to Life, requested the release of documents by the defendant, the Department of Health and Human Services ("HHS"), concerning its September 2011 award of a "sole-source discretionary replacement grant" to Planned Parenthood of New England ("Planned Parenthood"). After HHS failed to respond to Right to Life's request by the 20-day statutory deadline, Right to Life commenced this action, invoking this court's jurisdiction under FOIA. See 5 U.S.C. § 552(a)(4)(B). HHS has since released more than 2,500 pages of documents in response to Right to Life's request (and two related ones), but has refused to release other documents, or has released documents in redacted form, invoking three different statutory exceptions to FOIA.

The parties have filed cross-motions for summary judgment, see Fed. R. Civ. P. 56, as to whether HHS correctly invoked these exceptions. The exceptions at issue, as set forth in FOIA, are:

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; [and]
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]

5 U.S.C. § 552(b). Together with its motion and supporting memorandum, which also serves as an objection to Right to Life's summary judgment motion, HHS has submitted a revised "Vaughn index" listing 34 different categories of documents that HHS has continued to withhold, together with a brief description of each and the FOIA exception invoked as the basis of the withholding.[1] HHS has

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[1] As the Court of Appeals has explained, "[a] Vaughn index correlates information that an agency decides to withhold with the particular FOIA exemption or exemptions, explaining the agency's justification for nondisclosure." Maynard v. CIA, 986 F.2d 547, 556 (1st Cir. 1993). Its name is "derived from the seminal case, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)." Id. at 556 n.10.

also submitted declarations from two HHS officials (one involved in awarding the grant to Planned Parenthood, the other involved in responding to Right to Life's FOIA requests) and from a Planned Parenthood director.

Right to Life, for its part, has filed a memorandum (accompanied by several exhibits) in support of its own motion for summary judgment, as well as a memorandum both objecting to HHS's cross-motion and replying to HHS's objection to Right to Life's summary judgment motion. HHS has submitted a reply to that filing, and Right to Life has submitted a sur-reply.

Based on these materials, the court grants Right to Life's motion for summary judgment in part and denies it in part, and grants HHS's motion for summary judgment in part and denies it in part. While HHS has carried its burden to show that the vast majority of the materials it has continued to withhold in response to Right to Life's FOIA requests fall within the claimed exemptions, HHS has failed to carry that burden as to a few categories of information. Specifically, HHS has not shown that (1) Planned Parenthood's personnel policies amount to "confidential" commercial information, (2) that emails between HHS's regional director and her subordinates advising her on how to conduct a telephone call with a state official are protected by the deliberative process privilege, and (3) that disclosing the curriculum vitae of Planned Parenthood's medical director, or the salaries of Planned Parenthood employees, would amount to a

clearly unwarranted invasion of the employees' personal privacy.

I. Applicable legal standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if it could reasonably be resolved in either party's favor at trial, and "material" if it could sway the outcome under applicable law. See Estrada v. Rhode Island, 594 F.3d 56, 62 (1st Cir. 2010). In analyzing a summary judgment motion, the court "views all facts and draws all reasonable inferences in the light most favorable to the non-moving" parties. Id. On cross-motions for summary judgment, "the court must consider each motion separately, drawing inferences against each movant in turn." Merchants Ins. Co. of N.H., Inc. v. U.S. Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998) (quotation marks omitted). The standards for summary judgment in a FOIA case are the same as those in any other kind of case. Francis M. Dougherty et al., Freedom of Information, in 15 Federal Procedure: Lawyers' Edition § 38:461, at 539 (2011).

II. Background

A. Award of the grant to Planned Parenthood

The following facts are undisputed. For decades, HHS has provided federal funding to the State of New Hampshire under Title X of the Public Health

Service Act, created by the Family Planning Services and Population Research Act of 1970. Pub. L. 91-572, § 6(c), 84 Stat. 1504, 1506-08, codified as amended at 42 U.S.C. §§ 300–300a-6. The purpose of this funding is "to assist in the establishment and operation of voluntary family projects which shall offer a broad range of acceptable and effective family planning methods and services, 42 U.S.C. § 300(a), including, as Right to Life alleges, "free or reduced cost[] birth control, contraception, and other services." After receiving these funds, as grants from HHS, the State distributes them as subgrants to various entities throughout New Hampshire. It appears that this was done on an annual basis, and that Planned Parenthood was among those entities that regularly received these subgrants.

In June 2011, however, the New Hampshire Executive Council voted not to award any sub-grants to Planned Parenthood, which operates clinics in six different New Hampshire municipalities, effective July 1, 2011. In reaching this decision, the Executive Council "expressed its concern that Planned Parenthood was not able to provide sufficient guarantees that the Title X funds would not be used to subsidize abortions," according to Right to Life. Since its passage, Title X has prohibited the use of the funding it authorizes "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

In response, HHS wrote to its state counterpart, the New Hampshire Department of Health and Human Services, in mid-July 2011. HHS noted that, due to the Executive Council's decision, "currently

there is no funded entity to provide Title X services for [the] portion of the state" served by Planned Parenthood, and expressed concern "that access to Title X family planning services are being negatively impacted for a significant number of individuals in need." Thus, HHS asked for information on how the State proposed to provide those services in light of the Executive Council's decision.

Later that month, Christie Hager, the Regional Director of HHS's Region I Office (which encompasses New Hampshire) participated in a telephone conference with one of New Hampshire's Executive Councilors, David Wheeler, who had a number of questions about the consequences of the Council's decision to discontinue Planned Parenthood's subgrants. In preparation for this call, Hager sought assistance from several HHS staffers in compiling answers to Councilor Wheeler's questions, resulting in two chains of e-mails created prior to the conference call.[2]

In mid-August 2011, the New Hampshire Department of Health and Human Services informed HHS that the state was no longer providing Title X family planning services in the municipalities previously served by Planned Parenthood. As a result, the New Hampshire Department of Health and Human Services explained, it was relinquishing a portion of the federal grant equal to its projection

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[2] These e-mails are identified on the revised Vaughn Index as category 9. In response to Right to Life's FOIA requests, HHS disclosed an e-mail by Hager summarizing the call after it occurred, identified on the revised Vaughn Index as category 37.

of what Planned Parenthood would have received to provide those services for the second half of 2011, or approximately $360,000.

A week or so later, on August 19, 2011, Marilyn Keefe, the Deputy Assistant Secretary for Population Affairs of the Office of the Assistant Secretary for Health ("OASH") at HHS, signed a memorandum (dated one day earlier, August 18, 2011) to "OASH, Executive Officer" entitled "Sole Source Justification for Replacement Grant in New Hampshire." Noting the state's relinquishment of the HHS grant to provide Title X services in the six municipalities previously served by Planned Parenthood, 7 the memorandum states that "[a]s a result, there are no Title X services being provided in [those] areas . . . . Services need to be re-established as quickly as possible to minimize the interruption of needed clinical services and protect the public health." Thus, the memorandum explains, HHS's Office of Population Affairs ("OPA") "is requesting approval of a sole source replacement grant award to [Planned Parenthood] for a period of 16 months."

To justify the "sole source" nature of this action, i.e., that Planned Parenthood "is the only entity from which an application should be sought" for the replacement grant, the memorandum recites "an urgent need to reinstate services in [the affected] areas with an experienced provider that is familiar with the provision of Title X family planning services and applicable laws . . . and has a history of successfully providing services in this area of the state." The memorandum further explains that "[i]f this recommendation is approved, OPA will reach

out to the proposed replacement grantee to determine if the organization is willing to take on the project as a directly funded federal grantee" (underlining omitted). On August 19, 2011 (the same day Keefe signed it), the memorandum was countersigned on a blank line indicating "Approve," underneath the heading "Decision," by Michon Kretschmaier, the OASH Executive Officer. The parties vigorously dispute the extent to which this is the "decision" at issue for purposes of applying the deliberative process privilege here. See infra Part III.B.1.a.

On September 1, 2011, Planned Parenthood submitted a grant application to HHS and, on September 8, 2011, HHS prepared a document entitled "Technical Review" evaluating that application.[3] The next day, the Assistant Secretary for Health approved the publication of a notice, on the HHS website, that HHS "intends to issue a replacement grant to [Planned Parenthood] to provide Title X family planning services" in the affected municipalities. The notice was in fact posted to the HHS website on September 9, 2011.

Among other things, the notice explained that "[b]ecause of the urgent need to have Title X services reinstated, and because of [Planned Parenthood's] prior experience with providing Title X services in

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[3] Both of these documents were disclosed, in redacted form, in response to Right to Life's FOIA requests. The application is identified as category 26, and the Technical Review is identified as category 27 , on the revised Vaughn index.

the identified areas," HHS "intends to issue a solesource urgent replacement grant award to [Planned Parenthood] for a period of 16 months." The notice further explained, however, that "[t]he entire state of New Hampshire will be in a competitive status in [fiscal year] 2013, with a new grant award period beginning December 31, 2012."

On September 13, 2011, HHS issued a "Notice of Grant Award" to Planned Parenthood.[4] Among other things, this notice required Planned Parenthood to submit additional information to HHS by December 15, 2011, including "institutional files" on "a variety of policies and procedures." In response, Planned Parenthood submitted a number of documents to HHS, including information on its fee schedule and personnel policies at its clinics, as well as its "Manual of Medical Standards and Guidelines."[5] As noted at the outset, HHS has disclosed redacted versions of these documents on the grounds that they contain Planned Parenthood's confidential commercial information, as well as, in some instances, information that, if revealed, would

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[4] HHS asserts that this date marked its decision to award the grant to Planned Parenthood – even though, as just discussed, it had announced its "intention" to do so on its website four days earlier, on September 9, 2011. Whether HHS decided to award the grant to Planned Parenthood on September 9, 2011 or September 14, 2011 is immaterial for present purposes, however, because HHS has not invoked the deliberative process privilege as to any documents created between those two dates. See infra Part III.B.1.a. So the court will simply refer to the date of that decision as September 14, 2011.

[5] These documents are identified on the revised Vaughn index as categories 35-39.

constitute an invasion of privacy as to one or more of Planned Parenthood's employees. Right to Life disputes these characterizations.

B. Litigation

On October 7, 2011, a month or so after HHS announced its intention to award the grant to Planned Parenthood, counsel for Right to Life presented HHS with a request under FOIA for 27 different categories of documents concerning the award. At the end of that month, HHS notified counsel for Right to Life that HHS had received his FOIA request and had asked OASH to conduct a search, but would "be unable to comply" with the statutory deadline to respond, see 5 U.S.C. § 552(a)(6)(A)(i), even with the benefit of the 10-day extension available in "unusual circumstances," id. § 552(a)(B)(I).[6]

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[6] Right to Life argues in its opening summary judgment memorandum that HHS failed to comply with the statutory deadlines for responding to Right to Life's initial FOIA request, but does not identify any relief to which it would be entitled as a result of this delay. Moreover, in its response to HHS's motion for summary judgment, Right to Life disclaims any suggestion "that HHS's failure to follow the statute automatically results in a waiver of all exemptions." But Right to Life goes on to state that the late response to the FOIA request "does entitle [it] to summary judgment on the issue of HHS's failure to comply with the time requirements of FOIA." But, on summary judgment or otherwise, this court can only decide issues that could result in the provision of some meaningful relief. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Because, as Right to Life more or less acknowledges, a ruling that HHS failed to comply with the

Right to Life then commenced this action in late December 2011, seeking, among other relief, for "HHS to immediately provide [Right to Life] with all records responsive to the [FOIA] request." The case was assigned to Judge Barbadoro. HHS began producing documents to Right to Life in early January 2012, in a series of disclosures that continued well into the spring of that year. In the meantime, this court (McCafferty, M.J.) approved, over Right to Life's objection, HHS's proposed scheduling order in this matter, which required HHS "to produce all non-exempt documents on or before April 1, 2012 and to produce its Vaughn Index on or before April 15, 2012." Order of Feb. 24, 2012.

This order was subsequently modified, with Right to Life's assent, to add deadlines for HHS to produce, or list on a supplemental Vaughn index, documents responsive to a request that counsel for Right to Life had made to counsel for HHS in March 2012. This request sought the additional information that Planned Parenthood was required to submit by the Notice of Grant Award issued in September 2011. See Part II.A, supra.

One of these documents, as already noted, was Planned Parenthood's Manual of Medical Standards and Guidelines. After determining that certain portions of the manual (totaling 7 of 244 pages) were

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Act's deadlines in responding to the FOIA request would not provide any meaningful relief, this court cannot, and does not, make that ruling here.

exempt from disclosure under FOIA, HHS notified Planned Parenthood that HHS intended to release the balance of the manual. In response, Planned Parenthood argued that the entire manual was in fact confidential commercial information exempt from disclosure under FOIA, see 5 U.S.C. § 552(b)(4), but HHS rejected that argument and notified Planned Parenthood that it intended to proceed with disclosure.

Planned Parenthood then commenced an action in this court against HHS, seeking to enjoin it from releasing any portion of the manual. Planned Parenthood of N. New Eng. v. HHS, No. 12-cv- 163-JL (Apr. 26, 2012). With Planned Parenthood's assent, HHS sought, and was granted, a remand of that matter to HHS so it could "reconsider its FOIA determination in light of additional information provided by [Planned Parenthood] about specific portions of the manual, and produce a more comprehensive explanation for any determination that portions of the manual are subject to disclosure despite [Planned Parenthood's] objections." That action, which had been assigned to the undersigned, was then administratively closed "without prejudice to the possibility of being reopened." The present case (Right to Life's FOIA action) was then assigned to the undersigned. Order of May 3, 2012.

Upon reconsideration of its decision to release all but 7 pages of Planned Parenthood's manual, HHS "decided to withhold or redact significant portions" of it. HHS produced the other portions of the manual to Right to Life in July 2012. Then, in August 2012, Right to Life submitted another FOIA request to

HHS, this time seeking communications between Planned Parenthood and the agency concerning its decisions as to which documents to disclose in response to Right to Life's earlier FOIA requests. HHS made a series of disclosures in response to the August 2012 FOIA request between late August and mid-October 2012.

In the meantime, on April 13, 2012, HHS produced its initial Vaughn index in this matter, and later, in mid-July 2012, submitted a supplemented version which included the portions of the Planned Parenthood manual and other related documents requested by counsel for Right to Life in March 2012. Based on this Vaughn index, Right to Life filed its motion for summary judgment. When HHS filed its objection and cross-motion for summary judgment, it included a revised Vaughn index, which excluded certain documents that, while initially withheld, HHS had decided to release in response to Right to Life's summary judgment motion. The documents listed on the revised Vaughn index, then, are the ones presently in dispute.

III. Analysis

FOIA generally requires federal agencies to make their records available to any person upon proper request. See 5 U.S.C. § 552(a)(3)(A). But this requirement is subject to several exceptions, three of which are at issue here:

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; [and]
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]

5 U.S.C. § 552(b). As the Court of Appeals has advised, "[t]he policy underlying FOIA is . . . one of broad disclosure, and the government must supply any information requested by any individual unless it determines that a specific exemption, 15 narrowly construed, applies." Church of Scientology Int'l v. Dep't of Justice, 30 F.3d 224, 228 (1st Cir. 1994). Accordingly, "[t]he government bears the burden of demonstrating the applicability of a claimed exemption, and the district court must determine de novo whether the queried agency has met this burden." Id. (citations omitted).

In moving for summary judgment, Right to Life argues that HHS has failed to show that the exemptions it has invoked in withholding particular documents apply, for a number of reasons. In objecting, and cross-moving for summary judgment, HHS argues that it has in fact carried that burden here. As explained fully below, the court rules that HHS has sustained its burden to show that an exemption applies to most, but not all, of the information it has continued to withhold from Right to Life.

A. Confidential commercial information (exemption 4)

HHS has invoked exemption 4, protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential," in disclosing redacted versions of several documents submitted to HHS by Planned Parenthood. Again, Planned Parenthood provided those documents in response to the Notice of Grant Award, which required Planned Parenthood's "institutional files" on "a variety of policies and procedures." See Part II.A, supra. The documents include information on Planned Parenthood's fee schedule, personnel policies, collections policies, and medical standards and guidelines – most significantly, the Manual of Medical Standards and Guidelines.

HHS argues that the redacted portions of these documents constitute Planned Parenthood's confidential commercial information. But Right to Life maintains that HHS has failed to show that the redacted information is either "commercial" or "confidential." As explained fully below, the court rules that HHS has, in fact, carried that burden, except as to a single category of documents that it has failed to show is confidential.

1. "Commercial"

As an initial matter, Right to Life argues that none of the information submitted by Planned Parenthood is "commercial" in nature. This is so, Right to Life says (at least in its opening

memorandum) because Planned Parenthood is a not-for-profit organization and "[n]on-profit entities, by their definition, do not engage in commercial enterprises."[7] But, as HHS points out in response, courts applying exemption 4 have recognized that "[a] submitter's 'non-profit status is not determinative of the character of the information it reports.'" N.Y. Pub. Interest Research Grp. v. EPA, 249 F. Supp. 2d 327, 333 (S.D.N.Y. 2003) (quoting Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987), rev'd on other grounds,975 F.2d 871 (D.C. Cir. 1992) (en banc)); see also Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (rejecting argument that information was not commercial because the submitter "does not have profit as its primary aim"); Gov't Accountability Project v. Dep't of State, 699 F. Supp. 2d 97 , 102 (D.D.C. 2010) (similar). To the contrary, the scope of "commercial information" under exemption 4 does not depend on the character of the entity that

[7] In its reply, Right to Life accuses HHS of "misstat[ing] Right to Life's argument that the documents at issue cannot be commercial documents. It is not simply because [Planned Parenthood] is a non-profit entity." This court reads the foregoing statement from Right to Life's opening memorandum the same way HHS does. In any event, Right to Life's reply memorandum continues to press the point that a non-profit entity's information cannot be "commercial" under exemption 4, relying on the definitions of "commercial activities" and "commercial or for profit organization" set forth in an HHS "Facilities Program Manual" and a "Grants Policy Directive." Insofar as these materials set forth mutually exclusive definitions of "non-profit" and "commercial" in a non-FOIA context, the court does not find them instructive in light of the weight of case law, discussed infra, that defines "commercial" as it appears in FOIA itself.

submitted it to the agency, but on the character of the information itself. That much is clear from the language of exemption 4, in which "commercial" modifies the term "information," rather than the term "person" (referring to the source of the information). Thus, courts have recognized that "information is 'commercial' under this exemption if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature,'" Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 38 (D.C. Cir. 2002) (quoting Am. Airlines, 588 F.2d at 870)). In other words, exemption 4 applies "where the provider of the information has a commercial interest in the information submitted to the agency." Baker & Hostetler LLP v. Dep't of Commerce, 473 F.3d 312, 319 (D.C. Cir. 2006). Furthermore, because FOIA does not contain its own definition of the term "commercial" as it appears in § 552(b)(4), courts "have consistently held that the term[] 'commercial' . . . in the exemption should be given [its] ordinary meaning." Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983); see also, e.g., Watkins v. Bureau of Customs & Border Prot., 643 F.3d 1189, 1195 (9th Cir. 2011). That meaning is simply "pertaining to or relating to or dealing with commerce." Am. Airlines, 588 F.2d at 870.

The information that Planned Parenthood submitted to HHS in response to the Notice of Grant Award readily meets this accepted definition of "commercial" as it appears in § 552(b)(4). As explained in the declarations filed with HHS's summary judgment materials, the manual "provides a model for operating a family planning clinic," while the other documents contain information on more

discrete aspects of that operation, including setting rates, managing employees, and collecting accounts. This is plainly information serving a "commercial function," i.e., guiding the operations of an entity engaged in "commerce" as that term is commonly understood.

Right to Life nevertheless asserts that "it defies common sense that the operation of federally subsidized family planning clinics is commerce." The court disagrees. Many kinds of entities – including, just to name a few, universities, hospitals, and farms – receive federal grants or other forms of federal subsidies for their operations, and it cannot seriously be argued that, as a result, those operations are not "commerce." Moreover, Planned Parenthood does not fund its clinical operations solely through federal grants but, as one of its directors explains in a declaration submitted by HHS, "receives some of its revenue by accepting private insurance and collecting cash payments and co-payments from its patients." HHS has carried its burden to show that the documents that Planned Parenthood submitted to HHS in response to the "Notice of Grant" contained "commercial information" under § 552(b)(4).[8]

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[8] Rather than addressing the definition of "commercial" as set forth in the case law, Right to Life argues that the term must be "narrowly construed." While, as already noted, all FOIA exemptions must be narrowly construed, Church of Scientology, 30 F.3d at 228, there is no reasonable construction of "commercial," however "narrow," that excludes the day-to-day operations of nonprofit entity engaged in commercial activity, even if those operations are federally subsidized.

2 . "Confidential"

To prove that information falls within exemption 4, HHS must demonstrate not only that the information is "commercial," but also that it is "confidential." 5 U.S.C. § 552(b)(4). Whether commercial information is "confidential" depends, in the first instance, on whether the party who submitted it did so voluntarily, or was required to do so as a condition of doing business with the government. "[C]ommercial information provided to the [g]overnment on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass, 975 F.2d at 879. On the other hand, "'commercial . . . matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the [g]overnment's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys., 721 F.2d 1, 8 (1st Cir. 1983) (quoting Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted by the citing court)).[9] So, as HHS acknowledges, when a party was required to submit the information to the government, "it is not enough that information is the type of information that the submitter would usually

[9] Right to Life agrees that this test controls the definition of "confidential" for materials submitted on a "required" basis.

keep secret" to immunize it from disclosure to a third party under exemption 4.

HHS has identified both "voluntary" and "required" submissions among the information that it has withheld pursuant to exemption 4. With one exception, Right to Life has not disputed (in either its own motion for summary judgment or its objection to the Department's cross-motion) that the Department has correctly classified certain submissions that Planned Parenthood made as "voluntary," or that the information contained in these submissions is "of a kind that would customarily not be released to the public by theperson from whom it was obtained."[10] Critical Mass, 975 F.2d at 879. Based on the presentation in its summary judgment memorandum, and the supporting materials, HHS has carried its burden to show that exemption 4 applies to the information it has characterized as Planned Parenthood's "voluntary" submissions to the agency. Again, Right to Life does not argue to the contrary.[11]

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[10] These documents are identified on the revised Vaughn index as category 35 and part of category 38 (which is Planned Parenthood's Manual of Medical Standards and Guidelines). HHS argues that, while "[t]he majority of Category 38 was a required submission," seven pages of it were not, because they pertain to "services that are not funded under Title X." Right to Life does not dispute that point, and acknowledges in its objection that it "does not challenge the withholding of these seven pages."

[11] [11]As to category 35, which consists of documents describing the steps that Planned Parenthood uses to establish a fee schedule, Right to Life simply asserts that these are "part of

Right to Life's sole challenge to the application of exemption 4 is directed at whether HHS has shown, as to information that Planned Parenthood was required to submit, that the release of that information would likely "cause substantial harm to the competitive position of" Planned Parenthood. 9 to 5, 721 F.2d at 8. HHS, for its part, does not argue that releasing the information that Planned Parenthood was required to submit would likely "impair the [g]overnment's ability to obtain necessary information in the future." Id.

Before analyzing the application of exemption 4 to the particular documents at issue, the court pauses to address an argument that Right to Life repeatedly makes in challenging HHS's invocation of exemption 4. HHS argues that disclosure is required notwithstanding the exemption because "public disclosure would increase the quality of health clinics applying for federal funds while

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the fee schedule itself," so that "the document as a whole was a required submission." But Right to Life provides no support for that assertion. HHS, in contrast, relies on the declaration of one of its employees to the effect that, while Planned Parenthood was required to submit its fee schedule, it was not required to submit information on how it arrived at that required to submit, that schedule. There is no genuine dispute, then, that Planned Parenthood's submission of that information was "voluntary." As a result, it is confidential under exemption 4 so long as it "would customarily not be released to the public by the person from whom it was obtained." Critical Mass, 975 F.2d at 879. As just noted, HHS has carried its burden to show that the data Planned Parenthood uses to set its fee schedule fits that description, and Right to Life has not disputed that point.

simultaneously decreasing the costs to the taxpayer," or, more broadly, that the "public has a right to know" how Planned Parenthood conducts its operations, since those operations are financed in part through public funds.

As HHS points out, the Court of Appeals for the District of Columbia Circuit has expressly rejected the argument that, in applying exemption 4, courts "should gauge whether the competitive harm done . . . by the public disclosure of confidential information is outweighed by the strong public interest" in its disclosure. Pub. Citizen Health Research Grp. v. FDA, 185 F.3d 898, 903-04 (D.C. Cir. 1999). In declining to adopt this "consequentialist approach" to exemption 4, the court reasoned that "Congress has already determined the relevant public interest" by providing in FOIA that "information should be disclosed unless it comes within a specific exemption," id. at 904, including, of course, the exemption for "commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4). This court finds this reasoning persuasive – if for no other reason than it simply applies the Act as written. Right to Life provides no authority to the contrary in any event. So this court rejects Right to Life's suggestion that, even if material is "confidential" under § 552(b)(4) – in the accepted sense that its disclosure would likely "cause substantial harm to the competitive position of" the person who submitted it – that exemption is nevertheless inapplicable so long as that harm is outweighed by the public interest in the material.

a. Manual of Medical Standards and Guidelines and Planned Parenthood's letter describing them[12]

According to the declaration of Planned Parenthood's Director of Health Care Operations, Helen Reid, submitted with HHS's summary judgment memorandum, the organization's Manual of Medical Standards and Guidelines effectively "provides a model for operating a family planning clinic and for providing the services consistent with [Planned Parenthood's] unique model of care." Reid further explains that the information in the manual "has been developed over the years" by Planned Parenthood Federation of America (Planned Parenthood of Northern New England's national affiliate) and that both organizations "have a written policy prohibiting their reproduction, reprinting, and distribution in most cases."

HHS argues that releasing the manual would likely cause substantial harm to Planned Parenthood by, among other things, eliminating Planned Parenthood's advantage over its competitors from its efforts in compiling the manual

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[12] Again, the manual is identified on the revised Vaughn index as category 38, while the letter is category 39. HHS explains that the letter, which Planned Parenthood sent to HHS upon learning of its decision to release portions of the manual, has been disclosed except insofar as it includes the portions of the manual that HHS withheld as Planned Parenthood's confidential commercial information. Right to Life does not question this explanation. The analysis in this section, then, applies with equal force to the redacted portions of the letter.

and maintaining its confidentiality. If the manual were publicly released, Reid explains, "[o]ther health care providers, such as community health care clinics, could easily copy the Planned Parenthood model and compete for patients, funding, staff, and providers." This shows that releasing the manual will likely cause Planned Parenthood "harm flowing from the affirmative use of proprietary information by competitors," bringing it within the accepted definition of "confidential" information under exemption 4.[13] Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

In arguing to the contrary, Right to Life asserts that HHS cannot show a likelihood of "competitive harm based on the speculation that a hospital or low cost health clinic might compete for the lucrative federal grants in the future." As Right to Life acknowledges, however, "it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is all that need be shown" to bring commercial information

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[13] Right to Life relies on Ninth Circuit case, Frazee v. United States Forest Service, 97 F.3d 367 (9th Cir. 1996), for the proposition that a "plan of how to operate [is] not exempt from disclosure under exemption 4." But the court in Frazee simply ruled, in relevant part, that because the information contained in a submitter's plan for operating recreational campgrounds was "freely or cheaply available from other sources," the district court correctly "determined that the . . . disclosure of the Plan is unlikely to cause substantial competitive harm." Id. at 371. Here, in contrast, there is no suggestion that the information in Planned Parenthood's manual is freely available from other sources; Reid's undisputed sworn statements establish that it is not.

within exemption 4. Gulf & W. Indus., Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979). Right to Life does not question that Planned Parenthood faces "actual competition" for grants from hospitals and community health clinics; indeed, Right to Life states in its complaint here that, in deciding not to award the Title X sub-grants to Planned Parenthood, "the Executive Council specifically requested that hospitals or community health facilities be found who would be willing to provide the Title X services" instead.[14]

Regardless, even if those entities did not compete with Planned Parenthood for grants, Right to Life does not dispute Reid's statement, just quoted, that those entities compete with Planned Parenthood for patients. HHS has carried its burden to show that releasing the manual would likely cause substantial harm to the competitive position of Planned Parenthood.

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[14] Right to Life also relies on the fact that HHS awarded the replacement grant to Planned Parenthood on a "sole-source," or non-competitive basis. As HHS points out, though, that fact has no effect on whether releasing the manual will likely cause harm to Planned Parenthood in competing for Title X sub-grants in the future, given HHS's express statement that, following the expiration of the sole-source award, "the entire state of New Hampshire will be in competitive status" once again.

b. Fees and collections policy[15]

Reid attests that Planned Parenthood's "'Fees and Collections Policy' is an internal management policy that is not disclosed to patients or the public," addressing, among other things, "issues regarding the timeliness of payment and methods of payment for services, and invoice adjustments." She further states that disclosing this policy would harm Planned Parenthood's "ability to engage in commercial decision-making about how and whether to charge certain patients, and how and whether to release bad debts" – by, for example, allowing competitors to "design more favorable policies to attract patients away from" Planned Parenthood.

Information that would "enable competitors to solicit [a submitter's] customers with competitive arrangements" has been found to threaten substantial competitive harm and, as a result, to qualify as "confidential" under exemption 4. Burke Energy Corp. v. Dep't of Energy, 583 F. Supp. 507, 512 (D. Kan. 1984). Right to Life's sole argument to the contrary, that "[t]axpayers have a right to know when grantees chose to rely on government grants for payment for services instead of payment by the patients," is unsupported by the language of FOIA or any caselaw interpreting it, as already discussed. See Part III.A.2, supra (discussing Pub. Citizen, 185 F.3d at 903-04). HHS has carried its burden to show

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[15] These documents are identified on the revised Vaughn index as category 37.

that Planned Parenthood's "Fees and Collections Policies" are confidential under exemption 4.

C. Personnel policies[16]

Reid attests that Planned Parenthood's personnel policies "identify hours of work, compensation and benefit rates, benefit eligibility criteria, employee orientation, insurance policy limits, and disciplinary, improvement and termination issues." She asserts that releasing this information "would allow competitors to bid against [Planned Parenthood] for providers and staff, or even hire providers and staff away."

It is difficult for the court to view this information as "confidential." In most fields, including health care, information on how much an employer pays its employees, the benefits it provides, the conditions under which it expects them to work, and the like is commonly shared with prospective employees – including, presumably, those deciding whether the benefits and burdens of the prospective job make it worth pursuing when compared to the benefits and burdens offered by other similar positions. Reid does not say that Planned Parenthood deviates from this common practice in the name of preserving some "competitive advantage" (by, for example, requiring applicants to accept employment there without knowing what

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[16] These documents are identified on the revised Vaughn index as category 36.

their compensation will be or agreeing not to disclose that information as a condition of applying). Nor does Reid identify any practice that prevents Planned Parenthood employees themselves from revealing their salary and benefits to competitors interested in hiring those employees away. Her declaration, then, fails to show that Planned Parenthood faces a likelihood of substantial competitive injury from the release of its personnel policies. See News Grp. Boston, Inc. v. Nat'l Passenger R.R. Corp., 799 F. Supp. 1264, 1269 & n.7 (D. Mass. 1988) (finding that release of payroll information would not likely cause substantial competitive harm to employer).

Furthermore, as Right to Life points out in its objection to HHS's summary judgment motion, Planned Parenthood has already disclosed a list of its employees, their positions, and their salaries in a "Staff List Form" provided to the New Hampshire Department of Health and Human Services. As already noted, disclosure of information that is "freely or cheaply available from other sources . . . is unlikely to cause substantial competitive harm." Frazee, 97 F.3d at 371. While Planned Parenthood's personnel policies contain information beyond the salary data contained in the "Staff List Form," the public availability of that data further undermines HHS's claim that releasing such information would likely cause it substantial competitive harm. HHS has failed to carry its burden to show that Planned Parenthood's personnel policies are "confidential" under exemption 4.

B. Deliberative process and attorney-client privilege (exemption 5)

Also exempted from disclosure under FOIA are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption thus shields documents normally immune from civil discovery, including those protected by, among other doctrines, the deliberative process and attorney-client privileges. See NLRB v. Sears, Roebuck, & Co., 421 U.S. 132, 149-55 (1975). HHS invokes both of those privileges in defending its ultimate decision to withhold a number of documents, or to produce other documents only in redacted form, in response to Right to Life's FOIA request. Again, HHS bears the burden of showing that these privileges, and therefore exemption 5, apply to the documents in question. See Church of Scientology, 30 F.3d at 228. The court will consider each of the claimed privileges in turn.

1. Deliberative process privilege

As the court of appeals has explained, the deliberative process privilege

> is designed to safeguard and promote agency decisionmaking processes in at least three ways: it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions

> and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Providence Journal Co. v. Dep't of Army, 981 F.2d 552, 557 (1st Cir. 1992) (quotation marks and bracketing omitted; formatting altered). To establish that the deliberative process shields its inter- or intra-agency communications from disclosure under FOIA, the agency must show that the communications are both "predecisional" and "deliberative." Id. at 558. That is, the communication must have been both "prepared prior to a final decision in order to assist an agency decisionmaker in arriving at his decision" and "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Town of Norfolk v. Army Corp. of Engineers, 968 F.2d 1438, 1458 (1st Cir. 1992) (quotation marks omitted).

HHS has invoked the deliberative process privilege as to a number of documents encompassed by Right to Life's FOIA requests. Right to Life challenges the invocation of the privilege as to particular documents, and also makes two broader arguments as to the scope of the privilege generally. These arguments are ultimately unavailing.

First, Right to Life asserts that "even if documents would otherwise be protected by the deliberative process privilege," they "still need to be produced if the opinion or interpretation was later adopted by the agency." On this view, "HHS can withhold the deliberative advice of subordinates . . . that was rejected," but "cannot withhold the deliberative advice . . . that was accepted" by the agency in making its decision. As HHS points out, though, the Court of Appeals has explicitly held that an agency's "[e]xpress adoption of a predecisional document is a prerequisite to an agency waiver" of the deliberative process privilege that would otherwise apply. Providence Journal, 981 F.2d at 558. Indeed, the court indicated that, to effect such a waiver, the "agency must expressly adopt or incorporate [a] predecisional document by reference in [its] final decision." Id. (quotation marks, bracketing, and ellipse by the court omitted). Right to Life does not point to any documents embodying or announcing any "final decision" by HHS that incorporate by reference any of the documents as to which the agency has claimed the deliberative process privilege. Under Providence Journal, the fact that the final decision happened to be consistent with those pre-decisional documents is not enough.

Second, Right to Life relies on another decision by the Court of Appeals for the proposition that "where the documents sought may shed light on alleged government misfeasance, the [deliberative process] privilege is routinely denied." Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995) (quotation marks omitted). In upholding the district court's refusal to apply the

deliberative process privilege in that case, however, the Court of Appeals relied on a "strong showing of arbitrariness and discriminatory motives" on the part of the agency and the district court's finding that the agency had "acted in bad faith over a lengthy period of time." Id. Right to Life has not alleged, let alone made a "strong showing," of anything of the sort here. At worst, Right to Life accuses HHS of unlawfully awarding the grant to Planned Parenthood on a non-competitive basis. Even if that charge could be proven, it would not amount to the sort of "malfeasance" that the Court of Appeals has deemed sufficient to pierce the deliberative process privilege. See id.

Aside from these broader attacks, Right to Life does not dispute HHS's invocation of the deliberative process privilege as to several of the documents it has withheld on that basis. Based on its review of the materials submitted by HHS, the court concludes that HHS has carried its burden to show that the deliberative process privilege applies to those documents.[17] But Right to Life challenges HHS's invocation of the deliberative process privilege as to other documents, arguing that they are not "predecisional," and, in one case, also not "deliberative." For the reasons set forth below, the court rules that HHS has carried its burden to show that the deliberative process privilege applies to these documents as well – with the exception of the

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[17] These documents are identified on the revised Vaughn index as categories 1-12.

one category that Right to Life argues, correctly, are neither predecisional nor deliberative.

a. Predecisional

HHS has invoked the deliberative process privilege as to several documents that are dated subsequent to August 19, 2011.

HHS claims that these documents pre-dated its September 14, 2011 decision to award the grant to Parenthood. See Part I.A, supra. In response, Right to Life argues that HHS actually reached that decision on August 18, 2011 (at the latest), so that these subsequent documents could not have been "prepared prior to the final decision" at issue, bringing them outside the protections of the deliberative process privilege. Town of Norfolk, 968 F.2d at 1458. As HHS points out, however, the decision it made on August 19, 2011, was not to award the grant to Planned Parenthood, but to solicit an application for the grant from Planned Parenthood on a non-competitive (or "sole source") basis.

That much is clear from the memorandum from Keefe, the Deputy Assistant Secretary for Population Affairs at OASH, to Kretschmaier, the OASH executive officer, dated August 18, 2011. See Part I.A, supra. While the memorandum "request[s] approval of a sole source replacement grant award" to Planned Parenthood, it also explains that, "[i]f this recommendation is approved, OPA will reach out to the proposed replacement grantee to determine if the organization is willing to take on

the project as a directly funded federal grantee" (underlining omitted). The memorandum does not say, as Right to Life suggests, that approval of the recommendation will result in the award of the grant itself to Planned Parenthood. To the contrary, as Keefe explains in a declaration filed with HHS's reply brief, the decision embodied in Kretschmaier's countersignature to the memorandum "was that it permitted [Planned Parenthood] to apply for the grant without competition. It did not mean . . . that the grant had been awarded to" Planned Parenthood.

In arguing to the contrary, Right to Life relies solely on a document dated September 8, 2011 (after the memorandum) and entitled "Technical Review," which was disclosed, albeit in redacted form, in response to Right to Life's FOIA requests.[19] Indeed, in its response to HHS's summary judgment motion, Right to Life maintains that the "Technical Review" shows that HHS actually made the decision to award the grant to Planned Parenthood on August 12, 2011, i.e., a week before Kretschmaier countersigned

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19 [19]This is the document filed under the docket number (25-7) that Right to Life cites in making this argument in its brief. While Right to Life also cites a Bates number, that number does not correspond to any of the pages of docket no. 25-7. Because Right to Life does not otherwise describe the document on which it intends to rely for this argument, the court is left to evaluate the argument in light of the document that Right to Life actually cites, docket no. 25-7, which is the Technical Review.

Keefe's memorandum on August 19, 2011.[20] On this theory, additional documents withheld on the basis of the deliberative process privilege (emails and other documents that HHS says were exchanged among its employees in reaching the August 18, 2011 decision embodied in Kretschmaier's countersignature to the memorandum) would also post-date the relevant decision.[21]

But Right to Life does not explain how the "Technical Review" supports this theory, and, on the court's reading, it does not. The "Technical Review" evaluates a proposal from Planned Parenthood "for a single source grant to continue services it had provided in New Hampshire under a contract with the [New Hampshire] Department of Health and Human Services." The very fact that HHS was evaluating Planned Parenthood's proposal for the grant in early September 2011, of course, belies any suggestion that HHS had already decided to award the grant in mid-August 2011.[22] HHS has carried its

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[20] In further support of this argument, Right to Life asserts that, because Keefe's memorandum to Kretschmaier is entitled "Sole Source Justification for Replacement Grant in New Hampshire," it is "just that – a justification for a decision that had already been made." That is wholly inconsistent with the substance of the document, through which Keefe seeks Krestchmaier's sign-off on awarding the grant on a sole source basis by offering a "justification" as to why that is appropriate.

[21] These documents are identified on the revised Vaughn index as categories 13, 15, 16, 18, and 19.

[22] In its sur-reply, Right to Life argues that the decision "to award a sole source contract" was actually made by "higher level officials," including the Secretary of HHS and the

burden to show that the documents as to which it invokes the deliberative process privilege are predecisional, in the sense that they predated either the August 19, 2011 decision to solicit an application for the grant from Planned Parenthood on a sole-source basis (categories 13, 15, 16, 18, and 19) or the September 14, 2011 decision to award the grant to Planned Parenthood (categories 21, 2 5, and 27).

b . Deliberative

Right to Life also argues that HHS has improperly invoked the deliberative process privilege as to one category of documents because "there was no specific agency decision to which the document correlates" – rendering the documents neither "predecisional" nor "deliberative." This document comprises two chains of emails between Hager (the Regional Director of HHS's Region I Office) and HHS staffers from whom she sought assistance in preparing for a telephone call with Executive Councilor Wheeler about the consequences of the Council's decision to discontinue Planned

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President of the United States, on August 9, 2011, and August 10, 2011, respectively, citing to emails between two HHS officials. This court ordinarily ignores theories raised for the first time in sur-reply, see, e.g., Beane v. Beane, 856 F. Supp. 2d 280, 298 (D.N.H. 2012), and, in any event, the emails do not support Right to Life's position. They reflect simply that the Secretary and the White House were "briefed" on or around August 10 (while noting that, as of August 17 , OASH was still working to get the approval of both Kretschmaier and the White House).

Parenthood's subgrants.[23] See note 2 and accompanying text, supra.

Pointing out that the redacted portions of these emails discuss "options for providing responses to Wheeler's questions, and the suggested answers to those questions," HHS argues that this "information was predecisional and deliberative to Hager's participation in the call with Wheeler." But HHS does not explain how an agency representative's "participation" in a telephone call with an elected official amounts to a "decision" so as to bring documents advising the representative on what to say within the auspices of the deliberative process privilege. So far as the court can tell, in fact, the purpose of the call was simply to inform Wheeler about what HHS would do in response to the Executive Council's decision, presumably as a matter of agency rule or policy. And "an explanation of an existing policy . . . is not protected by the deliberative process privilege." Nat'l Day Laborer Organizing Network v. ICE, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011); see also RTC v. Diamond, 137 F.R.D. 634, 641 (S.D.N.Y. 1991) (noting that the deliberative process privilege "does not extend to materials related to the explanation, interpretation or application of an existing policy, as opposed to the formulation of a new policy"). HHS has failed to carry its burden to show that the emails advising Hager on her telephone call with Wheeler are protected by the deliberative process privilege.

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[23] These documents are identified on the revised Vaughn index as category 9.

2 . Attorney-client privilege

To show that the attorney-client privilege exempts a document from disclosure under exemption 5, the agency must show:

> (1) that [it] was or sought to be a client of [the attorney;
>
> (2) that the attorney in connection with the document acted as a lawyer;
>
> (3) that the document relates to facts communicated for the purpose of securing a legal opinion, legal services or assistance in legal proceedings; and
>
> (4) that the privilege has not been waived.

Maine v. Dep't of Interior, 298 F.3d 60, 71 (1st Cir. 2002) (bracketing by the court omitted). To satisfy the third element of this test, the agency cannot "assume[] that the requirement of client communicated confidentiality is satisfied merely because the documents are communications between a client and attorney," but must "identify [a] circumstance expressly or inferentially supporting confidentiality." Id. at 71-72.

In its opening memorandum for summary judgment, Right to Life argued that HHS had failed to make this showing in the supplemented version of its Vaughn index that HHS provided in mid-July 2012. See Part II.B, supra. But, with its response to Right to Life's motion for summary judgment (and in support of HHS's own motion for summary

judgment), HHS submitted a revised Vaughn index, together with a declaration from Robert Eckert, an HHS employee. These materials state the basis for HHS's invocation of the attorney-client privilege as to each document in considerably more detail than the earlier version of the Vaughn index and, in the court's view, suffice to show the requisite "circumstance[s] supporting confidentiality." Maine v. Dep't of Interior, 298 F.3d at 71-72. Indeed, Right to Life's response to HHS's motion for summary judgment does not argue to the contrary or, for that matter, address HHS's claim of attorney-client privilege in any way.[24] The court finds that HHS has carried its burden to show that the attorney-client privilege shields the information it has withheld from disclosure on that basis in response to Right to Life's FOIA request.[25]

C. Personnel information (exemption 6)

Finally, HHS has withheld information on the basis of exemption 6, which protects "personnel and medical files and similar files the disclosure of which

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[24] It is also worth noting that, in responding to Right to Life's summary judgment motion, HHS withdrew one of its claims of attorney-client privilege that Right to Life had identified as "most egregious[]": the claim as to the documents identified on the revised Vaughn index as category 17 , which have since been produced to Right to Life in unredacted form.

[25] [25]These documents are identified on the revised Vaughn index as categories 11, 18, 20, 23-24, and 33. While HHS also claims the deliberative process and work product privileges as to category 33, the court need not reach those contentions.

would constitute a clearly unwarranted invasion of personal privacy."[26] 5 U.S.C. 552(b)(6). HHS says that this information "consists of names, private phone numbers, biographical sketches, a [curriculum vitae], and . . . salary information of individual [Planned Parenthood] employees," as revealed in documents that Planned Parenthood submitted to HHS in support of its grant application.

Applying exemption 6 requires the court to "weigh the public interest in disclosure against a privacy interest in the requested information." Kurzon v. HHS, 2001 DNH 128, 2001 WL 821531, at *3 (D.N.H. July 17, 2001) (DiClerico, J.) (citing Dep't of Justice v. Reporters Comm'n for Freedom of the Press, 489 U.S. 749, 775 (1989)). HHS, which bears the burden of showing that this exemption applies, see id., argues that there is no recognized public interest in the information it has withheld under exemption 6, and, even if there were, it would be outweighed by the privacy interests of Planned Parenthood's employees. The court agrees with this analysis as to some, but not all, of the information HHS has withheld under exemption 6.

While HHS concedes that there is a public interest in "who is running [Planned Parenthood's]

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[26] These documents are identified on the revised Vaughn index as categories 26, 29, 36, and 39. The court has ruled that HHS properly withheld portions of the documents in categories 36 and 39 as confidential commercial information under exemption 4. See Parts III.A.2.a-b, supra. HHS invokes exemption 6 as to these documents only insofar as they reveal the names of employees of Planned Parenthood or its affiliates.

clinics" – which HHS says it has disclosed – it maintains that this interest does not extend to "identifying information of middle and lower level employees." Among the information that HHS has withheld, however, is the curriculum vitae of its "Medical Director." Given HHS's acknowledgment of a public interest in the identity of "who is running [Planned Parenthood's] clinics" – and its corresponding lack of any effort to identify any countervailing privacy interest in the items of that person's professional or educational background that would be contained on his or her curriculum vitae – the court rules that HHS has failed to carry its burden to show that disclosing the curriculum vitae would constitute a clearly unwarranted invasion of personal privacy.[27]

HHS has succeeded, however, in carrying its burden to show that releasing the names, private phone numbers, and biographical sketches of the other Planned Parenthood employees would constitute a clearly unwarranted invasion of their personal privacy. As HHS points out, the Supreme Court has held that "[t]he only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information would shed light on an agency's performance of its statutory duties or otherwise let citizens know what

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[27] [27]If the curriculum vitae contains the director's home address, telephone number, or email address, that information shall be redacted from the version of the document produced pursuant to this order, because the disclosure of that information would amount to a clearly unwarranted invasion of personal privacy. See infra this part.

its government is up to." Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 497 (1994) (quotation marks omitted). Thus, the Supreme Court ruled in that case that the privacy interest of federal civil service employees "in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure," so "disclosure would constitute a clearly unwarranted invasion of personal privacy" under exemption 6. Id. at 502 (quotation marks omitted).

This holding is plainly controlling as to the names, private phone numbers, and biographical sketches of the middle- and lower-level employees of Planned Parenthood – who, unlike the employees in the Supreme Court case, do not even work for the federal government, but for a private organization that receives part of its funding from the federal government. Right to Life does not identify, and the court cannot conceive of, any public interest in that kind of information, and "the employees' interest in nondisclosure is not insubstantial," for the reasons explained by the Supreme Court. Id. at 500-01. Indeed, federal courts have routinely held that exemption 6 applies to the names, addresses, and other personal information of the employees of government contractors. See, e.g., Painting & Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d 1300, 1303-04 (D.C. Cir. 1991); Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991); News Grp. Boston, 799 F. Supp. at 1272; Dougherty, supra, § 38:181, at 256 (citing additional cases). Right to Life does not provide any authority to the contrary.

Instead, Right to Life points to the fact that Planned Parenthood has already disclosed the names of its employees, their positions, and their salaries in a "Staff List Form" provided to the New Hampshire Department of Health and Human Services. See Part III.A.2.c, supra. The Court of Appeals has held, however, that "prior revelations of exempt information do not destroy an individual's privacy interest." Moffat v. Dep't of Justice, 716 F.3d 244, 251 (1st Cir. 2013).

In Moffat, the Court of Appeals ruled that releasing the names of various individuals (including law enforcement officers) contained in a report of a witness interview would work a clearly unwarranted invasion of personal privacy, even though some of those names had been revealed in a redacted version of the report released to the plaintiff prior to his FOIA request. Id. Thus, "[t]he privacy interests the government seeks to uphold remain[ed] as strong as they were before" the release of the report, yet the plaintiff had "not identified a public interest powerful enough to outweigh" them. So Moffat is right on point here, where, as just discussed, Right to Life has failed to articulate any public interest in the names, telephone numbers, or biographical sketches of the mid- or low-level Planned Parenthood employees.

In the absence of this identifying information, however, the court sees little if any privacy interest in the salaries of the Planned Parenthood employees, i.e., accompanied by the titles of the corresponding positions, rather than the names of the employees who hold those positions. There is also a substantial

public interest in what government contractors pay their employees, namely, whether the contractors are "spending taxpayer funds efficiently and effectively." News Grp. Boston, 799 F. Supp. at 1271 (ruling that exemption 6 shielded contractor's employees' names and addresses, but not their titles and wages). Accordingly, this court rules that HHS properly withheld the names, personal phone numbers and biographical sketches of Planned Parenthood's middle- and lower-level employees pursuant to exemption 6, but that HHS incorrectly invoked the exemption in withholding those employees' salary information. See id.

IV. Conclusion

For the foregoing reasons, both Right to Life's motion for summary judgment[28] and HHS's motion for summary judgment[29] are GRANTED in part and DENIED in part. Within 10 days of the date of this order, HHS shall produce the following information to Right to Life:

- the information identified on the revised Vaughn index as category 9;

- the information identified on the revised Vaughn index as categories 26 and 29, insofar as that information consists of the job titles and salaries of Planned Parenthood staff, or the curriculum vitae of its medical director

[28] Document no. 25.
[29] Document no. 31.

(excluding that person's home address, telephone number, or email address); and

• the information identified on the revised Vaughn index as category 36.

SO ORDERED.

/s/ Joe Laplante
Joseph N . Laplante
United States District Judge

Dated: September 30, 2013

cc: Michael J. Tierney, Esq.
Joseph Gardner Mattson, Esq.
Seth R. Aframe, AUSA