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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**JAMES V. LACY and UNITED STATES
JUSTICE FOUNDATION,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
STATE, et al.,
Defendants.**

**Case No. SA CV 22-1065-DOC

ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT [34] AND
DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT [33]**

1 Before the Court are the parties' cross-motions for summary judgment. The Court heard
 2 oral arguments on April 3, 2023. Unless otherwise indicated, the Court relies on the following
 3 relevant documents, referenced as follows:

- 4 • Defendant's Notice of Filing First Agency Affidavit (Dec. 12, 2020) ("Def.'s Notice")
 5 (Dkt. 20)
- 6 • Defendant's First Agency Affidavit (Dec. 12, 2020) ("First Weetman Decl.") (Dkt.
 7 20-1)
- 8 • Defendant's Responses to Plaintiffs' Interrogatories (Jan. 17, 2023), Pls.' Ex. 12 (Dkt.
 9 34-5, 83-111) (hereinafter "Def.'s Resp.")
- 10 • Defendant's Second Agency Affidavit (Jan. 23, 2023) (Dkt. 27) ("Second Weetman
 11 Decl.")
- 12 • Defendant's Preliminary Vaughn Index (Jan. 23, 2020) ("Def.'s Prelim. Vaughn
 13 Index") (Dkt. 20-2)
- 14 • Defendant's Motion for Summary Judgment ("Def.'s Mot.") (Dkt. 33);
- 15 • Defendant's Statement of Facts in Support of Def.'s Mot. ("Def.'s Facts") (Dkt. 33-
 16 1);
- 17 • Defendant's Third Agency Affidavit (March 6, 2020) ("Third Weetman Decl.") (Dkt.
 18 32-1);
- 19 • Defendant's *Vaughn* Index in Support of Def.'s Mot. ("Def.'s *Vaughn* Index") (Dkt.
 20 32-2);
- 21 • Plaintiff's Motion for Summary Judgment ("Pls.' Mot.") (Dkt. 34);
- 22 • Plaintiff's Exhibits in Support of Pls.' Mot. ("Pls.' Ex.") (Dkt. 34-5)
 - 23 ○ Pls.' Ex. 1, March 3, 2020 Email Acknowledging Receipt of First FOIA
 24 Request (Dkt. 34-5 at 7) (hereinafter "First FOIA Receipt");
 - 25 ○ Pls.' Ex. 2, March 3, 2020 Email Acknowledging Receipt of Second FOIA
 26 Request, (Dkt. 34-5 at 10) (hereinafter "Second FOIA Receipt");
 - 27 ○ Pls.' Ex. 3, March 4, 2020 Email Acknowledging Receipt of Third FOIA
 28 Request (Dkt. 34-5 at 13-14) (hereinafter "Third FOIA Receipt").
 - Pls.' Ex. 4, September 19, 2020 Letter re: First FOIA Request (Dkt. 34-5 at 16)
 (hereinafter "First FOIA Response")
 - Pls.' Ex. 5, September 16, 2020 Letter re: Second FOIA Request (Dkt. 34-5 at
 19) (hereinafter "Second FOIA Response").
 - Pls.' Ex. 6, September 30, 2022 Letter re: Third FOIA Request (Dkt. 34-5 at
 21) (hereinafter "Third FOIA Response");
 - Pls.' Ex. 13, February 8, 2023 Letter re: First FOIA Request (Dkt. 34-5 at 112-
 119) (hereinafter "First FOIA Disclosure");
- Plaintiff's Statement of Facts in Support of Pls.' Mot. ("Pls.' Facts") (Dkt. 35);
- Plaintiff's Opposition to Def.'s Mot. ("Pls.' Opp'n") (Dkt. 37);
- Plaintiff's Statement of Facts in Support of Pls.' Opp'n ("Pls.' Supp. Facts") (Dkt. 37-
 1);
- Defendant's Opposition to Plaintiff's Motion ("Def.'s Opp'n") (Dkt. 38);

- Defendant’s Statement of Facts in Support of Def.’s Opp’n (“Def.’s Supp. Facts”) (Dkt. 38-1)
- Defendant’s Reply (Defs.’ Reply”) (Dkt. 39);
- Plaintiff’s Reply (“Pls.’ Reply”) (Dkt. 40);
- Plaintiff’s Ex Parte Application to Reopen Plaintiffs’ Summary Judgment Motion (“Pls.’ Ex Parte”) (Dkt. 43); and
- Defendant’s Opposition re: Ex Parte Application (“Defs.’ Opp’ Ex Parte”) (Dkt. 44).

I. BACKGROUND

Plaintiffs in this case are United States Justice Foundation (USJF), a nonprofit corporation based in California, and its president James Lacy (collectively, “Plaintiffs”). Defendant is the United States Department of State (“Department” or “State Department”). Complaint (“Compl.”) (Dkt. 1) ¶ 1. This action arises out of three requests¹ made to the State Department under the Freedom of Information Act (FOIA), 5 U.S.C. § 551, *et seq* between February 2020 and February 2022. The requests sought records about “Hunter Biden and his associates’ Ukraine corruption inquiry, primarily concerning Energy Corporation Burisma.” Compl. ¶ 1. Plaintiffs sought to answer, in part, “to what degree Hunter Biden used or attempted to use his father’s office in order to influence policy on behalf of a Ukrainian energy company, Burisma Holdings, of which he was a director.” Compl. ¶ 17. To that end, they requested electronic records of specific State Department senior officials between the years of 2013 and 2016.

The first and second FOIA requests were submitted in 2020. The third FOIA request was submitted in 2022. All the requests sought records covering a time period before 2017. The requests named the relevant officials involved, explained why Plaintiffs believed the records

¹ The State Department assigned each FOIA request two reference numbers—one was originally assigned upon receipt of the request, and one was assigned when litigation began. *See* First Weetman Decl. (Dkt. 20-1) ¶¶ 26-28. The First FOIA Request was originally assigned F-2020-04255, now referred to in litigation as F-2020-04255. The “Second FOIA Request” was originally assigned F-2020-04256, now referred to in litigation as FL-2022-00078. The “Third FOIA Request” was originally assigned F-2022-05382, now referred to in litigation as FL-2022-0079. The Department has often confused those numbers in its representations.

1 existed, and provided the search parameters to use. Plaintiffs’ first FOIA request took over two
2 years. Its second and third FOIA requests—submitted two years apart—each took over six
3 months. For two of those requests, the State Department responded only after Plaintiffs filed
4 this action in May 2022. Whether it was before or after litigation, the State Department’s
5 response was the same: “We conducted a search. We located no responsive records.”
6

7 Plaintiffs challenged those determinations. They sought limited discovery seeking
8 information about the adequacy and scope of the search. Recognizing that discovery in FOIA
9 cases is rare and limited, the Court directed the State Department to submit agency affidavits
10 that “contain descriptions of the agency’s search procedures—including what records were
11 searched, by whom, and in what manner” to demonstrate “that the ‘search was reasonably
12 calculated to uncover all relevant documents.’” Minute Order (Dec. 5, 2023) (Dkt. 19) at 5. On
13 December 12, 2022, the State Department filed its first agency affidavit detailing the State
14 Department’s standard process for handling FOIA requests. It also detailed the searches it
15 conducted for Plaintiffs’ requests. It identified, for the first time, potentially responsive
16 documents based on supplemental searches it conducted using a variation of one of the terms. It
17 maintained that no documents were being withheld. Plaintiffs sought to serve interrogatories,
18 which the Court permitted. The Court also directed the parties to file a status report in 30 days
19 regarding the status of documents.

20 In January 2023, the State Department responded to Plaintiffs’ interrogatories. The State
21 Department also filed a second agency affidavit with the Court, providing a status update on the
22 processing of the potentially responsive documents. Along with its second agency affidavit, the
23 State Department filed a preliminary *Vaughn* index identifying, for the first time, the portions
24 of the documents it seeks to withhold and why. From December 2022 to March 2023, the State
25 Department proceeded to intermittently disclose to Plaintiffs approximately 140 pages of
26 records responsive to their three requests, some released in full and some partially redacted
27 pursuant to two exemptions under FOIA: Exemption 5 (deliberative process privilege or
28 presidential communications privilege) and Exemption 6 (personal privacy).

Now before the Court are the parties’ cross-motions for summary judgment. The State
Department contends it is entitled to summary judgment that it did not violate its obligations

1 under FOIA because (1) its original and supplemental searches were reasonably calculated to
 2 locate all responsive records; (2) the agency properly applied FOIA exemptions to withhold
 3 information protected from disclosure by FOIA Exemptions 5 and 6. Plaintiffs, for their part,
 4 accept that the searches the State Department *ultimately* conducted were adequate. They,
 5 nonetheless, seek a declaratory judgment—an enunciation by this Court—that Defendant
 6 violated FOIA because they failed to timely make a determination on their requests and their
 7 initial searches were inadequate. As to the redactions, Plaintiffs contend that they are improper
 8 and seek an order compelling the State Department to disclose the documents unredacted.

9 **A. Facts²**

10 **a. First FOIA Request (F-2020-04255 // FL-2022-00077)**

- 11 - Emails between February 2013 – December 2014
- 12 - To/From: Hunter Biden and David Wade (then-Chief
 13 of Staff of the State Department)
- 14 - Re: “United States Global Leadership Coalition,”
 15 “Center for U.S. Global Leadership,” “International
 16 Affairs Budget, Ukraine.”

17 Plaintiffs submitted their first FOIA request on February 26, 2020, requesting “[a]ll
 18 electronic communication between Hunter Biden and David Wade” from February 1, 2013 to
 19 December 31, 2014 that “reference and/or include the following terms: United States Global
 20 Leadership Coalition, Center for U.S. Global Leadership, International Affairs Budget,
 21 Ukraine.”³ On March 3, 2020, Plaintiffs received an email acknowledging receipt by the State

22 ² Unless indicated otherwise, to the extent any of these facts are disputed, the Court concludes they are not
 23 material to the disposition of the Motion. Further, to the extent the Court relies on evidence to which the parties
 24 have not cited or objected, the Court has considered all the evidence and overruled those objections.

25 ³ See First FOIA Receipt (Mar. 3, 2020), Pls.’ Ex. 1 (Dkt. 34-5 at 7). In their exhibits, Plaintiffs attach what
 26 appears to be an automated email providing a review of Plaintiff’s First FOIA request. See Pls. Ex. 1 (Dkt. 34-5 at
 27 6). The request described therein contains an additional portion, bolded below, requesting Elizabeth Schroyer
 28 emails:

The request is for all electronic communications between Mr. Hunter Biden and
 Mr. David Wade, then-Chief of Staff to then-Secretary of State John Kerry that
 reference, and or include, the terms 1) the "United States Global Leadership
 Coalition"; 2) the "Center for U.S. Global Leadership"; 3) "International Affairs
 Budget"; and 4) "Ukraine." These records should exist because Mr. Hunter Biden

1 Department’s Office of Information Programs and Services (“IPS”).⁴ The email stated that IPS
 2 will “not be able to respond within the 20 days provided by the statute due to ‘unusual
 3 circumstances’ includ[ing] the need to search for and collect requested records from other
 4 Department offices and Foreign Service posts.”⁵

5 By letter dated September 19, 2022, the State Department informed Plaintiffs that “[t]he
 6 Department of State has conducted searches and found no responsive records. This completes
 7 the processing of your request.”⁶ The letter also stated:

8 For your information, Congress excluded three discrete categories of law
 9 enforcement and national security records from the requirements of the FOIA. See
 10 5 U.S.C. 552(c). This response is limited to those records that are subject to the
 11 requirements of the FOIA. This is a standard notification that is given to all our
 12 requesters and should not be taken as an indication that excluded records do, or do
 13 not, exist. To the extent another agency asserts that it can neither confirm nor deny
 14 the existence of certain records, the Department of State will similarly take the
 15 position that it neither confirms nor denies the existence of those records.

16 If you have any questions, your attorney may contact
 17 Assistant United States Attorney . . . at [contact number] or []@usdoj.gov. Please
 18 refer to the case number, F-2020-04256/FL-2022/00077, and the civil action
 19 number, 22-cv-01065, in all correspondence about this case.⁷

20 was, for the timeframe of records requested, a board member and/or director of the
 21 United States Global Leadership Coalition and the Center for U.S. Global
 22 Leadership. **All electronic communications between Elizabeth Schraye and
 23 Mr. David Wade, then-Chief of Staff to then-Secretary of State John Kerry
 24 that reference, and/or include, the terms 1) the “United States Global
 25 Leadership Coalition”; 2) the “Center for U.S. Global Leadership”; 3)
 26 “International Affairs Budget”, and 4) “Ukraine.”** These records should exist
 27 because Ms. Elizabeth Schraye was, for the timeframe of records requested, the
 28 President of the United States Global Leadership Coalition and the Center for U.S.
 Global Leadership.

See Pls. Ex. 1 (Dkt. 34-5 at 6) (emphasis added).

⁴ First FOIA Receipt (Mar. 3, 2020), Pls.’ Ex. 1 (Dkt. 34-5 at 7). The email only acknowledged Plaintiffs’ request
 “regarding all electronic communications between Hunter Biden and David Wade that reference, and or include,
 the terms “United States Global Leadership Coalition”; the “Center for U.S. Global Leadership”; “International
 Affairs Budget”; and “Ukraine.”” *Id.* Defendant did not acknowledge the request regarding Elizabeth Schraye,
 supra note 6.

⁵ First FOIA Receipt (Mar. 3, 2020) (Dkt. 34-5 at 7), supra note 3 (citing 5 § U.S.C. 552(a)(6)(B)(i)–(iii)). The
 email also provided that the requester may contact the FOIA Requester Service Center or FOIA Public Liaison if
 they “have any questions regarding [the] request, would like to narrow the scope or arrange an alternative time
 frame to speed its processing, or would like an estimated date of completion.” *Id.*

⁶ First FOIA Response (Sep. 19, 2022), Pls.’ Ex. 4 (Dkt. 34-5 at 16).

⁷ First FOIA Response (Sep. 19, 2022), Pls.’ Ex. 4 (Dkt. 34-5 at 16). The Court notes that the letter incorrectly
 identified the reference number as F-2020-4256 for the First FOIA Request. This is the case number assigned to
 the Second FOIA Request.

1 After the Court’s scheduling conference,⁸ the State Department conducted a supplemental
2 search on December 6, 2022 with the acronym term “USGLC,” an abbreviation of the term
3 “United States Global Leadership Coalition,” and located potentially responsive material.⁹
4 Pursuant to the Court’s Order directing Defendants to “expand other search terms to include
5 common variations where appropriate,” the State Department conducted additional searches
6 using the following terms: “U.S.G.L.C.,” “U.S. Global Leadership Conference,” “Ukr,” “Kyiv,”
7 “Kiev,” “IAB,” and “Function150.”¹⁰

8 By letter dated February 8, 2023, the State Department informed Plaintiffs that it “has
9 identified an additional three responsive records subject to the FOIA” and “determined that all
10 three records may be released in part.”¹¹

11 We refer you to our letter dated September 19, 2022, regarding your request for
12 material The Department of State has identified an additional three responsive
13 records subject to the FOIA. We have determined that all three records may be
14 released in part.

15 An enclosure explains the FOIA exemptions and other grounds for withholding
16 material. Where we have made redactions, the applicable FOIA exemptions are
17 marked on each record. Where we have made redactions, the applicable FOIA
18 exemptions are marked on each record. All non-exempt material that is reasonably
19 segregable from the exempt material has been released and is enclosed.

20 If you have any questions, your attorney may contact
21 Assistant United States Attorney . . . at [contact number] or []@usdoj.gov. Please
22 refer to the case number, FL-2022/00077, and the civil action number, 22-cv-
23 01065, in all correspondence about this case.¹²

24 Defendant then released five pages responsive to the First FOIA Request containing
25 redactions pursuant to FOIA Exemptions 5 and 6, all of which reflect emails between Elizabeth
26 Schayer and David Wade.¹³ Defendant subsequently agreed to release those emails “without
27 Exemption 5 (deliberative process privilege) redactions” on Tuesday, April 4, 2023.¹⁴

28 ⁸ Dec. 5 Minute Order.

⁹ Def.’s Facts ¶ 9; First Weetman Decl. ¶ 34; Third Weetman Decl. ¶ 5

¹⁰ Def.’s Facts ¶ 11 (undisputed by Plaintiffs). *See*

¹¹ First FOIA Disclosure (Dkt. 34-5 at 112).

¹² First FOIA Disclosure (Dkt. 34-5 at 112).

¹³ Pls’ Facts ¶ 5; Def.’s Supp. Facts ¶ 5. *See* First FOIA Disclosure (Dkt. 34-5 at 112-119).

¹⁴ See latest status report.

b. Second FOIA Request (F-2020-04256 // FL-2022-00078).

- Emails between February 2016 and December 2016
- To/From: Karen Tramontano (employed consultant for Burisma) and Catherine Novelli (then-Under Secretary of State for Economic Growth, Energy, and the Environment)
- Re: “Burisma,” “Hunter Biden,” “Petro Poroshenko,” “Viktor Shokin,” “Mykola Zlochevski”

Plaintiffs submitted their second FOIA request on February 26, 2020, requesting “[a]ll electronic communication between Karen Tramontano and Catherine Novelli” dated between February 1, 2016 and December 31, 2016 “that reference and/or include the following terms: i. Burisma, ii. Hunter Biden, iii. Petro Poroshenk, iv. Viktor Shokin, v. Mykola Zlochevsk.”¹⁵

On March 3, 2020, Plaintiffs received an email acknowledging receipt by IPS and stating that the State Department will “not be able to respond within the 20 days provided by the statute due to ‘unusual circumstances’ includ[ing] the need to search for and collect requested records from other Department offices and Foreign Service posts.”¹⁶

¹⁵ See Second FOIA Receipt (Dkt. 34-5 at 10). In their exhibits, Plaintiffs attach what appears to be an automated email providing a review of Plaintiff’s Second FOIA request as submitted. See Pls. Ex. 2 (Dkt. 34-5 at 9). The request described therein includes the reason Plaintiffs believe the records exist:

I believe the record exists because published emails between State Department officials discussed a potential meeting between the two individuals, and Ms. Tramontano was an employed consultant for Burisma, a Ukrainian energy firm that also employed Hunter Biden, during the time frame of requested records.

Id. In the “additional comments” section, Plaintiffs provide:

In addition to all electronic communications between the two individuals named in the request, I would request the disclosure of any meetings between Ms. Karen Tramontano and Ms. Catherine Novelli during the same time period - 02/01/2016 - 12/31/2016.

¹⁶ Second FOIA Receipt (Mar. 3, 2020) (Dkt. 34-5 at 10). The email also provided that the requester may contact the FOIA Requester Service Center or FOIA Public Liaison if they “have any questions regarding [the] request, would like to narrow the scope or arrange an alternative time frame to speed its processing, or would like an estimated date of completion.” *Id.*

1 By letter dated September 16, 2020, the State Department stated that no responsive
2 records were found.¹⁷ Specifically, the letter stated:

3 Please be advised the Office of Information Programs and Services conducted a
4 search and located no records responsive to your FOIA request.

5 If you are not satisfied with DOS's determination in response to your FOIA
6 request, you may administratively appeal . . . Appeals must be postmarked within
7 90 calendar days and include a copy of this letter, clearly stating why you disagree
8 with the determination set forth in this response.

9 Additionally, if you are not satisfied with DOS's determination of your request,
10 you may contact the Office of Government Information Services at the National
11 Archives and Records Administration to inquire about the FOIA Mediation
12 Services they offer. The contact information is as follows . . .¹⁸

13 On December 6, 2022, the State Department's Office of Information Program (IPS)
14 determined that it "overlooked" a portion of Plaintiff's request that was placed in the additional
15 comments section of the FOIA submission form seeking disclosure of "any *meetings* between
16 Karen Tramontano and Catherine Novelli between February 1, 2016 and December 31, 2016."
17 Third Weetman Decl. ¶ 8 (emphasis added).¹⁹ Upon a supplemental "search in eRecords for
18 records responsive to this portion of the request on December 6, 2022," the State Department
19 located responsive documents.²⁰

20 By letter dated February 8, 2023, Defendants informed Plaintiffs that "[t]he Department
21 of State has identified an additional nine responsive records subject to the FOIA."²¹ The

22 ¹⁷ Second FOIA Response (Sep. 16, 2020) (Dkt. 34-5 at 19).

23 ¹⁸ Pls.' Ex. 5, Second FOIA Response (Sep. 16, 2020) (Dkt. 34-5 at 19). The response contained a digital
24 signature by an individual from the Office of Information Programs and Services; the individual's title was not
25 stated.

26 ¹⁹ According to Defendants, "this portion of the request was included in the comments section of the submittal
27 form and was not part of the original FOIA request." See First Weetman ¶ 33; Third Weetman Decl. ¶ 8 ("After
28 reviewing the searches conducted, . . . IPS subsequently determined that a portion of the Plaintiffs' second request
had been overlooked. Specifically, Plaintiffs placed an additional request in the comments section of the
submission form seeking disclosure any meetings . . .").

²⁰ Third Weetman Decl. ¶ 9; First Weetman Decl. ¶ 33.

²¹ See Feb. 8, 2023 Letter re: Second FOIA Request, Pls.' Ex. 14 ("Feb. 8 Disclosure re: Second FOIA Request")
(Dkt. 34-5 at 112). The Court notes that the record is riddled with inconsistencies. Defendant's first agency
affidavit, submitted on December 12, 2022, states that the records responsive to Plaintiff's Second FOIA Request
"have been produced to Plaintiffs." See First Weetman Decl. ¶¶ 8, 9. Defendant states in its motion that it
disclosed records responsive to the Second FOIA Request to Plaintiff on February 8, 2023. See Def.'s Facts ¶ 21
("On February 8, 2023, Defendant released to Plaintiffs nine responsive records (12 pages) in part."). Plaintiff
asserts that the disclosure occurred on February 15, 2023. See Pls.' Facts ¶ 11; Pls.' Supp. Facts ¶ 10. In its
opposition, Defendant identifies Plaintiff's statement that the responsive records were disclosed on February 15,
2023 as undisputed. See Def.'s Supp. Facts ¶ 11.

1 Department further “determined that one record may be released in full and eight records may
2 be released in part.”²² This production totaled 11 pages. Defendant only asserted claims of
3 privilege under Exemption 6, withholding “the contact information of the Department
4 employees and Blue Star Strategies personnel.”²³

5 **c. Third FOIA Request (F-2022-05382 / FL 2022-00079)**

- 6 - Emails from May 1, 2015 through July 30, 2015
7 - To/From: Hunter Biden and Anthony Blinken (then-
8 Secretary of State)
9 - Re: Burisma,” “Zlochevsky,” “Ukraine

10
11 Plaintiffs submitted their third FOIA request on February 28, 2022,²⁴ seeking two sets of
12 documents dated from May 1, 2015 through July 30, 2015:

- 13 (1) “all electronic communications between Hunter Biden and Mr. Anthony Blinken,
14 then-Deputy Secretary of State to then-Secretary of State John Kerry that reference,
15 and/or include, the terms 1) ‘Burisma’; 2) ‘Zlochevsky’; and 3) ‘Ukraine’”; and
16 (2) “all electronic or written calendar entries, sign-in logs, and meeting logs for Mr.
17 Anthony Blinken, then-deputy Secretary of State that reference, and or include, the
18 terms 1) ‘Burisma’; 2) ‘Zlochevsky’; 3) ‘Ukraine’; and 4) ‘Hunter Biden’.”²⁵

19
20
21 ²² Feb. 8 Disclosure re: Second FOIA Request, Pls.’ Ex. 14 (Dkt. 34-5 at 112), supra note 21. In full, the letter
stated:

22 We refer you to our letter dated September 16, 2022, regarding your request
23 The Department of State has identified an additional nine responsive records
24 subject to the FOIA. We have determined that one record may be released in full
25 and eight records may be released in part. [. . .] An enclosure explains the FOIA
26 exemptions and other grounds for withholding material. Where we have made
27 redactions, the applicable FOIA exemptions are marked on each record. [. . .] All
non-exempt material that is reasonably segregable from the exempt material has
been released and is enclosed. If you have any questions, your attorney may contact
Assistant United States Attorney Please refer to the case number, FL-2022-
00078, and the civil action number, 22-cv- 01065, in all correspondence about this
case.²²

28 ²³ See Final Vaughn Index, 5 (A-00000592684).

²⁴ See Third FOIA Receipt (Mar. 4, 2022), Pls.’ Ex. 3 (Dkt. 34-5 at 13).

²⁵ See Third FOIA Receipt (Mar. 4, 2022), Pls.’ Ex. 3 (Dkt. 34-5 at 13-14).

1 Plaintiffs requested expedited processing of this request, citing an “urgency to inform the
2 public concerning actual or alleged Federal Government activity.” Specifically, their request
3 stated:

4 Due to the on-going military situation in Ukraine, it is imperative that the public
5 be made aware of how fully enmeshed the son of the then Vice President, currently
6 President of the United States, was with the Ukrainian energy company, Burisma
7 Holdings, and what influence he tried to exert over official government policy due
8 to his father’s office.²⁶

9 The Department denied the request, reasoning that Plaintiffs failed to demonstrate a
10 “compelling need” under the agency’s FOIA regulations.²⁷ Specifically, the email stated that
11 Plaintiffs’ request does not show that (1) “failure to obtain the requested information on an
12 expedited basis could reasonably be expected to pose an imminent threat to the life or physical
13 safety of an individual;” that (2) “the information is urgently needed by an individual primarily
14 engaged in disseminating information in order to inform the public concerning actual or alleged
15 Federal government activity;” or (3) that “failure to release the information would impair
16 substantial due process rights or harm substantial humanitarian interests.”²⁸ Additionally, the
17 email noted:

18 Unless you advise otherwise, we will treat as non-responsive any compilations of
19 publicly available news reports and any publicly available documents not created
20 by the U.S. government, such as mass distribution emails from news media.

21 The email additionally stated that IPS will “not be able to respond within the 20 days
22 provided by the statute due to ‘unusual circumstances’ includ[ing] the need to search for
23 and collect requested records from other Department offices and Foreign Service posts.”²⁹ Like
24 the other emails acknowledging receipt, IPS stated that Plaintiffs can contact the “FOIA
25 Requester Service Center or our FOIA Public Liaison” to “narrow the scope or arrange an
26 alternative time frame to speed its processing, or would like an estimated date of completion.”³⁰

27 According to the State Department, searches of the eRecords Archive were first
28 conducted on the unclassified network on March 9, 2022, and then on the classified network on

26 See Third FOIA Receipt (Mar. 4, 2022), Pls.’ Ex. 3 (Dkt. 34-5 at 13-14).

27 See Third FOIA Receipt (Mar. 4, 2022), Pls.’ Ex. 3 (Dkt. 34-5 at 13-14).

28 See Third FOIA Receipt (Mar. 4, 2022), Pls.’ Ex. 3 (Dkt. 34-5 at 13).

29 See Third FOIA Receipt (Mar. 4, 2022), Pls.’ Ex. 3 (Dkt. 34-5 at 14).

30 See Third FOIA Receipt (Mar. 4, 2022), Pls.’ Ex. 3 (Dkt. 34-5 at 14).

1 March 15, 2022.³¹ The following search terms were used: (“Burisma” OR “Zlochevsky” OR
 2 “Ukraine” OR “Hunter Biden”); (“Burisma” OR “Zlochevsky” OR “Ukraine” OR “Hunter
 3 Biden”) AND (“hbiden@senecagacom” OR “rhb@oldakcr-biclen.com” OR
 4 “hbiden@rosemontseneca.com”); and “Hunter Biden”~2.³² These searches were limited to
 5 Department custodians “Antony Blinken” and “John Kerry.”³³

6 The search was “structured this way in order to mirror the conjunctive and disjunctive
 7 terms of the FOIA request.”³⁴ The email addresses “were included as search terms as they were
 8 understood to be email addresses used by Hunter Biden during the relevant time frame.”³⁵ With
 9 respect to the portion of the FOIA request seeking calendar entries, sign-in logs, and meeting
 10 logs for Mr. Blinken, it was anticipated that any such documents would appear through the use
 11 of the catch-all search term, “Hunter Biden.”³⁶ The searches were limited to records dated May
 12 1, 2015, to July 30, 2015. The searches returned several potentially responsive documents that
 13 were later processed and determined to be non-responsive.³⁷ Specifically, these potentially
 14 responsive records were emails between Mr. Blinken and his scheduling staff and support
 15 personnel concerning efforts to set up a lunch between Hunter Biden in May 2015.³⁸

16 On September 30, 2022, the State Department concluded that no responsive records were
 17 located in response to Plaintiff’s Third FOIA Request.³⁹ Specifically, the letter stated:⁴⁰

18 This letter is in response to your request dated February 28, 2022
 19 request The Department of State has conducted searches and found
 20 no responsive records. This completes the processing of your request.

21 For your information, Congress excluded three discrete categories of law
 22 enforcement and national security records from the requirements of the
 23 FOIA. See 5 U.S.C. 552(c). This response is limited to those records that
 24 are subject to the requirements of the FOIA. This is a standard notification
 25 that is given to all our requesters and should not be taken as an indication
 26 that excluded records do, or do not, exist. To the extent another agency
 27 asserts that it can neither confirm nor deny the existence of certain records,
 28 the Department of State will similarly take the position that it neither
 confirms nor denies the existence of those records.

31 Def.’s Resp. to Pls.’ Int. 10 (Dkt. 34-5 at 98).

32 Def.’s Mot. at 5–6.

33 Def.’s Mot. at 5–6.

34 Def.’s Mot. at 6.

35 Def.’s Mot. at 15.

36 Def.’s Mot. at 15.

37 Def.’s Mot. at 15.

38 Def.’s Mot. at 15.

39 See Third FOIA Receipt (Mar. 4, 2022), Pls.’ Ex. 3 (Dkt. 34-5 at 14).

40 See Third FOIA Response (Sep. 30, 2022), Pls.’ Ex. 6 (Dkt. 34-15 at 21).

1 If you have any questions, your attorney may contact Assistant United
2 States Attorney Jill S. Casselman . . . Please refer to the case number, F-
3 2020-05382/FL-2022-00079, and the civil action number, 22-cv-01065, in
all correspondence about this case.

4 In its December 12, 2022 filing with the Court, the State Department’s first agency
5 affidavit stated that its searches “returned several potentially responsive documents that were
6 later processed and determined to be non-responsive.”⁴¹ Specifically, “[w]ith respect to the
7 portion of the FOIA request seeking calendar entries, sign-in logs, and meeting logs for Mr.
8 Blinken,” the State Department “anticipated that any such documents would appear through the
9 use of the catch-all search term, ‘Hunter Biden.’”⁴² The potentially responsive records that the
10 State Department ultimately disclosed were “emails between Mr. Blinken and his scheduling
11 staff and support personnel concerning efforts to set up a lunch with Hunter Biden in May
12 2015.”⁴³ The State Department determined, however, that the documents “do not fall within the
13 terms of Plaintiffs’ FOIA request” because “Hunter Biden is not copied on any of the emails”
14 and “the emails do not contain calendar entries, sign -in logs, or meeting logs.”⁴⁴

15 The State Department identified records responsive to Plaintiffs’ Third FOIA Request in
16 January 2023. In a letter dated January 13, 2023,⁴⁵ addressed to Plaintiffs, the State Department
17 “agreed to produce 23 records” partially redacted pursuant to FOIA Exemptions 5 and 6.⁴⁶
Specifically, the letter stated:⁴⁷

18 This letter is in response to your request dated February 28, 2022 . . . The
19 Department of State has agreed to produce 23 records, subject to the
20 applicable FOIA exemptions. We have determined 4 records may be
released in full, and 19 records may be released in part.

21 An enclosure explains the FOIA exemptions and other grounds for
22 withholding material. The Department has waived such grounds for
withholding this material. Where we have made redactions, the applicable
FOIA exemptions are marked on each record. All non-exempt material

24 ⁴¹ See First Weetman Decl. ¶ 28.

25 ⁴² See First Weetman Decl. ¶ 28.

26 ⁴³ See First Weetman Decl. ¶ 29.

27 ⁴⁴ See First Weetman Decl. ¶ 29.

28 ⁴⁵ The letter was signed by Jeane Miller, Chief, Programs and Policies Division, Office of Information Programs and Services.

⁴⁶ See January 13, 2023 Letter re: Third FOIA Request, Pls.’ Ex. 10 (Dkt. 34-5 at 33) (“Jan. 13 Disclosure re: Third FOIA Disclosure”). See also January 2023 Documents re: Third FOIA Request, Pls.’ Ex. 11 (Dkt. 34-5 at 35-82) (“Jan. 13 Third FOIA Docs.”).

⁴⁷ Jan. 13 Disclosure re: Third FOIA Request, Pls.’ Ex. 10 (Dkt. 34-5 at 33), supra note 46.

1 that is reasonably segregable from the exempt material has been released
and is enclosed.

2 We will keep you informed as your case progresses. If you have any
3 questions, your attorney may contact [the] Assistant U.S. Attorney
4 Please refer to the case number, F-2022-05382/FL-2022-00079, and the
civil action number, 8:22-vs-01065, in all correspondence about this
5 case.⁴⁸

6 The release of 23 records totaled approximately 47 pages. In February 2023, the State
7 Department identified additional records responsive to Plaintiffs' Third FOIA Request. By letter
8 dated February 14, 2023, the State Department stated that, upon review, it had determined that
9 information could be released in an additional five records (80 pages) responsive to Plaintiff's
Third FOIA Request.⁴⁹ In full, the letter stated:

10 We refer you to our letter dated January 13, 2023, regarding your
11 request The Department of State has identified five additional
12 responsive records subject to the FOIA. We have determined that all five
records may be released in part.

13 An enclosure explains the FOIA exemptions and other grounds for
14 withholding material. Where we have made redactions, the applicable
15 FOIA exemptions are marked on each record. All non-exempt material
that is reasonably segregable from the exempt material has been released
and is enclosed.

16 This concludes the processing of your request. If you have any questions,
17 your attorney may contact Assistant United States Attorney. . . . Please
18 refer to the case number, FL-2022-00079, and the civil action number, 22-
cv-01065, in all correspondence about this case.⁵⁰

19 The State Department produced approximately 127 pages responsive to Plaintiff's Third
20 FOIA Request, some partially redacted pursuant to FOIA Exemptions 5 and 6.

21 To summarize: Prior to this lawsuit, the State Department made a determination as to
22 only one request—the Second FOIA Request. After Plaintiffs filed this action, the State
23 Department made determinations on the First FOIA Request and Third FOIA Request. Their
24 response was the same for each request: No responsive records were found. Through this
25 litigation, the Department conducted supplemental searches, located responsive documents, and
26 ultimately produced approximately 140 pages to Plaintiffs.

27 ⁴⁸ Jan. 13 Disclosure re: Third FOIA Request, Pls.' Ex. 10 (Dkt. 34-5 at 33), supra note 46.

28 ⁴⁹ See February 14, 2023 Letter re: Third FOIA Request, Pls.' Ex. 15 (Dkt. 34-5 at 137) ("Feb. 14 Disclosure re:
Third FOIA Request"); Third Weetman Decl. ¶ 16; Def.'s SUF ¶ 45.

⁵⁰ Feb. 14 Disclosure re: Third FOIA Request, Pls.' Ex. 15 (Dkt. 34-5 at 137).

1 **B. Procedural History**

2 Plaintiffs filed this action on May 26, 2022. *See* Compl. They asserted the following
3 causes of action arising from the Department’s processing of the three FOIA requests. First,
4 Plaintiffs alleged that Defendant failed to make a determination within 20 business days of its
5 receipt of all three FOIA requests, in violation of 5 U.S.C. § 552(a)(6)(A)(i). Second, they
6 alleged that the Department failed to conduct an adequate search for records responsive their
7 request, in violation of 5 U.S.C. § 552(a)(3). Third, they alleged that the Department improperly
8 withheld non-exempt records responsive to their requests, in violation of 5 U.S.C. § 552(d).
9 Finally, Plaintiffs asserted that the Department arbitrarily rejected Plaintiffs’ request to expedite
10 processing of its Third FOIA Request.

11 Plaintiffs sought both injunctive and declaratory relief. As to injunctive relief, Plaintiffs
12 requested an order requiring the Department (a) “to make a determination regarding Plaintiffs’
13 First and Third FOIA requests,” Compl. ¶¶ 36, 67; (b) to search for records responsive to the
14 First and Third FOIA requests, Compl. § 53, (c) to disclose records that are not exempt from
15 disclosure, *id.* ¶ 57, and (d) to expedite its response to the Third FOIA request. Plaintiffs also
16 sought a declaratory judgment (e) “that the State Department did not timely respond to
17 Plaintiffs’ three FOIA requests; (f) that the State Department did not adequately search for
18 records responsive to Plaintiffs’ three FOIA requests; (g) that the State Department improperly
19 withheld records responsive to Plaintiffs’ three FOIA requests; and (h) that the State Department
20 improperly denied Plaintiffs’ request to expedite its response to its request.” Compl. at 14-15.

21 Plaintiffs served Defendant on August 11, 2022. On October 12, 2022, Defendant filed
22 their answer.⁵¹ On October 24, 2022, the parties filed a Joint Rule 26(f) Report, setting forth
23 their positions and a proposed discovery and motion plan.⁵²

24 On December 5, 2022, the Court held a scheduling conference and ordered the
25 Department “to submit its agency affidavits (declarations detailing the government’s search
26 efforts) and Vaughn Index (identifying any withheld documents and asserted justifications[]) by
27

28 ⁵¹ Defendant’s Answer (Dkt. 14).

⁵² Joint Report (Oct. 24, 2022) (Dkt. 17).

1 December 12, 2022.”⁵³ The Court also permitted Plaintiff to serve written interrogatories and
2 ordered the State Department to respond by January 17, 2023.⁵⁴

3 On December 12, 2022, the State Department filed its first agency affidavit: a declaration
4 by Susan C. Weetman, the Deputy Director of the Office of Information Programs and Services
5 (“IPS”).⁵⁵ The affidavit described “generally, the State Department’s procedures for processing
6 FOIA requests for access to agency records and, more specifically, the State Department’s
7 response to Plaintiffs’ FOIA requests and the searches that it has conducted in response to
8 Plaintiffs’ FOIA requests in this case, both prior to and during this litigation.”⁵⁶ Per the State
9 Department, “no concurrently filed Vaughn index” was filed “as no responsive records have
10 been withheld as of this date.”⁵⁷ Defendant submitted the declaration “to allow the Court to
11 make a preliminary determination regarding the sufficiency of the State Department’s search for
12 responsive records in this case.”⁵⁸

13 On December 20, 2023, the Court held another status conference and ordered the
14 Department to “expand other search terms to include common variations where appropriate.”⁵⁹
15 The Court also directed the parties to file a report addressing the status of processed documents,
16 specifically:

17 . . . whether processing has been completed or when it is expected to be completed.
18 For the documents that have been processed as of that date, the parties shall report
19 whether they have been disclosed to Plaintiffs or when they expect to be disclosed.
20 The parties shall also report on the status of Plaintiff’s written interrogatories, and
21 whether Defendant has identified any documents it seeks to withhold as of that
22 date.

23 On January 19, 2023, the parties filed a joint status report (Dkt. 26). Through the report,
24 “Plaintiffs confirmed receipt of the 47-page document production on January 13, 2023 and
25 contend that the production has improper redactions.”⁶⁰ In addition to documents produced on
26 January 13, 2023, Defendant “through supplemental searches conducted in December 2022, . . .

27 ⁵³ Minute Order (Dec. 5, 2022) (Dkt. 19) (hereinafter “Dec. 5 Order”).

28 ⁵⁴ Minute Order (Dec. 5, 2022) (Dkt. 19) (hereinafter “Dec. 5 Order”).

⁵⁵ Defendant’s Notice (Dkt. 20).

⁵⁶ Defendant’s Notice (Dkt. 20) at 1-2.

⁵⁷ Defendant’s Notice (Dkt. 20) at 2.

⁵⁸ Defendant’s Notice (Dkt. 20) at 1.

⁵⁹ See Minutes of December 20, 2022 Conference (Jan. 3, 2022) (Dkt. 19) (hereinafter “Dec. 20 Order”).

⁶⁰ Joint Status Report (Dkt. 26).

1 identified approximately 160 pages of material that are potentially responsive to Plaintiff’s Third
 2 FOIA Request.”⁶¹

3 On January 23, 2023, the Court held another status conference. The State Department
 4 filed its second agency affidavit by Susan C. Weetman along with a “preliminary” Vaughn
 5 index affidavit identifying, for the first time, the portions of the documents it seeks to withhold
 6 and why. (“Second Weetman Decl.”) (Dkt. 28).⁶² The Court further ordered the Department to
 7 process the remaining documents, disclosures, and redactions by February 21, 2023 (Dkt. 28).

8 On February 21, 2023, the Court held another status conference (Dkt. 27). The Court set the
 9 following briefing deadlines:

10	Defendant’s Motion for Summary Judgment (MSJ):	March 6, 2023
11	Plaintiff’s Cross Motion for Summary Judgment:	March 10, 2023
12	Plaintiff’s Opposition to Defendant’s MSJ:	March 20, 2023
13	Defendant’s Opposition to Plaintiff’s Cross MSJ:	March 24, 2023
14	Defendant’s Reply in support of MSJ:	March 27, 2023
15	Plaintiff’s Reply in support of Cross MSJ:	March 30, 2023

16 On March 6, 2023, Defendant filed its Motion for Summary Judgment along with
 17 supporting exhibits (Dkts. 32-33). The exhibits included a third agency affidavit (“Third
 18 Weetman Decl.”) (Dkt. 32-1) and an updated *Vaughn* index (Dkt. 32-2). On March 13, 2023,
 19 Plaintiffs filed their Motion for Summary Judgment (Dkt. 34). On March 14, 2023, Plaintiffs
 20 filed their Statement of Genuine Material Facts (Dkt. 35) in support of their motion and a
 21 declaration explaining the delayed filing (Dkt. 35). On March 20, 2023, Plaintiffs opposed
 22 Defendant’s motion (Dkt. 37). On March 24, 2023, Defendant opposed Plaintiffs’ motion (Dkt.
 23 38). On March 27, 2023, Defendant filed a reply (Dkt. 39). On March 30, 2023, Plaintiffs filed
 24 a reply (Dkt. 40). On April 3, 2023, the Court heard oral argument on the cross motions for
 25 summary judgment (Dkt. 41). Following the hearing, the parties filed a status report, resolving
 26 some disputed redactions (Dkt. 42).

27 **II. LEGAL STANDARD**

28 Summary judgment is proper if “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.

⁶¹ *Id.*

⁶² Defendant’s Second Agency Affidavit (Jan. 23, 2023) (Dkt. 27) (“Second Weetman Decl.”)

1 56(a). Summary judgment is to be granted cautiously, with due respect for a party's right to
2 have its factually grounded claims and defenses tried to a jury. *Celotex Corp. v. Catrett*, 477
3 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A court must
4 view the facts and draw inferences in the manner most favorable to the non-moving party.
5 *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1992); *Chevron Corp. v. Pennzoil Co.*, 974
6 F.2d 1156, 1161 (9th Cir. 1992). When the parties file cross-motions for summary judgment,
7 the court “review[s] each motion . . . separately, giving the non[-]moving party for each motion
8 the benefit of all reasonable inferences.” *Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 995
(9th Cir. 2017).

9 The moving party bears the initial burden of demonstrating the absence of a genuine
10 issue of material fact for trial, but it need not disprove the other party's case. *Celotex*, 477 U.S.
11 at 323. The moving party can meet its burden by pointing out that the non-moving party has
12 failed to present any genuine issue of material fact as to an essential element of its case. *See*
13 *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). Once the moving party has met its
14 burden, the non-moving party “must do more than simply show that there is some metaphysical
15 doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
16 574, 586 (1986). A “material fact” is one which “might affect the outcome of the suit under the
17 governing law.” *Anderson*, 477 U.S. at 248. A party cannot create a genuine issue of material
18 fact simply by making assertions in its legal papers. *S.A. Empresa de Viacao Aerea Rio*
19 *Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Rather, the non-
20 moving party must affirmatively present specific admissible evidence sufficient to create a
21 genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. “The mere existence of a
22 scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could
23 reasonably find for [the opposing party].” *Liberty Lobby*, 477 U.S. at 252.

24 Although a court may rely on materials in the record that neither party cited, the Court
25 need not “comb the record” looking for other evidence; it is only required to consider evidence
26 set forth in the moving and opposing papers and the portions of the record cited therein. Fed. R.
27 Civ. P. 56(c)(3); *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001). Where
28 the parties file cross-motions for summary judgment, the court may consider evidence from one
party’s motion to determine the other’s motion and vice versa. *See Fair Hous. Council of*

1 *Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136–37 (9th Cir. 2001). If a party fails to
2 properly support an assertion of fact or fails to properly address another party's assertion of
3 fact, the Court may consider the fact undisputed for purposes of the motion. Fed. R. Civ P.
4 56(e)(2).

5 **III. DISCUSSION**

6 **C. Motion to Strike**

7 Before reaching the merits of the parties' cross-motions for summary judgment, the Court
8 must first resolve the question of Plaintiffs' late filing. The Court ordered Plaintiffs to file their
9 cross motion for summary judgment on Friday, March 10, 2023. *See* Minute Order, February 22,
10 2023 (Dkt. 31). Plaintiffs filed their motion on Monday, March 13, 2023 (Dkt. 35). They filed a
11 declaration explaining the delay on March 14, 2023 (Dkt. 36). Defendant moves to strike based
12 on the untimeliness of the motion.

13 Federal Rule 6(b)(1)(B) provides that “[w]hen an act . . . must be done within a specified
14 time, the court may, for good cause, extend the time . . . on motion made after the time has
15 expired if the party failed to act because of excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B).
16 Plaintiffs filed their motion for summary judgment days after the applicable deadline and failed
17 to seek leave to do so on the basis of Rule 6(b)(1)(B). In the interest of judicial economy, the
18 Court construes Plaintiffs' affidavit as a motion to extend pursuant to Rule 6(b)(1)(B). Plaintiffs
19 nonetheless must still demonstrate that the delay was the result of excusable neglect.

20 The Supreme Court has designated four factors for determining when a late filing may
21 constitute “excusable neglect” in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507
22 U.S. 380, 395(1993). The Nine Circuit has applied the *Pioneer* test for the purpose of assessing
23 “excusable neglect” under Rule 6(b). *See Kyle v. Campbell Soup Co.*, 28 F.3d 928, 930-32 (9th
24 Cir. 1994). To determine whether a party's failure to meet a deadline constitutes “excusable
25 neglect,” courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to
26 the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3)
27 the reason for the delay; and (4) whether the movant acted in good faith. *Ahanchian v. Xenon*
28 *Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010)). The determination of whether a party's
neglect is excusable “is at bottom an equitable one, taking account of all relevant circumstances
surrounding the party's omission.” *Pioneer*, 507 U.S. at 395.

1 At least three of the four *Pioneer* factors here favor Plaintiffs; the length of the delay was
2 short and would not impact judicial proceedings; and that there was no indication that Plaintiffs
3 had acted in bad faith. While the Court recognizes that Plaintiffs' reasons may not be provide
4 the most compelling justification for an attorney's delay,⁶³ courts consistently recognize that
5 "excusable neglect" under Rule 6(b) is a somewhat "elastic concept" and is "not limited strictly
6 to omissions caused by circumstances beyond the control of the movant." *Pioneer Inv. Servs.*
7 *Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993).

8 Having considered the four factors, the Court finds that Plaintiffs' failure to meet the
9 deadline constitutes excusable delay. First, Plaintiffs' delayed filing of the cross motion, after
10 Defendant already filed its motion, did not substantially prejudice Defendant. Defendant still
11 had ten or so days to oppose and the opportunity to file a reply. Second, the length of the delay
12 was over a weekend, a mere three days; it did not adversely affect the summary judgment
13 hearing date, which was two weeks away. Third, while Plaintiffs' reasons are no "compelling
14 excuse," the Ninth Circuit has cautioned against any "rigid legal rule against late filings
15 attributable to any particular type of negligence." *Pincay*, 389 F.3d at 860. Rather, courts are to
16 consider of the "nature of the contextual analysis and the balancing of the factors adopted in
17 *Pioneer*" and *See e.g., Bateman v. U.S. Postal Serv.*, 231 F.3d 1220 (9th Cir. 2000) (finding
18 excusable delay where attorneys' reasons for his nearly month-long delay were the need to
19 recover from jet lag and to review mail). Fourth, there is no indication that Plaintiffs' failure to
20 file the opposition on time was the result of bad faith.

21 Thus, Plaintiffs have demonstrated "excusable neglect" for failure to timely file their
22 motion for summary judgment. Defendant's motion to strike Plaintiffs' motion for summary
23 judgment is thus DENIED.

24 **D. Ex Parte Application to Reopen**

25 On April 27, 2023, Plaintiffs filed an Ex Parte Application to Reopen Discovery ("Pls.' Ex
26 Parte") (Dkt. 43), which the Court construes as a request to modify a scheduling order under
27 Fed. R. Civ. P. 16(b)(4). Plaintiffs seek leave to revise their summary judgment motion and
reopen discovery, arguing that "this relief is necessary due to newly discovered information

28 ⁶³ *See* Pls.' Reply ("It is a little embarrassing for counsel to admit that he spilled tea on his laptop, disabling it on the afternoon of an important filing deadline, but it happened and there was nothing that could be done.").

1 from Fox News, which reported that Antony Blinken and his wife frequently emailed with
 2 Hunter Biden.” *See* Pls.’ Ex Parte, 4-6. Defendants argue that Plaintiffs have not established that
 3 they will be irreparably prejudiced without this relief, because “Plaintiffs can and should simply
 4 file a new FOIA request seeking the records and information they are now interested in.” Defs.’
 5 Opp’n. Ex Parte (Dkt. 44) at 3. The Court agrees. Accordingly, the Court DENIES Plaintiffs’ Ex
 6 Parte Application to Reopen. (Dkt. 43).

7 **E. Motions for Summary Judgment**

8 Under the FOIA, an agency is obliged to make “promptly available” records that are
 9 “reasonably describe[d]” in a written request and are not exempt or excluded from disclosure. 5
 10 U.S.C. §§ 552(a)(3)(A), 552(b). An agency is entitled to summary judgment “only if the agency
 11 has shown that the evidence, when viewed in the light most favorable to [Plaintiffs], raises no
 12 genuine issue of material fact.” *Kowalczyk v. Dep’t of Just.*, 73 F.3d 386, 388 (D.C. Cir. 1996)
 13 (citing *Steinberg v. U.S. Dep’t of Justice*, 23 F.3d 548, 551 (D.C. Cir.1994)) (citation omitted)

14 The State Department argues that it is entitled to judgment that it did not violate FOIA
 15 because it (1) conducted searches reasonably calculated to locate all responsive records, and (2)
 16 properly redacted documents pursuant to two FOIA exemptions: Exemption 5 and Exemption 6,
 17 *see* 5 U.S.C. §§ 552(b)(5), (6). *See* Def.’s Mot. at 12. Plaintiffs seek a declaratory judgment that
 18 Defendant did not timely respond to their FOIA requests, in violation of 5 U.S.C. §
 19 552(a)(6)(A)(i), and that the State Department failed to conduct an adequate search for
 20 responsive records, in violation of 5 U.S.C. § 552(a)(3). Plaintiffs also contend that the State
 21 Department improperly withheld responsive, non-exempt documents in violation of 5 U.S.C. §
 22 552(d). Accordingly, Plaintiffs ask that the State Department be ordered to disclose the
 23 documents unredacted. *See* Pls.’ Mot. The Court addresses each argument in turn.

24 **1. Failure to Make a Determination**

25 Agencies are required, by statute, to make a determination on a FOIA request within 20
 26 business days of receipt. 5 U.S.C. § 552(a)(6)(A)(i). For each of Plaintiffs’ requests, Defendant
 27 exceeded the statutory maximum to respond. Plaintiffs’ First FOIA Request took over two years.
 28 Its second and third FOIA requests—submitted two years apart—each took over six months.
 And for two of those requests, the First and Third FOIA Request, the State Department
 responded only after Plaintiffs filed this action in May 2022. Even then, it was months into the

1 litigation before the State Department made determinations and many more months before it
2 disclosed documents. The State Department’s position, moreover, continued to fluctuate. The
3 initial determinations—that no responsive records were located—were undercut by
4 supplemental searches and disclosures.

5 Courts in the Ninth Circuit have generally enforced FOIA’s time limits “when the
6 violation is ‘egregious’ or when there is a ‘pattern or practice’ of delay.”⁶⁴ Months-long delays
7 have been held to rise to the level of “egregious” violations.⁶⁵ Notwithstanding that the 20-day
8 deadline elapsed many times over, the State Department here still did not make the requisite
9 determinations until months into the litigation. *See* 5 U.S.C. § 552(a)(6)(A)(i). Defendant’s
10 notices acknowledging receipt of Plaintiffs’ request invoked the “unusual circumstances”
11 requirement for an extension.⁶⁶ FOIA’s “unusual circumstances” exception can permit an
12 agency to extend the 20-day timeframe by “no more than ten working days,” provided that they
13 give written notice to the requestor “setting forth the unusual circumstances for such extension
14 and the date on which a determination is expected to be dispatched.” 5 U.S.C. §
15 552(a)(6)(B)(i).⁶⁷

16 Here, the State Department described the “unusual circumstances” as including “the
17 need to search for and collect requested records from other Department offices and Foreign
18 Service posts.”⁶⁸ Moreover, although the notices provided Plaintiffs the opportunity to request
19 “an estimated date of completion,” *id.*, FOIA requires the agency to notify the requestor “of the
20 date by which processing of the request can be expected to be completed.” The State

21 ⁶⁴ *See e.g., P.W. Arms, Inc. v. United States*, No. C15-1990-JCC, 2017 WL 319250, at *2 (W.D. Wash. Jan. 23,
22 2017; *see also Munger, Tolles & Olson LLP ex rel. Am. Mgmt. Servs. LLC v. U.S. Dep’t of Army*, 58 F. Supp. 3d
23 1050, 1054 (C.D. Cal. 2014).

24 ⁶⁵ *Id.*

25 ⁶⁶ Under FOIA, “‘unusual circumstances’ means, but only to the extent reasonably necessary to the proper
26 processing of the particular requests—(I) the need to search for and collect the requested records from field
27 facilities or other establishments that are separate from the office processing request; (II) the need to search for,
28 collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a
single request; or (III) the need for consultation, which shall be conducted with all practicable speed, with another
agency having a substantial interest in the determination of the request or among two or more components of the
agency having substantial subject-matter interest therein.” 5 U.S.C.A. § 552(a)(6)(B)(iii).

⁶⁷ Additionally, the agency is required to “provide the person an opportunity to limit the scope of the request so
that it may be processed within that time limit,” or “an opportunity to arrange with the agency an alternative time
frame for processing.” 5 U.S.C. § 552(a)(6)(B)(ii).

⁶⁸ *See* First FOIA Receipt; Second FOIA Receipt; Third FOIA Receipt.

1 Department failed to do so here. Even assuming that such circumstances apply, any extension
2 still would not have exceeded ten days.⁶⁹

3 Plaintiff's First FOIA Request was submitted on February 26, 2020. The State
4 Department conducted a search for this request on December 3, 2020.⁷⁰ It communicated to
5 Plaintiffs that no responsive records were found on September 19, 2022, months after Plaintiffs
6 filed this action. Plaintiffs' Second FOIA Request was submitted on February 26, 2020. The
7 State Department conducted a search for this request on June 3, 2020.⁷¹ It communicated to
8 Plaintiffs that no responsive records were found on September 16, 2020. Plaintiff's Third FOIA
9 Request was submitted on February 28, 2023. The State Department conducted searches for
10 this request on March 9, 2022 and March 15, 2022.⁷² It communicated to Plaintiffs that no
11 responsive records were found on September 19, 2022.

12 None of the State Department's determinations were within a timeframe considered
13 "prompt" by any ordinary understanding of the word. See 5 U.S.C. § 552(a)(3)(A). The statute
14 places the burden on the agency, not the FOIA requester, to justify delays in processing. 5
15 U.S.C. § 552(a)(4)(B). The State Department here does not address Plaintiffs' argument
16 regarding timeliness in opposition. More troubling is Defendant's failure, to date, to explain the
17 delay. Even after multiple rounds of briefing and a motion hearing, the State Department offers
18 no credible evidence to support an argument that disclosure within the statutory time period
19 was "not practicable" so as to justify the delay. *Id.* at 39 & n. 8.

20 In its responses to Plaintiffs' interrogatories, the State Department cites the
21 "Department's significant FOIA backlog and the impact of the COVID-19 pandemic on the
22 Department's FOIA operations" as a reason for the delay.⁷³ But Plaintiffs' First FOIA Request
23 was submitted on the same day as the Second FOIA Request, both received "immediately prior
24 to the COVID-19 pandemic" ⁷⁴ It remains unclear, then, why the State Department's

25 ⁶⁹ Moreover, although the notices provided Plaintiffs the opportunity to request "an estimated date of
26 completion," *id.*, FOIA requires the *agency* to notify the requester "of the date by which processing of the request
27 can be expected to be completed." The State Department failed to do so here.

28 ⁷⁰ See Def.'s Resp. to Pls.' Int. No. 7 (Dkt. 34-5 at 94).

⁷¹ Def.'s Resp. to Pls.' Int. 10 (Dkt. 34-5 at 98).

⁷² Def.'s Resp. to Pls.' Int. 10 (Dkt. 34-5 at 98).

⁷³ Def.'s Resp. to Pls.' Int. 10 (Dkt. 34-5 at 98).

⁷⁴ Def.'s Resp. to Pls.' Int. 1, Pls.' Ex. 12 (Dkt. 34-5, 83-112), at 85.

1 response to the First FOIA Request came two years later, notwithstanding that “IPS generally
2 processes FOIA requests on a first-in, first-out basis.” Def.’s Resp. Pls.’ Int. 5.

3 The Court will not “draw general conclusions about the [State Department’s] agency-
4 wide patterns and practices from its handling of one case.” Plaintiffs are rightfully concerned,
5 however, that the State Department may delay processing other requests in the near future.⁷⁵

6 Having reviewed the appropriateness of declaratory relief, the court concludes that based
7 on the record in this case, Plaintiffs are entitled to declaratory relief. The Department of State
8 violated FOIA by failing to timely respond to Plaintiffs’ three FOIA requests. For that reason,
9 the Court GRANTS Summary Judgment in Plaintiff’s favor.

10 **2. Adequacy of the Search**

11 Recognizing that, in the FOIA context, “only one side to the controversy (the side
12 opposing disclosure) is in a position confidently to make statements categorizing
13 information,”⁷⁶ “agencies bear the burden of demonstrating the adequacy of their search beyond
14 a material doubt.” *Transgender L. Ctr. v. Immigr. & Customs Enf’t*, 46 F.4th 771, 780 (9th Cir.
15 2022). To be sure, this is a “heavy burden.” *Id.* at 779. But it “appropriately reflects the purpose
16 and policy of FOIA, including transparency, public access, and an informed citizenry.” *Id.* at
17 780. Otherwise, “if, in the face of well-defined requests and positive indications of overlooked
18 materials, an agency can so easily avoid adversary scrutiny of its search techniques, [FOIA]
19 will inevitably become nugatory.”⁷⁷ In defending the adequacy of a FOIA search, an agency
20 must “demonstrate beyond material doubt that its search was reasonably calculated to uncover
21 all relevant documents.”⁷⁸ The proper focus for this inquiry thus is “the reasonableness of [an
22 agency’s] methods, not the quantity or quality of documents it unearths.” *Am. Oversight v.*
23 *DOJ*, 401 F. Supp. 3d 16, 22 (D.D.C. 2019). An agency's search methods are sufficient so long

24
25 ⁷⁵ See Pls.’ Mot. at 5 (“The need for Plaintiffs to aggressively pursue this litigation in order to get a response from
the State Department was becoming a pattern.”).

26 ⁷⁶ *Founding Church of Scientology of Wash., D.C. v. Nat’l Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979)
27 (stating that “[i]f the agency can lightly avoid its responsibilities by laxity in identification or retrieval of desired
materials, the majestic goals of [FOIA] will soon pass beyond reach”).

28 ⁷⁷ *Founding Church of Scientology of Wash., D.C. v. Nat’l Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979)

⁷⁸ *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (internal quotation
marks omitted).

1 as they “can be reasonably expected to produce the information requested.” *Oglesby v. U.S.*
 2 *Dep't of Army* (“Oglesby I”), 920 F.2d 57, 68 (D.C. Cir. 1990).

3 a. Search Methodology

4 The State Department’s FOIA search methodology is described in its first agency
 5 affidavit. The affidavit details how FOIA requests are received; to whom they are assigned;
 6 how the search process is initiated; how the parameters are determined; and why certain
 7 databases, and not others, are determined to contain responsive documents. But although the
 8 declaration was reasonably detailed, the extent to which the process described in the first
 9 affidavit applies to Plaintiffs’ three FOIA requests remains unclear. In its responses to
 10 Plaintiffs’ interrogatories, Defendant contends that “[t]he two-tier review process described in
 11 paragraph 14 of the Weetman Declaration was not in place until June 1, 2022” so “[a]ll three of
 12 Plaintiffs’ requests [which] were received prior to this date [] would not have been subject to
 13 the described two-tier review process.” *See* Def.’s Resp. to Pls. Int. 1 (Dkt. 34-5 at 84-85).

14 Defendant’s Response to Plaintiffs’ Interrogatory 6 likewise makes it difficult to discern
 15 what systems were searched for which requests:

16 The statement in paragraph 28 of the Weetman Declaration that a search
 17 was conducted of the eRecords Archive on the classified system was an
 18 error. The Technical Information Specialist who conducted the search
 determined that a search of the eRecords Archive on the classified network
 was not needed, as a Department employee would not be corresponding
 on a classified system with a member of the public.⁷⁹

19 The subject of Interrogatory 6 above, moreover, was Plaintiffs’ Second FOIA Request,
 20 not the Third FOIA Request addressed in Paragraph 28 of the first agency affidavit. *Compare*
 21 Pls.’ Interrogatory 6 (“On what day or days did you search for records responsive to Plaintiffs’
 22 Second FOIA Request”) *with* First Weetman Decl. (Dkt. 20-1) ¶ 28 (“For Plaintiffs’ Third
 23 FOIA request . . . IPS . . . conducted a search of eRecords on the Department’s unclassified and
 24 classified systems”). Defendants also note a “scrivener’s error” with respect to Paragraph
 25 34 of the first agency affidavit.⁸⁰

26
 27 ⁷⁹ First Weetman Decl. (Dkt. 20-1) ¶ 28

28 ⁸⁰ *See* Def.’s Resp. to Pls.’ Int. 13 (“The Weetman Declaration contains a scrivener’s error in paragraph 34,
 referring to Plaintiff’s first FOIA request, assigned litigation case number, FL-2022-00077, as the ‘Third FOIA
 request.’ This was in fact the Plaintiff’s first FOIA request.”);⁸⁰ First Weetman Decl. ¶ 34 (“Additionally, for

1 In summary, the Court cannot be sure what portions of Defendant’s agency affidavits to
2 credit. Although Defendant subsequently filed two agency affidavits with the Court, neither
3 clarified the discrepancies or errors. *See* Def.’s Facts ¶ 26 (“For Plaintiffs’ Third FOIA request .
4 . . . a search of eRecords on the Department’s unclassified *and* classified systems [was
5 conducted]”) (citing First Weetman Decl. ¶ 28)); Third Weetman Decl. ¶ 3 (“This declaration
6 supplements my previous submissions with additional information regarding the processing of
7 Plaintiff’s FOIA Requests . . . including the searches conducted and the FOIA exemptions
8 claimed in the responsive documents.”).

9 Notwithstanding the discrepancies in the record, the parties only dispute the adequacy of
10 the searches as they pertain to the search terms. As such, the Court’s analysis focuses on this
11 piece. For reasons set forth below, the Court GRANTS judgment in favor of Defendants.

12 **b. Search Terms**

13 The State Department argues that its “original searches were reasonably calculated to
14 locate records responsive to Plaintiffs’ FOIA requests” because it “used search terms taken or
15 derived from the FOIA requests themselves and encompassed all State Department custodians
16 identified by the FOIA requests.” *See* Def.’s Opp’n (Dkt. 38) at 6. Plaintiffs contend that
17 “[t]hese are searches Defendant should have performed in the first instance, before Plaintiffs had
18 to sue to enforce their FOIA rights.” Pls.’ Mot. at 15. The Court agrees with the State
19 Department, but not for the same reasons.

20 The touchstone of the search inquiry is reasonableness. “The burden falls on the
21 government to show that its search efforts were reasonable and logically organized to uncover
22 relevant documents. *See SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)
23 (“When a plaintiff questions the adequacy of the search an agency made in order to satisfy its
24 FOIA request, the factual question it raises is whether the search was reasonably calculated to
25 discover the requested documents, not whether it actually uncovered every document extant.”).
26 While a FOIA search need not be exhaustive or uncover every responsive document, the agency
27 must show “that it made a good faith effort to conduct a search for the requested records, using
28 methods which can be reasonably expected to produce the information requested.” *Oglesby v.*

Plaintiffs’ Third FOIA request, FL-2022-00077, a . . . supplemental search of the eRecords Archive [was
conducted] on December 6, 2022”).

1 *Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). “[I]f based on the circumstances of a
2 particular case, the government’s chosen terms are not reasonably calculated to uncover all
3 relevant documents . . . then the government has not fulfilled its duties under FOIA.” *Inter-*
4 *Coop. Exch. v. United States Dep't of Com.*, 36 F.4th 905, 911–12 (9th Cir. 2022). The fact that
5 subsequent searches would ultimately return responsive documents “does not demonstrate that
6 the searches were inadequate, because the failure of a search to produce particular documents, or
7 ‘mere speculation that as yet uncovered documents might exist,’ does not undermine the
8 adequacy of a search.” *Lasko v. U.S. Dep't of Just.*, No. 10-5068, 2010 WL 3521595 at 1 (D.C.
9 Cir. Sept. 3, 2010). As the Supreme Court cautioned, government misconduct is “easy to allege
10 and hard to disprove, so courts must insist on a meaningful evidentiary showing.” *Nat'l Archives*
11 *& Records Admin. v. Favish*, 541 U.S. 157, 175 (2004) (internal quotation marks and citation
omitted).

12 When it comes to search terms, the agency enjoys “discretion in crafting a list of search
13 terms that they believe[] to be reasonably tailored to uncover documents responsive to the
14 FOIA request.” *Agility Pub. Warehousing Co. K.S.C. v. NSA*, 113 F. Supp. 3d 313, 339 (D.D.C.
15 2015) (internal quotation marks omitted). So long as the “search terms are reasonably calculated
16 to lead to responsive documents, the Court should not ‘micro manage’ the agency’s search.”
17 *Liberation Newspaper v. U.S. Dep't of State*, 80 F.Supp.3d 137, 146 (D.D.C. 2015) (citation
18 omitted)/ *Cause of Action Inst. v. Internal Revenue Serv.*, 316 F. Supp. 3d 99, 110 (D.D.C.
19 2018). Observing that “[g]overnment agencies, like all bureaucracies, often use jargon,
20 acronyms, shorthand, and common variants of terms,” *Inter-Coop. Exch. v. United States Dep't*
21 *of Com.*, 36 F.4th 905, 911–12 (9th Cir. 2022), an agency may fail its FOIA obligations when it
22 ignores “logical variations,” “synonyms,” and “proxies” “calculated to turn up all responsive
23 documents,” *Government Accountability Project v. U.S. Dep't of Homeland Sec.*, 335 F. Supp.
3d 7, 11–12 (D.D.C. 2018).

24 As written, Plaintiffs’ requests all seek records that “reference, and/or include” specific
25 terms. Each term was subsequently identified and placed it in quotation marks. Defendant’s
26 initial searches, which turned up no responsive documents, adhered to the terms as provided.
27 The question is whether the agency’s limiting of the searches—to the terms delineated in the
28 FOIA requests—constituted a reasonable effort by the agency to locate the records that Plaintiffs

1 sought. Though the question of the adequacy of the search terms is a close call, the Court
2 concludes that the initial searches were reasonable.

3 Plaintiffs' three FOIA requests each seek records that "reference and/or include" specific
4 "terms," and then proceed to identify those terms. Plaintiffs' First FOIA Request, for example,
5 sought records "that reference, and or include, the terms 1) 'United States Global Leadership
6 Coalition'; 2) 'Center for U.S. Global Leadership'; 3) 'International Affairs Budget'; and 4)
7 'Ukraine.'" The State Department accordingly searched for records that, per Plaintiffs' requests,
8 "include and/or reference" those terms. *See Welsh v. U.S. Dep't of State*, No. CV 21-1380
9 (TJK), 2023 WL 2424606, at *5 (D.D.C. Mar. 8, 2023). Where the FOIA requests are "not
10 broadly drawn" and make a more "specific inquiry," the agency's decision to limit its search to
11 the four corners of the request is reasonable. *See id.* (citing *Kowalczyk v. Dep't of Justice*, 73
12 F.3d 386, 389 (D.C. Cir. 1996)). Agencies are not required to "account for every conceivable
13 term, variant, or misspelling" of the relevant terms. *Id.*

14 In reaching this determination, the Court does not suggest that an agency's rigid
15 adherence to the letter of the FOIA request will always be reasonable; in fact, a search for
16 phrases verbatim is often "doomed to return limited results." *Bader Fam. Found. v. United*
17 *States Dep't of Educ.*, 2022 WL 4355259, at *2-3 (D.D.C. Sept. 20, 2022) (citing *Gov't*
18 *Accountability Project*, 335 F. Supp. 3d at 11). But here, the agency's decision *not* to go beyond
19 the terms prescribed by Plaintiffs does not render its search unreasonable. The agency's eventual
20 production of responsive records similarly does not undermine the reasonableness of the initial
21 search. FOIA requestors, after all, are "only 'entitled to a reasonable search for records, not a
22 perfect one.'" *Id.* (quoting *Hamdan*, 797 F.3d at 772).

23 Accordingly, the Court GRANTS judgment in favor of Defendants on the adequacy of its
24 search.

25 **3. Exemptions**

26 FOIA contains a set of exceptions to an agency's general obligation to provide
27 government records to the public. See 5 U.S.C. § 552(b). These "statutory exemptions, which
28 are exclusive, are to be 'narrowly construed.'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d

1 26, 32 (D.C. Cir. 2002) (quoting *Dep't of Air Force v. Rose*, U.S. 352, 361 (1976)).⁸¹ The
 2 government bears the burden of establishing that any claimed FOIA exemptions apply. *ACLU v.*
 3 *Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011). And, “[i]f a document contains exempt
 4 information, the agency must still release ‘any reasonably segregable portion’ after deletion of
 5 the nondisclosable portions.” *Oglesby v. U.S. Dep't of Army* (“*Oglesby II*”), 79 F.3d 1172, 1176
 6 (D.C. Cir. 1996) (quoting 5 U.S.C. § 552(b)); *Price v. United States Dep't of Just.*, No. 18-CV-
 1339 (CRC), 2020 WL 3972273, at *4 (D.D.C. July 14, 2020).

7
 8 The State Department invokes FOIA’s Exemption 5 to withhold information from 23
 9 records and Exemption 6 to withhold information from 48 records.

10 **a. FOIA Exemption 5**

11 Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or
 12 letters which would not be available by law to a party other than an agency in litigation with the
 13 agency.” 5 U.S.C. § 552(b)(5). This language “simply incorporates civil discovery privileges.”
 14 *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *see also NLRB v. Sears,*
 15 *Roebuck & Co.*, 421 U.S. 132, 154 (1975) (“It is equally clear that Congress had the attorney's
 16 work-product privilege specifically in mind when it adopted Exemption 5[.]”). Exemption 5
 17 protects “materials that are both pre-decisional and deliberative.” *Mapother v. Dep't of Justice*, 3
 18 F.3d 1533, 1537 (D.C.Cir.1993) (citing *Wolfe v. Dep't of Health & Human Services*, 839 F.2d
 19 768, 773 (D.C. Cir. 1988) (en banc)). Exemption 5 states, in full:

20 This section does not apply to matters that are—... inter-agency or intra-agency
 21 memorandums or letters that would not be available by law to a party other than
 22 an agency in litigation with the agency, provided that the deliberative process
 privilege shall not apply to records created 25 years or more before the date on
 which the records were requested[.]

23 5 U.S.C. § 552(b)(5).

24 The State Department invokes FOIA’s Exemption 5 to withhold information pursuant to
 25 the deliberative process privilege and the presidential communications privilege. Specifically,
 26 the State Department withholds six (6) records pursuant to the deliberative process privilege. *See*

27
 28 ⁸¹ In addition to “exemptions,” there are also FOIA “exclusions” to which the requirements of the FOIA do not
 apply at all. *See* 5 U.S.C. § 552(c); *Benavides v. Drug Enforcement Admin.*, 968 F.2d 1243, 1248 (D.C. Cir.
 1992). *See e.g.*, First FOIA Response; Third FOIA Response.

1 5 U.S.C. § 552(b)(5); *see* Joint Status Report (Dkt. 42) ¶ 1 (“Defendant confirms that it has
 2 redacted material from six, not seven, documents to remove material protected by the
 3 deliberative process privilege.”). The State Department also withholds portions of 19 records
 4 pursuant to the presidential communications privilege. Third Weetman Decl. ¶ 23.

5 To invoke the exemption, the agency must show “that a document (1) is ‘inter-agency’ or
 6 ‘intra-agency’ in character, and (2) consists of material that would be protected as privileged in
 7 the civil discovery context.” *Rojas v. Fed. Aviation Admin.*, 989 F.3d 666, 672 (9th Cir. 2021),
 8 *cert. denied*, 142 S. Ct. 753 (2022) (citing *Sears*, 421 U.S. at 149). Absent the protection
 9 afforded by Exemption 5, “an agency's litigation opponents could obtain under FOIA the same
 10 privileged communications they were barred from obtaining under civil discovery rules.” *Id.* at
 11 673. Thus, the exemption “protects an agency's internal communications (as well as
 12 communications with other agencies) if those communications would be protected by one of the
 13 civil discovery privileges, such as the attorney-client privilege, the attorney work-product
 14 privilege, or the deliberative process privilege.” *Id.*

15 *i. Deliberative Process Privilege*

16 The State Department asserts the deliberative process privilege in six (6) records.
 17 Following the hearing on the cross motions for summary judgment, the State Department
 18 released to Plaintiffs two of the six (6) records without the deliberative process privilege,
 19 leaving four at issue.⁸²

20 The privilege protects “documents reflecting advisory opinions, recommendations and
 21 deliberations comprising part of a process by which governmental decisions and policies are
 22 formulated.” *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)
 23 (internal quotation marks omitted). For the deliberative process privilege to apply, the material
 24 must be “predecisional” and “deliberative.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir.
 25 1997). Unlike the presidential communications privilege, the deliberative process privilege does
 26 not protect documents in their entirety; if the government can segregate and disclose non-

27
 28 ⁸² These four documents are identified by the following item numbers in Defendant's Vaughn index: 16 (A-00000583692); 18 (A-00000583690); 27 (A-00000583690); 30 (A-00000583690). The Court notes that the same identification or A-numbers were used for the last three.

1 privileged factual information within a document, it must. *Army Times Publ'g Co. v. Dep't of Air*
 2 *Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993).

3 ***ii. Presidential Communications Privilege***

4
 5 The State Department also asserts the Presidential Communications Privilege in 22
 6 records.⁸³ Generally accepting the scope of Defendant's search, Plaintiffs note that the issue now
 7 is the redactions, "[m]ost significant among them are 22 documents Defendant describes as
 8 exempt under the presidential communications privilege." Pls.' Mot. (Dkt. 34-1) at 5. Plaintiffs
 9 argue that the presidential communications privilege "does not apply here because there is
 10 neither evidence that the President has invoked the privilege nor evidence that any of the
 11 documents involve communication with White House staff." *Id.*

12 The "presidential communications privilege" is a "presumptive privilege for
 13 [p]residential communications" that "preserves the President's ability to obtain candid and
 14 informed opinions from his advisors and to make decisions confidentially." *Karnoski v. Trump*,
 15 926 F.3d 1180, 1203–04 (9th Cir. 2019) (citation and internal quotation marks omitted). Despite
 16 the nomenclature, the privilege protects both "communications directly involving and
 17 documents actually viewed by the President," as well as "documents solicited and received by
 18 the President or his immediate White House advisers broad and significant responsibility for
 19 investigating and formulating the advice to be given the President." *Id.* (citation and internal
 20 quotation marks omitted). Unlike the deliberative process privilege, this privilege covers
 21 documents that are both pre-decisional and post-decisional, and it covers documents in their
 22 entirety. *Id.*

23 **b. Exemption 6 (48 records withheld in part)**

24 The State Department also invokes FOIA's Exemption 6 to withhold information in 48
 25 records pursuant to personal privacy. *See* Third Weetman Decl. ¶¶ 28-30. *See* 5 U.S.C. §
 26 552(b)(6). Exemption 6 protects from disclosure "personnel and medical files and similar files
 the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5

27 ⁸³ *See Vaughn Index*, (14) (A-00000583694); (20) (A-00000583690); (21) (A-00000583690); (22) (A-00000583690); (25)
 28 (A-00000583690); (28) (A-00000583690); (31) (A-00000583690); (48) (A-00000583690); (50) (A-00000583690); A-
 00000566775; A-00000566774; A-00000566772; A-00000566771; A-00000566769; A-00000566767; A-00000566773; A-
 00000566761; A00000566760; A-00000566759; A-00000566758; A-00000566757; A-00000566753.

1 U.S.C. § 552(b)(6). “In order to withhold information from disclosure under Exemption 6, the
2 agency must specifically invoke the exemption and must carry the burden of proving that
3 disclosure would constitute a clearly unwarranted invasion of personal privacy.” *Cameranesi v.*
4 *United States Dep’t of Def.*, 856 F.3d 626, 637 (9th Cir. 2017) (citation omitted). When
5 evaluating the applicability of Exemption 6, courts are instructed to “balance the public interest
6 in disclosure against the interest Congress intended the [e]xemption to protect.” *Id.* (quoting
7 *Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (internal quotation marks
8 omitted). The Ninth Circuit has established “a two-step test for balancing individual privacy
9 rights against the public’s right of access.” *Id.* First, the agency must show that personal privacy
10 interest is “nontrivial” or more than “de minimis.” *Yonemoto*, 686 F.3d at 693 (internal citation
11 and quotation marks omitted). Next, if the agency succeeds, the requester must show that the
12 public interest at stake is “significant” one and that the information sought is “likely to advance
13 that interest.” *Lane v. Dep’t of Interior*, 523 F.3d 1128, 1137 (9th Cir. 2008) (alteration in
14 original) (quoting *Favish*, 541 U.S. at 172) (internal quotation marks omitted); *see also*
15 *Yonemoto*, 686 F.3d at 694. “Otherwise, the invasion of privacy is unwarranted.” *Favish*, 541
16 U.S. at 172.

17 Pursuant to Exemption 6, the State Department withheld the contact information of the
18 Department employees and the non-public contact information for non-federal entities who were
19 copied on the emails.

20 Given the discrepancies highlighted above, the Court is not satisfied that the descriptions
21 of the withheld information are accurate. *Id.* at 836 (“the requester may nonetheless produce
22 countervailing evidence, and if the sufficiency of the agency’s identification or retrieval
23 procedure is genuinely in issue, summary judgment is not in order”). FOIA gives district courts
24 the discretion to examine the contents of requested agency records in camera “to determine
25 whether such records or any part thereof shall be withheld.” *See* 5 U.S.C. § 552(a)(4)(B). “The
26 decision whether to perform in camera inspection is left to the ‘broad discretion of the trial court
27 judge.’” *Lam Lek Chong v. DEA*, 929 F.2d 729, 735 (D.C. Cir. 1991) (quoting *Carter v. U.S.*
28 *Dep’t of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987)).

Here, the Court finds in camera inspection of the documents appropriate “to make a
responsible *de novo* determination on the claims of exemption.” *Carter*, 830 F.2d at 392.

1 Defendant is ORDERED to produce all of the disputed documents in which the defendant has
2 invoked Exemptions 5 and 6 to the court for *in camera* review within seven (7) days of this
3 order. 5 U.S.C. § 552(a)(4)(B).

4 **IV. DISPOSITION**

5
6 For the foregoing reasons, the Court **DENIES** Plaintiff's Ex Parte Application (Dkt. 43);
7 **GRANTS IN PART** Plaintiffs' Motion for Summary Judgment (Dkt. 34); and **GRANTS IN**
8 **PART** Defendant's Motion for Summary Judgment (Dkt. 33). In particular, the Court:

- 9 — **GRANTS** summary judgment in favor of Plaintiffs as to Defendant's failure to
10 make a determination;
- 11 — **GRANTS** summary judgment in favor of Defendants as to the adequacy of the
12 search; and
- 13 — **DENIES WITHOUT PREJUDICE** summary judgment with respect to the
14 propriety of the redactions pursuant to the exemptions.

15 Defendant is **ORDERED** to produce the disputed documents in which the defendant has
16 invoked Exemptions 5 and 6 to the court for *in camera* review within seven (7) days of this
17 order. 5 U.S.C. § 552(a)(4)(B).

18 DATED: May 3, 2023

19 

20

DAVID O. CARTER

21 UNITED STATES DISTRICT JUDGE