UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NISKANEN CENTER, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 17-676 (JEB)
U.S. DEPARTMENT OF ENERGY,	)	
	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Eric R. Glitzenstein
Meyer Glitzenstein & Eubanks LLP
Suite 210
4115 Wisconsin Ave., N.W.
Washington, D.C. 20016
(202) 588-5206
eglitzenstein@meyerglitz.com

Counsel for Plaintiff

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This Freedom of Information Act ("FOIA" or "Act"), 5 U.S.C. § 552, case concerns Department of Energy ("DOE") records relating to the National Coal Council ("Council")—a formally chartered federal advisory committee established pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2. Although the Council, as a formal FACA committee, has extraordinary access to DOE and the Secretary of Energy, and for decades has used that access to promote the interests of the coal industry, DOE is withholding, among other materials, records relating to the finances and sources of financial support for the Council—information that is not covered by any FOIA exemption and that the public has a significant interest in obtaining and analyzing. In addition, DOE has performed a woefully inadequate search for materials responsive to the FOIA request submitted by Plaintiff Niskanen Center (the "Center")—a non-profit think tank in Washington, D.C. that is studying the effectiveness of federal advisory committees.

Accordingly, as explained further below, because DOE has not satisfied its burden to support its exemption claims, and nor has it performed an adequate search for responsive materials, DOE's motion for summary judgment should be denied and Plaintiff's motion for summary judgment should be granted.

LEGAL CONTEXT AND FACTUAL BACKGROUND

A. THE FREEDOM OF INFORMATION ACT

Congress enacted FOIA in order "to open agency action to the light of public scrutiny," *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 750 F.3d 927, 929 (D.C. Cir. 2014) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)), and to "promote the broad disclosure of Government records by generally requiring federal agencies to make their records available to the public on request." *DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015) (citing *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988)). Since the "basic objective of the Act is disclosure," *Chrysler Corp. v. Brown*, 441 U.S. 281, 290 (1979), the nine statutory exemptions from disclosure "are explicitly made exclusive and must be narrowly construed." *Milner v. U.S. Dep't of Navy*, 562 U.S. 562, 565 (2011) (internal quotation marks and citations omitted). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 116.

The Act requires each federal agency to make non-exempt records "promptly available to any person" upon request, 5 U.S.C. § 552(a)(3)(A)(ii), and vests jurisdiction in the district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). The agency wishing to withhold a requested record has the burden of proving that the record is exempt, and the Court must decide the matter *de novo*. *Id.*; *see also U.S. Dep't of Justice v. Reporters Comm. for Freedom of the*

Press, 489 U.S. 749, 755 (1989). Therefore, when an agency fails to meet its burden of proof that an exemption applies to the withheld information, summary judgment should be entered for the requester. *Id.*; *see also, e.g.*, *Public Citizen Health Research Group v. Food & Drug Administration*, 185 F.3d 898, 906 (D.C. Cir. 1999) (finding summary judgment for the requester to be appropriate because the agency's "[c]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold requested documents").

In order to carry its burden of establishing that a particular document, or portion of a document, may be withheld, "an agency must submit sufficiently detailed affidavits or declarations, a *Vaughn* index of the withheld documents, or both, to demonstrate that the government has analyzed carefully any material withheld, to enable the court to fulfill its duty of ruling on the applicability of the exemption, and to enable the adversary system to operate by giving the requester as much information as possible, on the basis of which the requester's case may be presented to the trial court." *Ctr. for Auto Safety v. U.S. Dep't of Treasury*, 133 F. Supp. 3d 109, 117 (D.D.C. 2015) (citing *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996)). Hence, the "district court must review the *Vaughn* index and any supporting declarations 'to verify the validity of each claimed exemption.'" *Ctr. for Auto Safety*, 133 F. Supp. 3d at 117 (quoting *Summers v. U.S. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998)).

In addition, a reviewing court has an "affirmative duty" to determine whether the agency has produced all segregable, non-exempt information contained in an agency record. *Elliott v. U.S. Dep't of Agric.*, 596 F.3d 842, 851 (D.C. Cir. 2010); *see also Stotl-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) ("[B]efore approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld.") (internal quotation omitted); 5 U.S.C. § 552(b) ("Any reasonably

segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

An agency also bears the burden to demonstrate that it has conducted a reasonable search for responsive documents, and "'[w]hen a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably calculated to discover the requested documents . . . .'" *Wisdom v. U.S. Trustee Program*, 232 F. Supp. 3d 97, 116 (D.D.C. 2017) (Boasberg, J.) (quoting *Safecard Servs., Inc. v. SEC*, 926 F.3d 1197, 1201 (D.C. Cir. 1991)). If the record before the Court "'leaves substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper.'" *Wisdom*, 232 F. Supp. 2d at 116 (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1994)); *see also Reporters' Comm. for Freedom of the Press v. FBI*, 877 F.3d 399, 402 (D.C. Cir. 2017) ("[t]o prevail on summary judgment, an 'agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to produce the information requested'") (quoting *Oglesby*, 920 F.2d 57, 62 (D.C. Cir. 1990)); *James Madison Project v. Dep't of Justice*, Civ. No. 16-116, 2018 WL 1472492, at *2 (D.D.C. Mar. 26, 2018) ("The Court will grant summary judgment to the government in a FOIA case only if the agency can prove 'that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.'") (quoting *Friends of Blackwater v. U.S. Dep't of Interior*, 391 F. Supp. 2d 115, 119 (D.D.C. 2005)).

B. THE FEDERAL ADVISORY COMMITTEE ACT

FACA was enacted in 1972 in an effort to "control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals." *Nat'l Anti-Hunger Coal. v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir. 1983) (internal quotation omitted). The statute was "enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 453 (1989).

Of particular concern to Congress in enacting FACA was the potential for undue influence by special interest groups in government decision making. As explained by the House Report:

> One of the greatest dangers in unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony . . . pointed out the danger of allowing special interest groups to exert undue influence upon the government through the dominance of advisory committees which deal with matters in which they have vested interests.

H.R. Rep. 92-107, *reprinted in* 1972 U.S.C.C.A.N. 3496 and *Source Book: Legislative History, Texts, and Documents*, at 156 (Comm. Print 1978).

In adopting FACA, Congress made certain findings, including that "standard and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees," and that the "Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees." 5 U.S.C. App. 2 § 2(b). FACA's openness and accountability requirements apply to any advisory committee "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal

Government . . . .” *Id.* § 3. The work of advisory committee must generally be open to public scrutiny, *see id.* § 10(a)(1) (meetings); *id.* § 10(b) (documents), and the agencies to which committees report must take appropriate steps to “assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest . . . .” *Id.* § 5(b)(3).

The operations and activities of federal advisory committees are extensively overseen by Congress, the General Services Administration, and the specific agencies to which the committees report. The Administrator of the General Services Administration (“GSA”) has within it a “Committee Management Secretariat” which shall be “responsible for all matters relating to advisory committees,” *id.* § 7(a), and GSA is required to “prescribe administrative guidelines and management controls applicable to advisory committees . . . .” *Id.* § 7(c). In addition, “[e]ach agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with the directives” of the GSA, *id.* § 8(a), and each agency “shall designate an Advisory Committee Management Officer who shall . . . exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency”; “assemble and maintain the reports, records, and other papers of such committee during its existence”; and “carry out, on behalf of the agency, the provisions [of FOIA] with respect to such reports, records, and other papers.” *Id.* § 8(b). In addition, “[n]o advisory committee shall meet or take any action until an advisory committee charter has been filed . . . with the head of the agency to whom [the] advisory committee reports and with the standing committees of the Senate and the House of Representatives having legislative jurisdiction of such agency.” *Id.* § 9(c).

C. THE COUNCIL

The National Coal Council is a federal advisory committee established by DOE. As explained on the Council's web-site, in 1984, "Secretary of Energy Don Hodel announced the establishment of the [Council]" and, "[i]n creating the [Council], Secretary Hodel noted that '[t]he Reagan Administration believes the time has come to give coal—our most abundant fossil fuel—the same voice within the federal government that has existed for petroleum for nearly four decades.'" *See* Plaintiff's Exhibit ("Pl. Ex. A") at 1; *see also* Pl. Ex. B (Transcript of May 2010 Council Meeting) at 47-48 ("tutorial session" by Council Secretary explaining that "back in the early '80s, the days of the Reagan Administration, it was decided that the coal industry needed a voice from a citizen-based group, like the petroleum industry had, and as a result . . . President Reagan asked Don Hodel, then the Secretary [of DOE], to take steps to do this."). More than three decades later, "the [Council] continues to serve as an advisory group to the Secretary of Energy, chartered under [FACA]," Ex. A at 1.

According to the Council's formal federal charter, the Council "provides advice and recommendations to the Secretary of Energy on general policy matters relating to coal and the coal industry," "including providing the Secretary with advice on: Federal policy that directly or indirectly affects the production, marketing and use of coal"; "[p]lans, priorities, and strategies to address more effectively the technological, regulatory and social impact of issues relating to coal production and use"; the "appropriate balance between various elements of Federal coal-related programs"; and the "progress of coal research and development" conducted in accordance with federal law. Pl. Ex. C at 1-2.

The Council's charter provides that the "estimated annual operating cost [to the federal government] associated with supporting the Council is approximately $ 100,000" and that a

"full-time or permanent part-time [DOE] employee, appointed in accordance with agency procedure, will serve" as the Council's Designated Federal Officer, who must "approve or call all of the advisory council's and subcommittee's meetings, and prepare and approve all meeting agendas, attend all council and subcommittee meetings, and adjourn any meeting when the [Designated Federal Officer] determines adjournment to be in the public interest." Pl. Ex. C at 2. Pursuant to the Council's charter, Council members may be compensated by the federal government for their "per diem and travel expenses," the Council's members may be "appointed as special government employees," and the records of the Council must be handled in accordance with federal recordkeeping laws and "be available for public inspection and copying, subject to the [FOIA]." *Id*. at 2-3.

Notwithstanding FACA's requirements that all federal advisory committees be "fairly balanced" and "not be inappropriately influenced by . . . any special interest," 5 U.S.C. App. 2 §§ 5(b)(2), (3), the composition of the Council, as well as its leadership, is dominated by representatives of, and advocates for, the coal industry. *See, e.g.*, Pl. Ex. D (indicating that the Council's Chair works for Dominion Resources and that its Vice Chairs work with Arch Coal and Hunton & Williams, a law firm that regularly represents coal companies); Pl. Ex. E ("Member Roster- 2017"); Pl. Ex. F (draft Council "White Paper" explaining that "[m]embers of the [Council] are appointed by the Secretary of Energy and represent all segments of coal interests and geographic distribution"); Pl. Ex. K (2016 "Members of Coal Policy Committee").

Studies prepared by the industry-dominated Council play a significant role in federal decsionmaking bearing on the coal industry, as touted by the Council itself. For example, DOE staff recently relied on Council reports in producing a report for DOE Secretary Rick Perry—who delivered the keynote address at the Council's 2017 annual Spring meeting—that "reaffirms

the value of baseload coal generation in our nation's energy mix," and complains about the "extent to which continued regulatory burdens are responsible for forcing the premature retirement of baseload [coal] power plants" and how "renewable energy, accelerated by government policies and mandates, has negatively impacted the economics of baseload [coal] plants." Pl. Ex. G at 1, 5; *see also* 82 Fed. Reg. 11,211 (Feb. 21, 2017) (Pl. Ex. H) (DOE announcement of the Spring 2017 meeting of the Council stating that the "Council provides advice and recommendations to the Secretary of Energy on general policy matters relating to coal and the coal industry," and indicating that among the agenda items to be discussed was "Opportunities for Coal in the Trump Administration").

Although the Council operates as a federal advisory committee, and that has always been the only reason and justification for its existence, in 1985 the Council "incorporated as a 501c6 non-profit organization in the State of Virginia." Pl. Ex. A at 2.[1] The non-profit organization—"NCC, Inc."—is the alter ego of the Council itself, i.e., the "leadership of the [Council] serves as officers of NCC, Inc. and members of the Council serve as NCC Inc. shareholders," and the sole function of NCC, Inc. is to "manage the business aspects of running the Council." *Id.*; *see also* Pl. Ex. B at 51-52 (explanation by attorney instrumental in creation of the NCC, Inc. that it was

[1] Section 501(c)(6) of the Internal Revenue Code "provides for the exemption of business leagues, chambers of commerce, real estate boards, boards of trade and professional football leagues, which are not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." https://www.irs.gov/charities-non-profits/other-non-profits/business-leagues. According to the IRS, a "business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit." *Id*. The IRS returns filed by the non-profit entity created by the Council states that the organization's sole "mission" is exactly the same as the Council itself: to "serve[] as an advisory committee to the Department of Energy" and to "provide[] advice and recommendations to the Secretary of Energy regarding general policy matters relating to coal production and technological, regulatory and social impact issues." Pl. Ex. N (2014 return).

"established in order to do the housekeeping for the National Coal Council" and is a "totally parallel organization" and that these "processes protect our work and . . . our work is one thing: an advisory opinion or a document in writing that goes to the Secretary of Energy. That's the sole reason for our being."); *see also* Pl. Ex. M (NCC, Inc. Bylaws reflecting that facilitating the work of the FACA committee is the only function of NCC, Inc.).[2]

D. PLAINTIFF'S FOIA REQUEST

By letter dated March 10, 2017, the Niskanen Center's Director of Technology Policy advised DOE that the Center "is engaged in a study of the long-term effectiveness of certain federal advisory committees that deal with emerging technologies," and that the "National Coal Council is one of eight such advisory committee that we have chosen for our study." Defendant's Exhibit ("Def. Ex.") A; Pl. Ex. O. Accordingly, the Center requested under FOIA five categories of information "for all years since 1985," including (1) membership lists; (2) information regarding Council subgroups; (3) reports or studies issued by the Council; (4) newsletters, announcements, and other public communications by the Council or any Council subgroup; and (5) agendas, transcripts, and minutes of all meetings of the Council and Council subgroups. *Id*. at 1-2. In addition, "[b]ecause the NCC (perhaps uniquely among federal advisory committees) appears to have been incorporated," the Center also requested eight additional categories of information specifically relating to NCC, Inc., including (6) "all documents" relating to NCC, Inc.'s "application for 501(c)(6) status"; (7) "[a]ll documents relating to the decision to incorporate NCC, Inc."; (8) all financial statements of the Council and NCC, Inc.;

[2] According to a public statement by the attorney who helped establish NCC, Inc., its core function was to "create a structure which could withstand an assault by opponents" of the industry-dominated federal advisory committee, evidently by cloaking as many of the committee's operations in secret as possible. Pl. Ex. B at 50.

(9) "[a]ll documents describing the relationship" between the Council and NCC, Inc.; (10) "[a]ll documents describing NCC, Inc., income and expenditures, including the source of all such income and the recipients of all such expenditures"; (11) lists of officers and directors of NCC, Inc.; (12) agendas and minutes of all meetings of the officers or directors of NCC, Inc.; and (13) all reports, registrations, disclosure, or any other submissions by the NCC or NCC, Inc. to the IRS or the Commonwealth of Virginia.[3]

In a March 16, 2017 e-mail, the Center advised DOE that the Center was requesting all responsive documents generated since 1986 (rather than 1985) and was also seeking a waiver of processing fees on the grounds that the "purpose of the requested information is to attempt to gain a better understanding of the institutional dynamics at work in federal advisory committees," and that the Center is a 501(c)(3) "nonprofit think tank operating in the public interest and would be disseminating the findings and research to the broader public." Def. Ex. B at 1-2. By letter to the Center dated April 7, 2017, DOE's FOIA Officer confirmed that the Center's request encompassed "all years since 1986," and also stated that the request had been "assigned" to "DOE's Office of Fossil Energy (FE) to conduct a search of their files for responsive documents." Def. Ex. C at 2. The FOIA Officer did not explain why the Office of Fossil Energy was the only component of DOE in which a search for responsive materials would be conducted. However, DOE"s FOIA Officer did grant the Center's fee waiver request "because the subject of the request relates to a government activity, and information about the activity could lead to greater understanding by the public about the matter," and the Center also

[3] The Center's letter also requested such records directly from the Council/NCC, Inc., citing the broad disclosure mandate imposed on all advisory committees by FACA. *See* Def. Ex. A; Pl. Ex. O. The Council/NCC, Inc. has never responded to that request in any manner.

"demonstrated the ability and intent . . . to disseminate the information to the public in a form that can further understanding of the subject matter." *Id*.

When DOE failed to provide any documents by FOIA's statutory deadline, the Center failed this lawsuit on April 17, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i). Shortly after DOE's Answer was filed, by letter dated July 7, 2017, DOE provided the Center with what DOE said was its "final response" to the request. Def. Ex. D at 1. DOE stated that the Office of Fossil Energy had "completed its search and identified" only eleven documents and one "Windows Media Player" as "responsive to the request." *Id*. at 2. The released material consisted of previously published transcripts of public Council meetings dating from 2009. *See* Declaration of David Bookbinder (Niskanen Center Chief Counsel) at ¶ 2 (Pl. Ex. P). According to DOE, the only material being withheld as exempt consisted of "home addresses, personal email addresses, and cell phone numbers," Def. Ex. D at 2—information that the Center told DOE it has no interest in obtaining and hence is not at issue in this litigation. *See* ECF No. 16-1 (Declaration of Alexander C. Morris) at ¶ 30 (stating that the Center's counsel "consented to the redactions of personal contact information, such as mailing addresses, telephone numbers, and email addresses).

After reviewing the July 7, 2017 production, the Center's Chief Counsel advised DOE's counsel that the agency's response was deficient, including because DOE had failed to provide any documents relevant to many of the 13 categories of information requested, including any information relating to the relationship between the Council and NCC, Inc. *See* Pl. Ex. P. ¶ 2; ECF No.16-1 ¶¶ 22, 23. On September 13, 2017, DOE advised the Center that it had located 21 additional documents and one video file, but that it was withholding information in the newly located materials pursuant to Exemption 4. *See* Def. Ex. E at 2. That exemption allows an agency

to withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). DOE asserted that the "information withheld under Exemption 4 consists of sensitive financial and privileged whose disclosure would likely cause substantial harm to the competitive position of the NCC, Inc. to attract and maintain members, to negotiate salary and benefits with its staff, and to make decisions regarding private litigation." Def. Ex. E at 2-3. DOE did not explain how the Council/NCC, Inc. will purportedly suffer "substantial harm" to its "competitive position," who the Council's/NCC, Inc.'s purported "competitors" are, or even what it means for a federally chartered advisory committee (or its non-profit alter ego) to suffer competitive harm.

As for DOE's search for responsive materials, DOE's September 13, 2017 letter still did not disclose any materials earlier than 2008, *see* Pl. Ex. P. ¶ 2, nor did it account in any manner for Council-related materials covering the 22 year period between 1986 and 2008. *See* Def. Ex. E. The letter conceded that DOE's search had failed to yield any documents coming within a number of the categories in the Center's request (including categories related to the decision to incorporate NCC, Inc. in the first instance and the relationship between the Council and NCC, Inc.) but otherwise provided no details on the extent or nature of the search conducted. *Id.* at 1-2.

E. DOE'S MOTION FOR SUMMARY JUDGMENT

In an effort to satisfy its burden to justify the Exemption 4 withholdings at issue, as well as to establish the reasonableness of its search for responsive materials, DOE has submitted a single Declaration from DOE's FOIA Officer, along with a six-page *Vaughn* Index. *See* ECF No. 16-1, Def. Ex. F. The Declaration contains three conclusory paragraphs purporting to explain the basis for asserting Exemption 4, *see* ECF No. 16-1 at ¶¶ 33-35, and the *Vaughn* Index asserts similarly summary justifications for withholding one document in full and portions of four other

documents on the grounds that their release would somehow cause "substantial competitive harm," Def. Ex. F at 1-4, 6—again without even suggesting who the Council might be in "competition" with or how a formally chartered federal advisory committee could be deemed to be in competition with anyone for the purposes of an Exemption 4 claim.

As for the adequacy of the search, DOE's Declaration concedes that only a single office within DOE was searched for responsive materials—the Office of Fossil Energy, *see* ECF No. 16-1 at ¶ 11—although responsive documents would likely be located in other parts of DOE—including the Office of the Secretary of Energy, who is the designated *recipient* of the Counsel's advice and recommendations. The Declaration also asserts that, within the Office of Fossil Energy, the "search included locating files containing 'National Coal Council'" and various subject categories, *id*. ¶ 25, but contains no indication that the search was also designed to locate hard copy or electronic files designated "NCC, Inc.," while again acknowledging that the search "did not locate any documents" in a number of the request categories specifically pertaining to NCC, Inc. *Id*. ¶ 31. In addition, the Declaration asserts that, within the Office of Fossil Energy, DOE's "search included locating files . . . for all years since 1986," *id*. ¶ 25, although in fact DOE did not release (or withhold) even a single document covering the 1986-2008 time frame. Pl. Ex. P ¶ 2.

ARGUMENT

For a number of reasons, as set forth below, DOE has not remotely satisfied its burden to justify its Exemption 4 withholding and to establish the adequacy of its search. First, DOE's Declaration and *Vaughn* Index do not meet the most rudimentary standards imposed by Circuit precedent. Second, even aside from the threshold defects in DOE's submission, the agency's assertion of Exemption 4 does not contain even the most basic information necessary to support

the proposition that the Council, a federal advisory committee, and/or NCC, Inc., the Council's alter ego, will, as DOE asserts, suffer "competitive injury" in the event that the withheld material is disclosed. Third, for a number of reasons—including the unexplained (and inexplicable) failure to locate or produce a single document covering more than two decades of the time frame delineated in the Center's request—DOE has not even begun to establish the reasonableness of its search.

The public has an overriding interest (and a right under FOIA) to glean as much information as possible regarding the workings and financial support for an influential federal advisory committee that affords the coal industry special access to the Secretary of Energy. Indeed, not only does such information go to the heart of why FOIA was enacted, *see Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (explaining that the FOIA's central purpose "focuses on the citizens' right to be informed about 'what their government is up to'"), but it also implicates the core reasons why FACA was enacted. *See supra* at 13-14. Consequently, under the circumstances here and especially given the anemic effort made by the government to explain its response to a FOIA request that DOE has conceded is in the public interest, DOE's motion for summary judgment must be denied and Plaintiff's motion must be granted.

I. DOE HAS NOT SATISIFIED ITS BURDEN TO DEMONSTRATE THAT THE MATERIAL WITHHELD PURSUANT TO EXEMPTION 4 IS EXEMPT FROM DISCLOSURE.

A. With Regard to the Materials Withheld on Exemption 4 Grounds, DOE Has Not Even Satisfied Its Obligation to Provide the Court With a *Vaughn* Index and/or Declarations Meeting Basic Legal Requirements.

Before turning to the specific reasons why DOE has not, and cannot, satisfy the stringent strictures for withholding documents under Exemption 4, DOE's Exemption 4 withholdings

suffer from an even more overarching flaw: they do not satisfy Circuit precedents for how federal agencies must meet their burdens under FOIA, and they do not even satisfy the requirements under the Federal Rules of Civil Procedure for parties moving for summary judgment.

As this Court has explained, in light of FOIA's "objective of affording the public maximum access to most government records," in order for an agency to meet its "burden of demonstrating that at least one exemption applies," and to "assist a court in its *de novo* review of the withholdings and to allow the party seeking access to documents to engage in effective advocacy, the government must furnish 'detailed and specific information demonstrating that material withheld is logically within the domain of the exemption claimed.'" *Am. Immigration Council v. U.S. Dep't of Homeland Security*, 950 F. Supp. 2d 221, 235 (D.D.C. 2013) (Boasberg, J.) (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998)); other internal quotations omitted). Consequently, "[t]ime and again, courts in this Circuit have stressed that the government cannot justify its withholdings on the basis of summary statements that merely reiterate legal standards," *Am. Immigration Council*, 950 F. Supp. 2d at 235, or that merely offer "vague" rationalizations for withholding. *Campbell*, 164 F.3d at 30.

Hence, "[w]hile FOIA's individual exemptions impose their own tailored evidentiary burden, as a starting point, the government must meet five overarching requirements for each withholding," including, of particular relevance here, by "'describ[ing] the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose'"; "'explain[ing] how this material falls within one or more of the categories'"; and "'if the exemption requires a showing of harm . . . explain[ing] how the disclosure of the material in question would cause the requisite degree of harm.'" *Am.*

Immigration Council, 950 F. Supp. 2d at 235 (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987)).

DOE's Exemption 4 withholdings do not satisfy these standards. The single Declaration submitted by DOE's FOIA Officer says that DOE "withheld one document in full and withheld portions of four documents under FOIA Exemption 4," ECF No. 16-1 at ¶ 33, but says almost nothing beyond making boilerplate assertions that the documents are covered by Exemption 4.[4] Thus, the Declaration summarily asserts that the "National Coal Council provided these documents to DOE without the need of a subpoena, court order, or warrant," *id*.—which, as explained below, has no bearing on whether the materials may be withheld under Exemption 4, *see infra* at 22-23—but does not otherwise explain the circumstances under which DOE *did* obtain the materials from its chartered federal advisory committee. The *only* other statement made in the Declaration bearing on the Exemption 4 withholding is that:

> [d]isclosure of this information would cause substantial competitive harm to the National Coal Council, Inc.'s competitive interests because it would harm the National Coal Council Inc.'s transactions with third parties for memberships and membership fees, the ability to negotiate salary and benefits with staff, and the ability to make decisions regarding private litigation. In addition, the withheld material does not shed light on Government operations and disclosure may curtail companies from entering into contracts or other negotiations with the Government in the future.

Id. at ¶ 34. Even aside from the fact that these conclusory assertions make no sense in the factual context here (e.g., because information reflecting who is financially supporting a chartered federal advisory obviously *does* "shed light on Government operations") and cannot support an Exemption 4 withholding in any event (e.g., because disclosing information about a federal

[4] There is also a discrepancy between DOE's Declaration and its *Vaughn* Index. The Declaration asserts that "DOE withheld one document in full and withheld portions of four documents under FOIA Exemption 4," ECF No. 16-1 ¶ 33, whereas the *Vaughn* Index identifies *six* documents as being withheld in full or part under Exemption 4. *See* ECF No. 16-1 at 1-3, 6 (indicating that Documents 1-5 and 19 have been withheld pursuant to Exemption 4).

advisory committee bears no relationship to "contracts or other negotiations with the Government in the future") these are precisely the kinds of "summary statements" that this and other Courts have consistently held to be insufficient to "enable the reviewing court to make an informed and accurate determination" and to "allow the adversary system to operate effectively and encourage transparency by 'forc[ing] the government to analyze carefully any material withheld.'" *Am. Immigration Council*, 950 F. Supp. 2d at 236 (quoting *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984)).

Indeed, Defendants' sole Declaration does not even satisfy the basic standards imposed by the Federal Rules of Civil Procedure for a party moving for summary judgment. Rule 56(c)(4) provides that an "affidavit or declaration used to support or oppose a motion for summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). The Declaration on which DOE relies satisfies none of these standards.

Rather, the assertion by DOE's FOIA Officer that the withheld information would somehow "cause substantial harm to the National Coal Council's competitive interests," ECF No. 16-1 at ¶ 34, is not being made by anyone representing (or even associated with) the Council itself or its non-profit alter ego, NCC, Inc. In fact, the assertion is not even being made by a DOE official or employee who claims to have any substantive knowledge or information regarding the Council's/NCC Inc.'s workings, its purported "competitors," the circumstances under which the information at issue was obtained from the Council/NCC, Inc., or any other information that might be relevant to the invocation of Exemption 4 based on a claim of business confidentiality and competitive injury. Thus, it would violate elementary rules of civil procedure as well as Circuit FOIA precedents for the Court to rely on this Declaration to sustain the government's

burden. *See, e.g.*, *United States ex rel. Al-Amin v. George Washington University*, No. 95-2000, 2000 WL 35629877, at *2 (D.D.C. Sept. 13, 2000) (striking paragraphs of declarations "where the declarants had no personal knowledge to support their allegations" in contravention of Federal Rule 56).[5]

Further, DOE's *Vaughn* Index is equally lacking in substance and detail. Although the Index purports to correlate a "justification" for withholding to each withheld document, the justifications are little more than boilerplate assertions that release of a particular document (or portion of a document) "would cause substantial competitive harm to NCC, Inc." without providing any explanation, e.g., how that harm would purportedly occur, who is in competition with NCC, Inc., the way in which any alleged competitor would use the specific information at issue to the detriment of the Council and/or its non-profit alter ego, or any other information that might permit the Court to conclude that Exemption 4 has been properly invoked here. *See* ECF No. 16-1 at 1-2, 6 (descriptions/justifications for Documents 1-5, 19).

In sum, this is the quintessential case in which DOE is relying on "generalized, categorical descriptions of the contents and conclusions that do little more than parrot established legal standards." *Am. Immigration Council*, 950 F. 2d at 236. Consequently, under these

[5] Although statements based on hearsay may be more "acceptable for FOIA affidavits" than in some other contexts, *Wisdom*, 232 F. Supp. 3d at 115—specifically when the adequacy of an agency's search is called into question—the legal problem with the agency Declaration here goes far deeper than reliance on hearsay. Rather, the fatal defect in this case is that the Court has not been afforded even the remotest reason to believe that DOE's FOIA Officer has *any* factual basis (whether based on hearsay communications or anything else) for the conclusory assertions made underlying the Exemption 4 claim. This does not satisfy the plain terms of Rule 56 and could not be relied on as a basis for a summary judgment disposition in *any* context, let alone one in which DOE "bears the ultimate burden of proof" to establish that agency records may be withheld from scrutiny. *Id*. at 112.

circumstances, the Court could properly reject DOE's showing at the threshold, without even applying the specific standards that must be met for an Exemption 4 withholding.

B. DOE Has Not, and Cannot, Satisfy Its Burden to Establish that Information Has Been Properly Withheld Under Exemption 4.

Even putting aside the threshold flaw in DOE's motion for summary judgment, the agency's Exemption 4 withholdings cannot be sustained. Again, Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person" that is "privileged or confidential." 5 U.S.C. § 552(b)(4). DOE does not contend that it withheld any "trade secrets" and Plaintiff does not dispute that the information was "obtained from a person" as that language has been interpreted by Circuit precedent. Therefore, the issue before the Court is whether all of the withheld material qualifies as (1) "commercial or financial" information that is (2) "privileged or confidential." As set forth below, DOE has not met its burden to establish that any of the information withheld on Exemption 4 grounds meets both the threshold test and qualifies as "privileged or confidential."

1. Whether All of the Withheld Information is "Commercial or Financial"

Although five of the six documents subject to Exemption 4 claims are described (albeit in conclusory form) as at least containing some "financial" information, thus satisfying the threshold test, *see Vaughn* Index at Docs.1, 2, 4, 5, 19, the description for one of the withheld documents—Doc. 3 in the Index—makes no reference to any "commercial or financial" information. It is described in the Index as a "Privileged legal memorandum related to NCC private litigation," with no indication whatsoever as to what the "private litigation" that may have been conducted by a federal advisory committee entailed, let alone whether the memorandum contains, or bears any relationship, to any "commercial" of "financial"

information. Likewise, the "justification" for the withholding makes no reference to commercial or financial information but, rather, asserts that the "legal memorandum was redacted in full and concerns confidential, privileged legal advice on potential legal strategies for NCC, Inc. regarding private litigation related to NCC, Inc." Index at Doc. 3.

Plainly, "legal advice" relating to "litigation" conducted by a federal advisory committee—whatever that litigation might concern, which is not elucidated at all in the *Vaughn* Index or accompanying Declaration—may have nothing to do with financial or commercial information. Consequently, as to this document, which has been "redacted in full," *Vaughn* Index at Doc. 3, DOE has not even demonstrated that the threshold requirement for invocation of Exemption 4 is satisfied. By the same token, one of two redactions from Document 1—"contain[ing] an agenda item referring to private litigation," Index at Doc. 1—is not described as having anything to do with financial or commercial information. The Court should therefore reject DOE's withholding of these materials without even considering whether they qualify as "confidential" or "privileged." *See Public Citizen v. U.S. Dep't of Health & Human Servs.*, 975 F. Supp. 2d 81, 104-05 (D.D.C. 2013) (rejecting Exemption 4 claim where agency asserted that documents were confidential within the meaning of the exemption but set forth no basis for finding that the documents even "contain commercial information" as a threshold matter).

2. Whether the Information is "Confidential": Which Legal Test Applies

The Court of Appeals has developed two tests to determine whether information is "confidential" for purposes of Exemption 4; which test to apply depends on the manner in which the government agency obtained the information at issue. *Ctr. for Public Integrity v. U.S. Dep't of Energy*, 234 F. Supp. 3d 65, 74 (D.D.C. 2017) ("*Center for Public Integrity I*"). When an agency receives the information by way of a *mandatory* disclosure, the information is considered

confidential for purposes of FOIA Exemption 4 if the agency establishes that disclosure is likely to (1) impair the agency's ability to obtain the information in the future or (2) cause substantial harm to the competitive position of the source of the information. *Nat'l Parks Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*Nat'l Parks I*"). A different test applies when the government has obtained information by way of an entirely *voluntary* disclosure; in that case, the information is "confidential" for purposes 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 Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

The information at issue here was provided to DOE by a federal advisory committee and/or its non-profit alter ego—entities that exist *solely* to advise the federal government and could not perform that solitary function without a formal government charter that may be eliminated by DOE at any time and for any reason. Consequently, this is the classic example of information provided involuntarily to the government.

On the other hand, DOE has not adduced *any* facts from which the Court could infer a voluntary dissemination of information. In fact, DOE does not even begin to describe the specific circumstances under which it obtained the materials subject to the Exemption 4 claim. Instead, DOE merely asserts, in typically conclusory fashion, that the Council "provided these documents to DOE without the need for a subpoena, court order, or warrant." ECF No. 16 at 9-10; ECF No. 16-1 at ¶ 33 ("The National Coal Council provided these documents to DOE without the need of a subpoena, court order, or warrant."). However, that is *not* the legal test for whether materials were provided to an agency "voluntarily." That was made crystal-clear *to DOE* in a recent case in which DOE attempted, unsuccessfully, to assert an identical argument that, because particular

documents were provided to DOE "without the need of a subpoena, court order, or any warrant," it meant that the "information was submitted voluntarily and the *Critical Mass* test governs." *Center for Public Integrity I*, 234 F. Supp. 3d at 75.

This argument was rejected by Judge Mehta on the grounds that, under Circuit precedent, so long as the agency has the legal authority to insist that certain information be provided to the agency, it matters not whether the agency actually issued any "subpoena" or "warrant," or used any comparable legal process to obtain information. *Id*. ("When determining whether information is submitted voluntarily, courts look to the agency's 'actual legal authority' to compel the documents or information, rather than the 'parties' beliefs or intentions' about the agency's authority to do so.") (quoting *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin*., 244 F.3d 144, 149 (D.C. Cir. 2001)). The court held that, because the government was in a position to demand, and not merely request, that certain information be provided, the "very real specter of government compulsion render[ed] . . . production here involuntary for purposes of Exemption 4" and "[a]ccordingly, the *National Parks* test governs." *Id*.; *see also In Def. of Animals v. United States Dep't of Health and Human Services*, No. 99-3024, 2001 WL 34871354, at *9 (D.D.C. Sept. 28, 2001) (holding that a private research facility's responses to a request for information regarding its financial condition, sent by a federal agency providing financial support to that facility, were involuntary even though the agency had merely requested production of the information, because the agency had the authority to compel production as a condition for continuing to provide financial support").

Further, it is also the "law of this Circuit" that "'for purposes of Exemption 4, information provided to the government because it is required for participation in a voluntary government program is treated as a mandatory, as opposed to a voluntary, submission of

information'" for purposes of applying *National Parks* in lieu of *Critical Mass*. *See Public Citizen*, 975 F. Supp. 2d at 111 (quoting *Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, 796 F. Supp. 2d 13, 35 n.8 (D.D.C. 2011)); *see also Ctr. for Auto Safety v. U.S. Dep't of Treasury*, 133 F. Supp. 3d 109, 120-21 (D.D.C. 2015) (holding that where information was submitted to the Treasury Department by auto manufacturers as part of their "efforts to secure funding" from the government, the "withheld documents are considered involuntarily submitted, and the ordinary *National Parks* standard must be applied").

When the correct legal test is applied here, the inevitable conclusion is that there is nothing "voluntary" about the submission of the information at issue. Again, the Council is a chartered federal advisory that exists *entirely* at the mercy and pleasure of the federal government. The Council cannot discharge its functions, or even *meet*, without the consent of DOE. *See, e.g.*, Pl. Ex. R (request for the Secretary of Energy's "approval for the Council" to hold a meeting in Washington, D.C.).

In turn, DOE has its *own* statutory duties vis-à-vis compliance with FACA, which entails strict oversight of the Council's activities, including by taking the necessary steps to ensure, e.g., that the Council is not being "inappropriately influenced by . . . any special interest," 5 U.S.C. App. 2 § 5(b)(3); that its membership is "fairly balanced in terms of the points of view represented and the function to be performed," *id*. § 5(b)(2); that it is complying with the "administrative guidelines and management controls" established by GSA, *id*. § 8; that it is complying with its government charter, *id*. § 9(c); and that it is abiding by FACA's broad requirements for public transparency. *Id*. § 10. When, in the discharge of these legal responsibilities and in its plenary oversight of the advisory committee under its jurisdiction, DOE obtains documents bearing on the Council's operations and activities, it would make no legal or

logical sense to describe that interaction as "voluntary." Indeed, in its own public pronouncements, the Council itself recognizes as much. *See, e.g.* Pl. Ex. B at 49 (statement by the Council's Secretary to its members that the "Federal Advisory Committee Act is our bible"; that "Everything we do here has to be in conformity with [FACA] or we can't do it"; that "this group's authority emanates from the charter which is granted by the DOE and the Secretary himself or herself"; and that the "Secretary appoints the members" and "[e]ach of you has received an official appointment"); *id*. at 53 (statement by Council's Secretary that "because we serve [DOE], we have to observe" DOE's instructions on all "policy question[s]").

3. The Withheld Information Does Not Satisfy the *National Parks* Test For Confidential Information.

Where, as here the *National Parks* test for confidentiality applies, information is deemed "confidential" only "if disclosing it would either (1) 'cause substantial harm to the competitive position of the person from whom the information was obtained' or (2) 'impair the Government's ability to obtain necessary information in the future.'" *People for the Ethical Treatment of Animals v. U.S. Dep't of Health and Human Servs.*, 201 F. Supp. 3d 26, 36 (D.D.C. 2016) ("*PETA*") (quoting *National Parks I*, 498 F.2d at 770). The Court of Appeals has "cautioned that 'conclusory statements' are insufficient to meet the Government's burden on these issues." *PETA*, 201 F. Supp. 3d at 37 (quoting *Multi Ag. Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1227 (D.C. Cir. 2008)). DOE's motion does not, and in fact hardly makes any effort to, satisfy either basis for withholding.

a. There is No Assertion, Let Alone Evidence, of Impairment of Government Information Gathering If the Records Are Released.

As for impairment of the government's ability to obtain necessary information, "[a]s a general matter, an impairment claim 'is inherently weak'" where, as here, information has not

been provided to an agency voluntarily. *PETA*, 201 F. Supp. 2d at 47 (quoting *Niagara Mohawk Power Co. v. U.S. Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999)). There is "presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future" if it is "supplied pursuant to statute, regulation or some less formal mandate." *National Parks I*, 498 F.2d at 770; *see also Ctr. for Auto Safety*, 244 F.3d at 148 ("When the Government obtains information as part of a mandatory submission, the Government's access to the information normally is not seriously threatened by disclosure.").

This may explain why the government's brief does not even argue that impairment will occur. DOE's Declaration contains a single obscure assertion, unaccompanied by any explanation, that "disclosure may curtail companies from entering into contracts or other negotiations with the Government in the future." ECF No. 16-1 ¶ 34. The Court of Appeals has "more than once held that such conclusory and generalized assertions are not enough to establish the requisite risk of impairment." *Niagara*, 169 F.3d at 18.

Moreover, the assertion here is not only "conclusory and generalized," it appears to be a boilerplate statement with no discernible relationship to *this* case, which has nothing to do with any "company" entering into any "contract" or "negotiation" with the government. Again, this case deals with a chartered federal advisory committee that exists entirely at the pleasure of the government. If the Council were to refuse to supply DOE with any information that DOE needs or desires in the exercise of its authority over its own advisory committee, DOE could simply disband the committee and decline to afford its members with a preferential pathway for providing advice to the Secretary of Energy. That "potentially draconian penalty" is more than sufficient to ensure that DOE can obtain whatever information it deems necessary. *Public Citizen*, 975 F. Supp. 2d at 112; *see also Ctr. for Auto Safety*, 133 F. Supp. 3d at 127 (holding

that there could be no impairment of access to information where the Treasury Department "will be able to obtain whatever information it demands from companies for participation in a government program providing significant benefits to the participants because, otherwise, the companies will be unable to participate").

The government's brief does not establish (or even argue) otherwise. Under these circumstances, there is no legal or factual basis for any finding that disclosure would meaningfully impair the government's ability to obtain "necessary" information in the future. *See, e.g.*, *Wash. Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252, 269 (D.C. Cir. 1982) ("A minor impairment cannot overcome the disclosure mandate of FOIA."); *PETA*, 201 F. Supp. 2d at 48 (rejecting impairment argument as "unavailing and conclusory" where the agency had "not produced any evidence—or pointed to any factual or legal authorities—suggesting that the Government's ability to obtain information in the future would be harmed by the release of the requested information").

b. There Is No Evidence that the Council Has Any "Competitors" Within the Meaning of Exemption 4, Let Alone that Disclosure Would Cause It "Substantial Competitive Injury."

In order "for the government to preclude disclosure based on a competitive injury claim, it must prove that the submitters '(1) actually face competition, and (2) substantial competitive injury would likely result from disclosure.'" *Niagara*, 169 F.3d at 18 (quoting *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976)). DOE has not even attempted to prove either of these elements.

As for whether the Council "actually face[s] competition," DOE does not even intimate what relevant "competition" exists for a chartered federal advisory (or its non-profit alter ego) the only function of which is to advise the Secretary of Energy. Moreover, far from identifying

any real-world competitors who might take advantage of any of the Council's financial information, DOE's documents confirm that the Council's/NCC, Inc.'s membership is a Who's Who of coal industry representatives and advocates. *See* Pl. Exs. D, E, J, K. In fact, the Council's composition is so laden with representatives of the coal industry that "[n]ow and then" the members have had to be warned that being a member of the Council and/or NCC, Inc. "does not give you in any way, shape or form any protection against violations of the federal antitrust laws." Pl. Ex. B at 53.

But even if DOE had attempted to establish that anyone is in any "actual competition" with the Council—which it did not—DOE has also presented no evidence whatsoever of "competitive injury," much less the kind of "*substantial* competitive injury mandated by Circuit precedent." *Niagara*, 169 F.3d at 18 (emphasis added). The Court of Appeals has held that the only kind of harm that may satisfy this test is that "flowing from the affirmative use of proprietary information *by competitors*." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (emphasis added). Accordingly, any "predictions of harm based on the potential use of information by non-competitors would not warrant the withholding of that information pursuant to FOIA Exemption 4." *PETA*, 201 F. Supp. 2d at 39 n.12 (citing *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C. Cir. 2010)); *see also Biles v. Dep't of Health and Human Servs.*, 931 F. Supp. 2d 211, 225 (D.D.C. 2013) ("the 'harm' aspect of 'competitive harm' is an *unfair* commercial disadvantage by way of exposure").

Further, "[c]ompetitive injury . . . should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from . . . embarrassing publicity.'" *Center for Public Integrity I*, 234 F. Supp. 2d at 76 (quoting *Pub.*

Citizen Health Research Group, 704 F.2d at 1291 n.30)); *Public Citizen*, 975 F. Supp. 2d at 113 ("[T]he D.C. Circuit has made clear that,'[i]n this inquiry, it is simply irrelevant that' confidential treatment of the documents would avoid disclosure of information 'that might be damaging to [the provider's] reputation.'") (quoting *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989)); *In Def. of Animals v. U.S. Dep't of Agric.*, 656 F. Supp. 3d 68, 80 (D.D.C. 2009) ("[a]s the court of appeals has instructed, the competitive injury that matters is a competitor's affirmative use of proprietary information that could reap a windfall for the competitor, rather than the harm caused by a customer or other third party's negative reaction to disclosure").

Neither DOE's Declaration, nor its *Vaughn* Index, make any serious effort to satisfy this stringent standard. The Declaration has a vague one-sentence assertion that disclosure "would cause substantial competitive harm to the National Coal Council, Inc.'s competitive interests because it would harm the National Coal Council Inc.'s transactions with third parties for memberships and membership fees, the ability to negotiate salary and benefits with staff, and the ability to make decisions regarding private litigation." ECF No. 16-1 ¶ 34. The Declaration contains no explanation as to how any of these "harm[s]" will purportedly occur from the release of the specific information at issue, or even what is meant by obscure phrases such as "transactions with third parties for memberships and membership fees" or "decisions regarding private litigation." The *Vaughn* Index is equally conclusory and uninformative. *See, e.g.*, Index at Doc. 2 (stating that the document "contains projected financial information" *from nine years ago*, the release of which would, in some totally unidentified manner, "cause competitive harm to NCC, Inc. in transactions with third parties for membership and membership fees"); *id.* at Doc. 4 (stating that the document contains a "strategic plan" for the "2008-2009 Term" with

"sensitive commercial financial information" that would somehow "negatively impact . . . NCC Inc.'s ability to attract and maintain members"); *id*. at Doc. 19 (asserting that the release of "information about NCC's Inc.'s [sic] income, expenses, assets, and liabilities" "would cause substantial competitive harm" without explaining how).

These are precisely the kinds of "[c]onclusory and generalized allegations" that courts in this Circuit routinely reject as a basis for finding substantial competitive injury. *See, e.g. Pub. Citizen Health Research Grp.*, 704 F.2d at 1290-91 ("Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents"). The Declaration and Index merely "list[] the same boilerplate, ambiguous descriptions and reasons for withholding," which is "insufficient to sustain [DOE's] burden of showing a likelihood of substantial competitive harm." *Ctr. for Auto Safety*, 133 F. Supp. 2d at 131. Indeed, DOE's conclusory statements say nothing whatsoever about *how* release of the withheld information, much of which "now date[s] back to at least several years ago, would be used by competitors affirmatively to harm" the Council and/or NCC, Inc. *Public Citizen*, 975 F. Supp. 2d at 115. Controlling Circuit precedent dictates that this cannot suffice to sustain an Exemption 4 withholding.[6]

[6] *See also Occidental Petroleum*, 873 F.2d at 342 (requiring more than "conclusory statement" regarding competitive harm); *Center for Public Integrity I*, 234 F. Supp. 3d at 78 (holding that a "wholly conclusory statement that '[r]elease of such information would damage . . . business interests' . . . does not suffice" under *National Parks I*) (internal quotation omitted); *Ctr. for Auto Safety*, 133 F. Supp. 3d at 131 ("Merely conclusory statements about competitive harm, even if repeated numerous times, are not sufficient."); *Public Citizen*, 975 F. Supp. 2d at 114 (explaining that the "Court is mindful that merely conclusory statements about competitive harm, even if repeated numerous times, are not sufficient"); *Biles*, 931 F. Supp. 2d 211 at 223 ("[C]onclusory claims of commercial harm . . . are therefore insufficient to establish [the agency's] burden of proof."); *In Def. of Animals*, 656 F. Supp. 2d at 80 (rejecting Exemption 4 claim where "defendants' evidence provides no more than the '[c]onclusory and generalized allegations' that the court of appeals has rejected as insufficient to sustain a claimed exemption from disclosure") (quoting *Pub. Citizen Health Research Grp.*, 704 F.2d at 1291); *Delta Ltd. v.*

Not only are DOE's justifications for withholding entirely conclusory, but they also conflict with other information in the public domain. Much of the information that is being withheld relates to the "dues" and other financial support that members of the Council have been asked to pay in order to serve on the Council. *See*, *e.g.*, Pl. Ex. S (Redacted Docs. 2, 19) (deleting "contribution" information); Pl. Ex. T (Redacted Doc. 4) (deleting "dues" amounts paid by various members); *see also* Pl. Ex. I (solicitation of membership for 2016-17, explaining that a "willingness to commit time *and financial resources to support the NCC*" is required) (emphasis added). Information reflecting how much money coal industry representatives and other members of the Council are being asked, and are willing, to pay to serve on a chartered federal advisory committee with preferential access to the Secretary of Energy is, of course, a matter of substantial public interest, particularly in view of FACA's directive that "special interest[s]" not be permitted to "inappropriately influenc[e]" the work of federal advisory committees, 5 U.S.C. App. 2 § 5(b)(3), and Congress's recognition, in enacting FACA, of the "danger of allowing special interest groups to exert undue influence upon the government through the dominance of advisory committees which deal with matters in which they have vested interests." *See supra* at 5-6.[7]

More important for purposes of Exemption 4 analysis, there already are documents in the public domain indicating that the coal industry is heavily involved in funding the work of the

U.S. Customs & Border Protection Bureau, 393 F. Supp. 2d 15, 19 (D.D.C. 2005) ("The defendant must show exactly who [is likely to be] injured by the release of [the] information and explain the concrete injury.").

[7] Hence, DOE's conclusory assertion that "the withheld material does not shed light on Government operations," ECF No. 16-1 ¶ 7, is not only immaterial to whether DOE can withhold records under Exemption 4, but is also plainly wrong. It also contradicts DOE's own decision to grant a fee waiver to the Center on the grounds that "*the subject of the request relates to a government activity, and information about the activity could lead to greater understanding by the public about the matter*." Def. Ex. C at 2 (emphasis added).

Council/NCC, Inc. *See, e.g.*, Pl. Ex. J (document entitled "Thank You NCC Supporters 2016!" and "thank[ing] the following for their support," including individuals from Great River Energy, Southern Company, Peabody Energy, Dominion Energy, etc.); Pl. Ex. L (identifying Soap Creek Energy and Southern Company as "event hosts" for the Council's 2016 annual Spring meeting). Even the redacted records at issue identify the Council's dues-paying members, *see* Pl. Ex. T, while (evidently) deleting exactly how much each member was responsible for and the status of their payment to serve on the federal advisory committee. Although the Council may prefer to keep this additional information from public scrutiny—although there is nothing before the Court even indicating that is the case—what is already in the public domain also undercuts any notion that further disclosure will somehow cause "substantial competitive injury" of the kind that Exemption 4 is designed to prevent. *See Ctr. for Auto Safety*, 133 F. Supp. 3d at 135 (rejecting Exemption 4 claim when the record reflected that the "availability of similar information" to that being withheld "belies the defendants' assertion about the risk of substantial competitive injury from the release of the documents"); *Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin.*, 290 F. Supp. 2d 124, 134 (D.D.C. 2003) ("[p]ublic availability of information defeats an argument that the disclosure of the information would likely cause competitive harm"); *cf. Jurewicz v. U.S. Dep't of Agric.*, 891 F. Supp. 2d 147, 154 (D.D.C. 2012) (Boasberg, J.) (rejecting companies' claim of competitive injury in a "reverse-FOIA" case where the record reflected that "similar information was already in the public domain").

4. Alternatively, DOE Has Not Satisfied the *Critical Mass* Test for Confidential Information.

Although the Court must apply the *National Parks* test under the circumstances here, even if the Court were to apply the more relaxed *Critical Mass* framework, DOE would still lose. Under *Critical Mass*, information must be a kind that "would customarily not be released to the

public by the person from whom it was obtained" in order to qualify as "confidential" for purposes of Exemption 4. *Critical Mass,* 975 F.2d at 879. "[I]n assessing customary disclosure, the court will consider how the particular party customarily treats the information, not how the industry as a whole treats the information." *Ctr. for Auto Safety v. Nat'l Traffic Safety Admin.*, 244 F.3d 144, 148 (D.C. Cir. 2001).

DOE has proffered no evidence from the Council/NCC, Inc. (or from anywhere else) regarding how the kind of information at issue is "customarily treat[ed]," or if there even *is* a customary practice. Hence, DOE's Exemption 4 claim is without any factual foundation regardless of which test the Court applies.

5. None of the Information is "Privileged"

The government asserts that "DOE has appropriately protected NCC documents subject to the attorney client and work product privileges," ECF No. 16 at 10, but advances no further argument as to how any of the withheld materials may be withheld under Exemption 4 on this basis. Although information that both satisfies the threshold test for Exemption 4 coverage—i.e., that it is "commercial or financial"—*and* that is properly subject to a claim of attorney-client or work-product privilege may be withheld pursuant to the exemption, *e.g.*, *Wash. Post Co.*, 690 F.2d at 267 n.50; *Indian Law Resource Center v. Dep't of the Interior*, 477 F. Supp. 144, 148-49 (D.D.C. 1979), that is not the case here.

DOE's Declaration does not even mention the attorney-client or work-product privilege, let alone explain on what basis (or even by who) those privileges are purportedly being asserted. However, as noted previously, the *Vaughn* Index summarily refers to one five-page document (dated November 13, 2017) as being withheld "in full" on the grounds that it contains "potential legal strategies for NCC, Inc. regarding private litigation," Index at Doc. 3, and one "agenda

item" from a 2008 "Meeting Agenda" "referring to private litigation." *Id*. at Doc. 1. There is no further explanation as to what "private litigation" the federal advisory committee was purportedly engaged in, whether DOE had any involvement in the litigation, the status of the litigation, the subject matter of the redacted material, the circumstances under which the material was provided to DOE, whether anyone associated with the Council/NCC, Inc. has even asserted privilege or asked DOE to do so on its behalf, or anything else relating to the factual context that might allow the Court to evaluate a claim of attorney-client or work-product privilege *by the Council/NCC, Inc.*

As explained earlier, the assertion of Exemption 4 for this material must fail at the outset because there is no basis on which the Court could conclude that it even satisfies the threshold "commercial or financial" test. *See supra* at 34. But even putting that problem aside, the cursory claim of privilege under the circumstances here must be rejected because the Declaration from DOE's FOIA Officer in no way demonstrates that the information is in fact privileged. "The attorney-client privilege applies only if, *inter alia*, the communication relates to a fact of which the attorney was informed . . . by his client . . . for the purpose of securing primarily either (i) an opinion on law; or (ii) legal services or (iii) assistance in some legal proceeding.'" *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007) (alterations in original) (quoting *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984)). The privilege cannot be invoked "if the party asserting the privilege has previously disclosed the communications such that they waive the privilege." *Center for Public Integrity I*, 234 F. Supp. 3d at 77 (citing *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 145 (D.C. Cir. 2015)).

Here, the Declaration from DOE's FOIA Officer "fall[s] well short of establishing the attorney-client privilege." *Center for Public Integrity I*, 234 F. Supp. 3d at 77. It is "entirely

conclusory," *id*., and does not even reflect any invocation of privilege by the Council itself, let alone set forth *any* of the specific elements required under Circuit precedent for an invocation of the attorney-client privilege. In any case, DOE's own Declaration *forecloses* any assertion of the privilege because it asserts that the purportedly privileged information was provided *to DOE* in the absence of any judicially compelled disclosure by the agency through subpoena or otherwise, *see* ECF No. 16-1 at ¶ 33; under Circuit precedent that is alone sufficient to waive any assertion of the attorney-client privilege. *See Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (holding that a company "destroyed the confidential status" of purportedly attorney-client communications "by permitting their disclosure" to the Securities and Exchange Commission); *see also Ctr. for Public Integrity v. U.S. Dep't of Energy*, No. 15-cv-01314, 2018 WL 401225, at **4-5 (D.D.C. Jan. 12, 2018) (*Center for Public Integrity II*") (holding in a FOIA case that a DOE contactor had waived the attorney-client privilege, and hence foreclosed the invocation of Exemption 4, by disclosing documents to the government without judicial compulsion; explaining that the "D.C. Circuit adheres to a 'strict rule on waiver' of the attorney-client privilege" under which the privilege is deemed waived unless the disclosure to a federal agency was "'judicially compelled'") (citing *Permian* and quoting *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) (other internal quotation omitted)); *Jordan v. U.S. Dep't of Justice*, 273 F. Supp. 3d 214, 233 (D.D.C. 2017) ("Courts in this district recognize that 'disclosure of documents inconsistent with the confidential nature of the attorney-client relationship waives the attorney-client privilege with respect to 'all other communications related to the same subject matter.'") (quoting *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 310 (D.D.C. 1994)); *cf. United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 686 (1st Cir. 1997) (holding that MIT's disclosure of documents to a federal agency waived the

attorney-client privilege because the disclosure "resulted from [MIT's] own voluntary choice, even if that choice was made at the time it became a defense contractor and subjected itself to the alleged obligation of disclosure.").

Nor does DOE provide any basis for finding that the information withheld as "privileged" is subject to the attorney work-product privilege. Such a claim of privilege applies only to specific material prepared by an attorney (or someone working under the attorney's direction) "in anticipation of litigation," Fed. R. Civ. P. 26(b)(3). The work-product privilege "'does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparation from the discovery attempts of the opponent." *Permian Corp.*, 665 F.2d at 1219 (quoting *United States v. AT & T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)). "In ascertaining whether a document was prepared in anticipation of litigation," the Court of Appeals "applie[s] a 'because of' test, asking whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" *National Ass'n of Criminal Defense Lawyers v. Dep't of Justice Executive Office for U.S. Attorneys*, 844 F.3d 246, 252-53 (D.C. Cir. 2016) (quoting *United States v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010)); other internal quotation omitted)). For that standard to be met, "the attorney who created the document must have "had a subjective belief that litigation was a real possibility, and that subjective belief must have been objectively reasonable." *National Ass'n of Criminal Defense Lawyers*, 844 F.3d at 252-53.

Here, other than a conclusory reference to "private litigation related to NCC, Inc.," Index at Doc. 3, and an "agenda item referring to private litigation," *id*. at Doc. 1, there is no explanation as to *what* litigation DOE is even referring to that a federal advisory committee

might have been involved in or was anticipating (which is not privileged information), and what specific role the withheld information played in anticipation of such litigation. Such a flimsy basis for an invocation of privilege is not sufficient in *any* civil litigation context, and surely not where there is a "strong presumption in favor of disclosure." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C.Cir.2002) (internal quotation omitted); *cf. Am. Immigration Council*, 950 F. Supp. 2d at 242 (holding that agency's generic assertion that "materials were drafted by attorneys in contemplation of litigation" was insufficient to invoke the work-product privilege in the context of an Exemption 5 claim, because "the work-product prong of Exemption 5 requires that agencies make a good-faith effort to describe the nature of each individual document and the particular circumstances that make its use in litigation foreseeable").

6. Even If Any of the Information Is Subject to Exemption 4, DOE Has Not Demonstrated that All Segregable Non-Exempt Information Has Been Disclosed.

As the foregoing makes clear, DOE has fallen woefully short of its burden to establish that *any* of the withheld materials fall within the scope of Exemption 4. The FOIA Officer's Declaration and accompanying *Vaughn* index do not set forth the "'justifications for nondisclosure with reasonably specific detail'" and they also do not "'demonstrate that the information withheld logically falls within the claimed exemption.'" *Wisdom*, 232 F. Supp. 3d at 112 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). To the contrary, the Declaration and Index are completely conclusory, they do not begin to establish the facts necessary to sustain an Exemption 4 claim, and the information at issue—concerning the operation of a federal advisory body whose sole legal raison d'etre is to advise the Secretary of Energy—does not "logically" fall within an exemption designed to safeguard confidential business information. *Id.*

However, even if DOE had established that *some* of the material at issue could be withheld under Exemption 4—which it did not—it also has not even endeavored to demonstrate that all *segregable* non-exempt information has been produced. "An agency must 'disclose all reasonably segregable, nonexempt portions of the requested record[s].'" *Parker v. U.S. Dep't of Justice, Office of Prof. Resp.*, 278 F. Supp. 3d 446, 452 (D.D.C. 2017) (Boasberg, J.) (quoting *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003)). Indeed, this Court would, in any case, have an "affirmative duty to consider the segregability issue *sua sponte*," *Elliott v. USDA*, 596 F.3d 842, 851 (D.C. Cir. 2010), and in Exemption 4 cases, "[a]s with other exemptions, 'if the government can segregate and disclose non-privileged . . . information within a document, it must.'" *Parker*, 278 F. Supp. 3d at 453 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)); *see also STS Energy Partners LP v. Federal Energy Regulatory Comm.*, 582 F.Supp.3d 323, 330 (D.D.C. 2015) ("Beyond showing that Exemption 4 applies to these contested documents, FERC must also prove that there is no 'reasonably segregable' material in the withheld documents that can be released to the public."); *cf. Wisdom*, 232 F. Supp. 3d at 129 (sustaining an agency's segregability showing where the "agency has shown that it went line-by-line to determine whether any of the information contained therein was subject to the cited exemption").

Here, the government's motion says nothing about DOE's effort to segregate all non-exempt information, while asserting in conclusory fashion that the "withheld information concerns a litigation matter, dues amounts, financial projections, strategic plans, employee compensation, and information about NCC's income, expenses, assets, and liabilities." ECF No. 16 at 10. DOE's Declaration says little more, asserting, with no accompanying explanation, that

the "information and withheld pursuant to Exemption 4 has been reviewed to ensure that all reasonably segregable information has been released to Plaintiff." ECF No. 16-1 ¶ 35. Such "conclusory statement" on segregability do not pass muster. *STS Energy Partners*, 582 F. Supp. 3d at 331 (holding that an agency "baldly" asserting that "'[t]here is no additional segregable factual information that could be released without revealing protected information' . . . "will not suffice" to meet the agency's burden); *see also Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (rejecting affidavit which claimed only that "there 'were no factual portions . . . which could be reasonably segregated'") (alteration in original)).

II. DOE HAS NOT CONDUCTED A REASONABLE SEARCH.

As explained previously, DOE "bears the burden to demonstrate that it has conducted a reasonable search" for responsive documents. *Wisdom*, 232 F. Supp. 3d at 116; *see supra* at 4. "The government must describe a search with sufficient detail that the reviewing court can determine whether the search was reasonable." *Am. Immigration Council*, 950 F. Supp. 2d at 231. DOE has fallen far short of meeting its burden. To the contrary, DOE's own Declaration, along with other materials before the Court, conclusively establish that DOE did *not* conduct a search reasonably calculated to locate all relevant materials.

First, DOE concedes that it searched only within a single office within the entire Department—the Office of Fossil Energy ("FE")—without providing any reasonable explanation as to why that would be the *only* place within all of DOE where responsive records would be likely to be found. *See Rodriguez v. FBI*, No. 16-cv-02465, 2018 WL 999908, at *3 (D.D.C. Feb. 21, 2018) (refusing to uphold agency's search where the agency failed to "explain why 'the only reasonable place to look for' the documents was within [one specific office] or why 'no other

record systems are reasonably likely to contain' responsive records") (quoting *Aguiar v. Drug Enf't Admin.*, 865 F.3d 730, 739 (D.C. Cir. 2017)).

In explaining DOE's sole focus on the Office of Fossil Energy, the government's declarant merely states that "FE is the program office within the Department of Energy that is designated by the National Coal Council charter to provide *primary* support to its organization." ECF No. 16-1 at ¶ 16 (emphasis added). But that hardly means that FE is the *only* office where responsive records are likely to be found. Most obviously, DOE inexplicably failed to search the Office of the Secretary of Energy notwithstanding the fact that, by virtue of its charter, the Council "provides advice and recommendations *to the Secretary of Energy* on general policy matters relating to coal and the coal industry." Pl. Ex. C at 1 (emphasis added); *see also* Pl. Ex. Q (letter from Council to DOE Secretary proposing a Council "study on the value and use of coal in a carbon constrained energy market"). Simply put, a search cannot be deemed complete when it ignores an obvious location where responsive records will likely, if not inevitably, be located—particularly the office of the ultimate federal official with direct involvement in the matter at hand. *See, e.g.*, *Reporter's Comm. for Freedom of the Press v. FBI*, 877 F.3d 399, 407 (D.C. Cir. 2017) (holding that the FBI failed to conduct a reasonable search when it failed to search the offices of the FBI Director although the "record unmistakably establishe[d]" the Director's involvement in the subject matter); *Friends of Blackwater*, 391 F. Supp. 2d at 121 (finding search unlawfully narrow where the agency failed to search the Office of the Secretary of the Interior where, given the nature of the request, it was "reasonable to conclude that responsive documents [were] likely to be maintained there").

Second, DOE's Declaration also demonstrates that DOE failed to conduct a reasonable search even within the Office of Fossil Energy. According to DOE's declarant, DOE personnel

conducted searches of "physical files" within the Office of Fossil Energy, which "included locating files containing '*National Coal Council*' and the names of working groups and subgroups, announcements, press releases, membership lists, charters, studies, agendas, newsletters, meetings, and audio and written transcripts . . . ." ECF No. 16-1 ¶¶ 16, 25 (emphasis added). These categories of *Council* documents parallel only the first five (of the 13) categories in the Center's request. *See* Pl. Ex. O at 1-2 (requesting Council membership lists, names of subgroups and working groups, reports or studies, newsletters, announcements, press releases, agendas, transcripts, and meetings).

However, DOE's declarant makes no comparable representation regarding the search of "physical files" within the Office of Fossil Energy for documents specifically pertaining to the Counsel's alter ego, NCC, Inc. As explained, "[b]ecause the [Council] (perhaps uniquely among federal advisory committees) appears to have been incorporated," the Center's FOIA request was expressly crafted so as to obtain documents pertaining to "both" NCC and NCC, Inc., and hence eight of the categories enumerated in the request specifically mention NCC, Inc. materials, including all "documents relating to the decision to incorporate NCC, Inc.," all "documents describing the relationship between NCC and NCC, Inc.," and all "documents describing NCC, Inc. income and expenditures, including the sources of all such income and the recipients of all such expenditures." Pl. Ex. O at 2.

Yet DOE's Declaration makes no mention of the use of "NCC, Inc."—or any comparable search term—in searching for, locating, and reviewing physical files. Nor does the Declaration contain any statement that DOE specifically searched for records falling within categories 6-13 in Plaintiff's request—a statement that is especially conspicuous by omission in light of DOE's

concession to the Center that its search had failed to locate a single document responsive to four of the categories in the Center's request specifically pertaining to NCC, Inc. *See* ECF No. 16-1 ¶ 31 (explaining that DOE's September 13, 2017 "response noted FE did not locate any documents responsive to parts 6, 7, 9, and 13 of Plaintiff's request").

DOE's search for electronic records is equally deficient, as described by DOE itself. According to DOE's declarant, the DOE "staff manually searched their staff records, maintained within a FE shared central depository that is accessible only to FE employees to upload and save documents . . . ." ECF No. 16-1 ¶ 16. Again, however, DOE's Declaration indicates that DOE only searched such "shared" files "for any records containing 'National Coal Council'" and the first five categories in the Center's request. *Id*. The Declaration says nothing about searching electronic records for records containing "NCC, Inc." or, for that matter, any other search term designed to locate records in categories 6-13. Such a facially flawed search cannot pass legal muster. *See, e.g.*, *Debrew v. Atwood*, 792 F.3d 118, 122 (D.C. Cir. 2015) ("[a] reasonably detailed affidavit, setting forth the search terms and type of search performed . . . is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search"); *Friends of Blackwater*, 391 F. Supp. 2d at 120 (rejecting adequacy of search where the agency declaration "fail[ed] to enumerate any specific search terms used in examining the agency's electronic files").

Even further, DOE's search for emails, in particular, is described in DOE's Declaration itself as being woefully incomplete. The Declaration describes a search for "email correspondence" for only a *single employee* (Robert Wright, the "previous Designated Federal Officer" for the Committee), while acknowledging that "other FE employees . . . worked on matters with the Coal Council . . . ." ECF No. 16-1 ¶ 16. DOE provides no explanation as to why

email correspondence was not searched for any other DOE employees (including, apparently, the *current* Designated Federal Officer overseeing the committee's work). In addition, even for Mr. Wright, the Declaration describes a clearly inadequate search, indicating that the "[s]earch terms National Coal Council" and "NCC" were used but, once again, inexplicably omitting at least one other obvious search term: "NCC, Inc." This demonstrably anemic search for email communications, seemingly designed to locate as little as possible, explains why DOE did not turn over even a single DOE email to the Center in response to its request. *See* Pl. Ex. P ¶ 3.

Third, in addition to being unduly narrow from a location and subject matter standpoint, DOE's search is also impossible to justify from the vantage point of the time frame encompassed by the documents provided by DOE. Although DOE's Declarant represents that DOE searched for documents "for all years since 1986," ECF No. 16-1 ¶¶ 16, 25, in fact DOE did not release (or account for) any documents preceding *2008*. *See Vaughn* Index; Pl. Ex. P ¶ 2. DOE offers no explanation for this glaring discrepancy—i.e., why it has not located any documents encompassing 22 years of the Council's existence—which also calls the thoroughness of its search into serious question. *See, e.g.*, *Defenders of Wildlife v. United States Dep't of Interior*, 314 F. Supp. 2d 1, 10 (D.D.C. 2004) ("An agency may not ignore 'positive indications of overlooked materials'") (quoting *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)).

CONCLUSION

"Consistent with [FOIA's] statutory mandate, federal courts have jurisdiction to order the production of records that an agency improperly withholds." *Wisdom*, 232 F. Supp. 3d at 112; *AIC*, 950 F. Supp. 2d at 235 ("[T]he reviewing court must bear in mind that FOIA mandates a 'strong presumption in favor of disclosure'" and "[t]his Court, accordingly, can compel the

release of any records that do not satisfy the requirements of at least one exemption") (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). Thus, to avoid such relief and "satisfy FOIA, an agency must demonstrate both that it adequately searched for responsive records and that it turned over all such records not subject to a specific exemption." *Wisdom*, 232 F. Supp. 3d at 113.

Here, DOE has done neither: it has not demonstrated that the materials withheld pursuant to Exemption 4 have been properly withheld; nor has it demonstrated that it conducted a search reasonably calculated to locate all responsive records. Consequently, the Court should deny DOE's motion for summary judgment, and grant Plaintiff's motion. *See Friends of Blackwater*, 391 F. Supp. 2d at 122 (granting the plaintiff's motion for summary judgment and as relief ordering an "adequate search" after finding that the agency's search was not reasonably calculated to locate all responsive records). As relief, as set forth in the accompanying Proposed Order, Plaintiffs respectfully request that the Court order that DOE (1) promptly disclose the material withheld on Exemption 4 grounds; and (2) promptly conduct a new search that comports with Circuit precedents for what constitutes such a search. This relief is not only entirely warranted as a matter of FOIA jurisprudence, but is especially appropriate in this case, in which an industry-dominated federal advisory committee with special and ongoing access to the Secretary of Energy has sought, including through the creation of a highly unusual alter ego, to avoid legitimate public scrutiny of its activities, financial arrangements, and funding.

Respectfully submitted,

/s/Eric R. Glitzenstein
Eric R. Glitzenstein
Meyer Glitzenstein & Eubanks LLP
Suite 210
4115 Wisconsin Ave., N.W.
Washington, D.C. 20016
(202) 588-5206
eglitzenstein@meyerglitz.com

Counsel for Plaintiff