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.	)	

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this Freedom of Information Act ("FOIA") case concerning Department of Energy ("DOE") records pertaining to an industry dominated federal advisory committee, the National Coal Council ("Council" or "NCC"), Plaintiff Niskanen Center's motion for summary judgment and opposition to DOE's motion demonstrated that DOE failed to sustain its burden of establishing either that the documents at issue are subject to Exemption 4, or that DOE engaged in a search reasonably designed to locate all responsive materials. *See* ECF No. 17, 18. Plaintiff's motion explained why the public has a significant interest in the work of the Council, and especially in records bearing on the funding of the work of a formally chartered federal advisory committee that has preferential access to the Secretary of Energy and other high-ranking officials in the Administration. In addition, Plaintiff explained why DOE had not met its burden to demonstrate that the withheld materials fall within the strictures of Exemption 4. As for the search issue, Plaintiff pinpointed a number of specific ways in which DOE's effort to uncover responsive materials, as described by DOE itself, was plainly deficient.

In response, DOE has made no effort to dispute that the public has a substantial interest in records bearing on the Council, particularly in view of Congress's stated purpose, in enacting the Federal Advisory Committee Act ("FACA), that federal advisory committees be fairly balanced and not be susceptible to abuse by "special interest groups [seeking] to exercise 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. 3491, 3496; *see* Pl.'s Mem. in Supp. of its Mot. for Summ. J. ("Pl. Mem.") at 5-6. Rather, DOE has now submitted a Declaration from Janet Gellici, who is the CEO of *both* the Council[1] *and* its alter ego, NCC, Inc., that concedes that DOE is withholding information so that the public does *not* obtain information illuminating how an influential federal advisory committee is being funded and whether that funding arrangement violates FACA. Ms. Gellici says in her Declaration that if the public is fully informed as to who is funding the Council's work and to what extent, this "could lead to public discrediting of the NCC and its reports," and, further, that "[p]utting this information into the public domain *could lead members of the public to believe that NCC, Inc.'s operations and NCC reports are dominated by certain members*" and that "*FACA prohibits this practice by requiring NCC's members to be fairly balanced . . . .*" Decl. of Janet Gellici ("Gellici Decl."), ECF No. 20-1 ¶ 7 (emphasis added).

But putting information in the "public domain" that will shed light on whether an official federal advisory committee used by DOE to establish government energy and environmental policy is "dominated" by certain representatives of the coal industry in potential violation of federal law is *precisely* the kind of public disclosure that FOIA was designed to accomplish. *See*

[1] *See* htttp://www.nationalcoalcouncil.org/page-CEO-Message.html (attached as Pl. Ex. U).

Pl. Mem. at 2. Moreover, although DOE has submitted two additional Declarations in response to Plaintiff's arguments (one from Ms. Gellici, and a supplemental Declaration from DOE's FOIA Officer), DOE has again not come close to satisfying the standards for withholding under Exemption 4. Nor has DOE demonstrated that it conducted a search reasonably designed to locate all responsive materials. Consequently, Plaintiff's motion for summary judgment must be granted.

I. DOE HAS NOT ESTABLISHED THAT THE RECORDS MAY BE WITHHELD UNDER EXEMPTION 4 AS "CONFIDENTIAL" OR "PRIVILEGED."

A. THE WITHHELD DOCUMENTS DO NOT SATISFY THE CIRCUIT'S EXEMPTION 4 STANDARDS FOR "CONFIDENTIAL" STATUS.

Plaintiff's opening brief explained that the conclusory descriptions in DOE's *Vaughn* Index do not satisfy the standards established by Circuit precedent. Pl. Mem. at 15-19. In addition, Plaintiffs explained that DOE has failed to carry its burden to justify any withholdings under Exemption 4, either under the test established in *National Parks*—which applies to documents provided to a federal agency involuntarily (such as those generated by or for a federal advisory committee)—or the test set forth in *Critical Mass*, which applies to documents provided to an agency on a purely voluntary basis. *Id*. at 21-37.

In response, DOE has not supplemented its *Vaughn* Index with more detailed descriptions of the documents at issue. Nor has the agency persuasively rebutted any of Plaintiff's detailed Exemption 4 arguments regarding the reasons why the *National Parks* test clearly applies here or why the materials may not be withheld under either test. Instead, DOE's two-page legal response, along with the two new Declarations, reinforce why the Court must grant summary

judgment for Plaintiff as to the Exemption 4 withholdings predicated on the assertion of "confidential" status.[2]

To begin with, as to DOE's claim that most of the materials are properly withheld as "confidential," DOE's cursory Exemption 4 discussion advances no argument whatsoever that DOE has (or could) satisfy the *National Parks* test for records that have been obtained as a mandatory matter. *See* Def.'s Reply in Supp. of its Summ. J. Mot. and Opp'n to Pl.'s Cross-Mot. for Summ. J. ("DOE Opp/Reply"), ECF No. 20 at 5-7.[3] Instead, DOE's *entire* argument is that the materials were provided to DOE "voluntarily" *by NCC, Inc.*, and hence the *Critical Mass* test applies. *See* DOE Opp/Reply at 6 ("since the documents at issue were provided voluntarily, the Court's analysis is governed by *Critical Mass*"). Consequently, by putting all of its eggs in the *Critical Mass* basket, DOE has waived any argument that the materials could be withheld if, as Plaintiff contends, *National Parks* governs here. For several reasons, DOE has not and cannot sustain its burden to establish that the *Critical Mass* test applies.

[2] As to Doc. 3 in the *Vaughn* Index and one of the redactions in Doc. 1, Plaintiff pointed out in its opening brief that the vague reference to "litigation" did not even satisfy Exemption 4's low threshold requirement that withheld materials be "commercial or financial" in nature. *See* Pl. Mem. at 20-21. Although the Gellici Declaration says nothing about those specific withholdings, the Supplemental Morris Declaration submitted by DOE's FOIA Officer now asserts that they concern information related to NCC, Inc.'s "brokerage account." *See* Supplemental Declaration of Alexander C. Morris ("Suppl. Morris Decl."), ECF No. 20-2 ¶¶ 19, 22. Assuming that this belated, conclusory representation—made by DOE's FOIA Officer rather than the Council/NCC, Inc.'s own declarant—is sufficient to satisfy Exemption 4's threshold requirement, DOE has not sustained its burden to demonstrate that the withheld materials are "confidential" or "privileged." *See infra* at 4-16.

[3] DOE says that the only document withheld as "privileged" is Doc. 3, and that Plaintiff was "incorrect" in assuming that the portion of Doc. 1 relating to "potential private litigation" was withheld on "privilege" grounds. DOE Opp/Reply at 7 n.1. Consequently, if the Court agrees with Plaintiff on the insufficiency of DOE's "confidential" demonstration, this would encompass all documents other than Doc. 3, which is discussed separately below. *See infra* at 14-16.

1. DOE Has Made No Factual Showing That The Documents Were "Voluntarily" Provided.

First, other than asserting in conclusory fashion that the documents at issue "were provided voluntarily," Suppl. Morris Decl. ¶ 14, DOE has provided no *evidence* to support that proposition. As to most of the records (those dating from 2008), the Declaration belatedly submitted by the CEO of the Council/NCC, Inc. admits that she has "*no knowledge of why these documents were shared with the DOE*." Gellici Decl. ¶ 4 (emphasis added). Nor does DOE's current FOIA Officer purport to have any personal knowledge of the circumstances under which these documents were provided to DOE. Consequently, as to the 2008 documents (Nos. 1, 2, 3, 4, 5), DOE has proffered *no evidence whatsoever* on which the Court could base a conclusion that the *Critical Mass* framework applies. Plaintiff is entitled to summary judgment as to those documents for this reason alone.[4]

As to the only remaining document at issue (No. 19), which was generated in 2016, DOE proffers scant more, and surely not enough under Circuit precedent to support the proposition that *Critical Mass* rather than *National Parks* applies. Ms. Gellici asserts that the document was "shared voluntarily and in confidence with our designated federal officer," Gellici Decl. ¶ 5, but says nothing more about why, or the circumstances under which, the document was provided to the federal official overseeing the Council's FACA compliance.

Nor has DOE submitted a Declaration from the Council's "designated federal officer"—i.e., the federal employee legally responsible for overseeing the Council's work and ensuring its compliance with FACA's requirements, *see* 5 U.S.C. App. 2 § 8(b) (providing that each agency

[4] Doc. 1 is erroneously identified in the *Vaughn* Index as dating from "11/13/2017," which post-dates when the documents were produced to Plaintiff. *See* ECF No. 16-1 at 2. The actual date of the document is November 13, 2008. *See* Pl. Ex. V (attached).

"shall designate an Advisory Committee Management Officer who shall . . . exercise control and supervision over" the committee's operations, and "assemble and maintain the reports, records, and other papers of such committee during its existence"); *see also* Pl. Mem. at 6. DOE's FOIA Officer says only that the document was provided to "show DOE the state of NCC, Inc.'s finances," Supp. Morris Decl. ¶ 14, without explaining, e.g., the nature of DOE's interest in the "state of NCC, Inc.'s finances"; whether the documents were furnished to DOE's "designated federal officer" in his legal capacity as overseer of the Council's compliance with FACA's legal requirements; whether DOE instructed the Council/NCC, Inc. to furnish the document so that DOE could assess who, exactly, is funding the Council's advisory work (and, in turn, discharge DOE's obligation to ensure that the Council is not being "inappropriately influenced . . . by any special interest" in violation of FACA, 5 U.S.C. App. 2 § 5(b)(3)); or any other information that might bear on whether the document was furnished "voluntarily." Simply put, therefore, DOE's factual showing falls woefully short of what Circuit precedent demands for a reviewing court to conclude that a submission of information to a federal agency was genuinely "voluntary" for purposes of applying *Critical Mass* rather than *National Parks*. *See* Pl. Mem. at 21-25.

2. DOE's Contention That The Documents Were "Voluntarily" Submitted Is Based On The Legal Fiction That There Is A Meaningful Distinction Between The Council and NCC, Inc.

Although DOE's anemic factual showing is sufficient to resolve the issue in Plaintiff's favor, there is also a more fundamental legal reason why the Court must reject DOE's argument that any of the documents at issue were furnished voluntarily. DOE's argument is based entirely on the legal artifice that there is some meaningful, let alone dispositive, legal distinction between the Council and NCC, Inc.

In its opening brief, Plaintiff explained that the Council, a chartered federal advisory committee that was created and is operated with the singular purpose of advising the federal government, certainly does not furnish materials to DOE "voluntarily" within the meaning of Circuit precedent because DOE has the plenary authority (indeed, the legal duty) to demand the production *from its own chartered advisory committee* of whatever materials DOE needs or wants to ensure that all of FACA's openness and accountability requirements are being fulfilled. *See* Pl. Mem. at 23-25. This is especially so for documents relating to who is *paying for* the advisory work of the Council because, once again, DOE is obligated by federal law to understand and oversee such funding to ensure (among other requirements) that the federal advisory committee is not being "inappropriately influenced . . . by any special interest." 5 U.S.C. App. 2 § 5(b)(2).

Crucially, therefore, DOE does not dispute that documents emanating *from the Council itself* cannot be deemed to be "voluntarily" provided to the federal agency to which the Council reports, that exercises control over the Council, and that can terminate the Council at any time and for any reason of DOE's choosing. Accordingly, DOE's legal position regarding the Exemption 4 withholdings turns entirely on DOE's contention that the Council and NCC, Inc "are not one and the same" and that Plaintiff is "incorrect" in describing NCC, Inc. as the Council's "alter ego." DOE Opp/Reply at 5.

In effect, DOE's legal position is that publicly-important documents that reflect the financial underpinnings of a federal advisory committee and that *would* be subject to (and would fail) the stringent *National Parks* test if furnished by the Council, may nonetheless be withheld from public scrutiny because the documents were instead provided by an entity created for the purpose of supporting the federal advisory committee, and that has no legal or practical function

other than to assist with the committee's federal advisory function. *See* Pl. Mem. at 9-10; Gellici Decl. ¶ 2 (admitting that NCC, Inc. was created "to handle all of the business activities *required to fulfill NCC's charter*") (emphasis added). However, there are multiple flaws in this transparent effort to play a shell game with the public's fundamental right to know who is paying for the work of an influential federal advisory committee that has preferential access to the Secretary of Energy and other high-ranking federal officials on such vitally important topics as whether and how the federal government should be promoting coal as an energy source in an era of climate change. *See* Pl. Mem. at 7-10.

To begin with, just as it would make no legal or logical sense to hold that a chartered federal advisory committee provides its records "voluntarily" to the federal agency it serves, it would likewise make no sense to hold that an entity that exists for no purpose other than to facilitate the existence of the federal advisory committee does so. That is especially true under the specific circumstances before the Court here. Although DOE asserts that the Council and NCC, Inc. "are not one and the same" and that Plaintiff was "incorrect" in characterizing NCC, Inc., as the "alter ego" of the Council, DOE Opp/Reply at 5, those unsubstantiated assertions are belied by the Council/NCC, Inc.'s own website and other public documents, which treat the entities as synonymous and stress their parallel purpose, structure, and personnel.

As noted in Plaintiff's opening brief (at 9), with no rebuttal from DOE, the Council/NCC, Inc's *single, joint website* states that the *Council* "incorporated as a 501c6 non-profit organization in the State of Virginia," and that the "leadership of the NCC serves as officers of NCC, Inc. and members of the Council serve as NCC Inc. shareholders." Pl. Ex. A at 4; *see also* Pl. Ex. B at 51 (explanation at public meeting of the Council that "every member who's

appointed to the Council is also a shareholder" of NCC, Inc. and that the "officers [of NCC, Inc.] are the same officers as the Coal Council").[5]

The website also represents that the "activities and operations of the NCC are funded solely from member contributions," *id*. at 6, i.e., the very same member "contributions" that NCC, Inc.'s declarant says are provided *to NCC, Inc*., and are reflected in NCC, Inc.'s "financial records." Gelleci Decl. ¶¶ 5, 6; *see also* Pl. Ex. B at 51 (explanation in public meeting that NCC, Inc. collects the "member" dues that support the Council's advisory relationship with DOE). In addition, the Council/NCCs public website and even the Council's formal DOE charter provides the *Council's* "CONTACT" information as the address, phone, and fax number of "*National Coal Council, Inc.*" Pl. Ex. A at 6 (footer of Council's website) (emphasis added); *see also* Pl. Ex. C at 6 (charter, reproduced on website). In other words, the Council and NCC, Inc., exist in exactly the same physical location as well as being held out to the public on social media as being one and the same.

In addition, the only two individuals described on the joint website as "*NCC* Staff"—including Ms. Gellici who, as noted, is simultaneously the CEO of both the Council and NCC, Inc.—are employees of NCC, Inc. and their contact information is the same as that for NCC, Inc. *See* Pl. Ex. W; *see also* 82 Fed. Reg. 11,211, 11,212 (Feb. 21, 2017) (Pl. Ex. H) (DOE's formal notice of Council meeting, stating that the "NCC Business Report" would be presented by "NCC CEO Janet Gellici"); Pl. Ex. L at 3 (public notice of Council's spring meeting stating that "Janet Gellici, CEO, NCC" would provide a report on "Governance issues," including "NCC, Inc.

[5] Although Ms. Gellici appears to imply that NCC, Inc. has its own website, *see* Gellici Decl. ¶ 3 (referring to the "operating expenses for NCC. Inc., including expenses related to website upkeep") in fact there is no separate website for NCC, Inc. There is only *one* website: the Council's, *see* www.nationalcoalcouncil.org, which describes the Council and NCC, Inc. as overlapping and interchangeable entities.

Bylaws Revision-Membership Vote"). Further, along with serving as the pass-through entity for the Council's funding by its members, NCC, Inc. also directly participates in the *substantive advisory work* of the Council by actually "draft[ing]" the Council's reports to the Secretary of Energy and also "pull[ing] together the data for the public deliberation and scrutiny" in which the Council engages. Pl. Ex. B at 54, 55.

But even more important than these myriad indicia of alter ego status, NCC, Inc.'s own formal filings with the State of Virginia and the Internal Revenue Service ("IRS") belie any notion that there is any real distinction between the entities. Both NCC, Inc.'s public "Bylaws" and the returns it files with the IRS unequivocally present NCC, Inc. ***as the federal advisory committee*** authorized to provide recommendations to the Secretary of Energy.

The Bylaws state that "[m]eetings of members *of the Corporation* held to develop and consider advice, information or recommendations *to be given to the Secretary of Energy* shall be subject to and consistent with the Federal Advisory Committee Act," and that "[m]embers *of the Corporation* are selected and appointed to serve *on the National Council by the Secretary of Energy* . . . ." Pl. Ex. M at 1 (emphasis added). The Bylaws also provide that "[e]very request from the Secretary of Energy *to the corporation for advice, information and recommendations* shall be referred to the Executive Committee," *id*. at 10 (emphasis added), and a "Coal Policy Committee shall only deliberate upon reports for submission to, and give assistance to, the Corporation at meetings of its members *with respect to requests from the Secretary of Energy for advice, information and recommendations*." *Id*. at 8 (emphasis added).

NCC, Inc.'s federal tax returns likewise treat NCC, Inc. and the Council as one and the same. In the section of NCC, Inc.'s tax return requiring the filer to "describe the organization's mission or most significant activities," the answer provided is: "THE COUNCIL SERVES AS

AN ADVISORY COMMITTEE TO THE DEPARTMENT OF ENERGY _ THE COUNCIL PROVIDES 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 at 1 (capitalization in original). A similar statement is made in a part of the tax return that requires NCC, Inc. to describe *its* "Accomplishments." *Id*. at 2.

In short, as the attorney who established NCC, Inc. declared in a public meeting of the Council, the Council and NCC, Inc. are, and hold themselves out to federal and state regulators and the public at large to be, entirely "parallel organization[s]" that have absolutely no independent purpose or function but to serve the federal advisory function for which the Council was created by DOE. Pl. Ex. B at 51. Therefore, by any reasonable measure—and certainly the one endorsed by the Court of Appeals in equivalent circumstances to prevent an entity from sidestepping federal legal obligations—NCC, Inc. surely *is* the alter ego of the Council. *See, e.g.*, *Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362, 370 (D.C. Cir. 2018) (finding corporate entities to have "alter ego" status for purposes of the National Labor Relations Act, and basing that finding on their "*[s]ubstantial identity of management, business purpose, operation, equipment, customers, supervision, and ownership*") (emphasis added and citations omitted); *Flynn v. R.C. Title*, 353 F.3d 953, 958 (D.C. Cir. 2004) (holding that two companies were "alter egos" of each other for purposes of paying into a multi-employer pension fund based on the "similarities between the two enterprises in their *ownership, management, business purpose, operations, equipment, and customers*") (emphasis added); *Capital Tel. Co. v. FCC*, 498 F.2d 734, 737-78 (D.C. Cir. 1974) (upholding agency's treatment of separate applications by a

corporation and an individual for two radio channels as a single application because the individual was the sole stockholder of the corporation and controlled its operations).

Not only do the Council and NCC, Inc. have all of the earmarks of alter egos as defined by the D.C. Circuit but, even more germane to this case, the Court of Appeals has specifically "admonished that 'the fiction of a corporate entity cannot stand athwart sound regulatory practice,'" *Quinn v. Butz*, 510 F.2d 743, 759 (D.C. Cir. 1975) (quoting *Capital Tel. Co.*, 498 F.2d at 738 n.11), and that "[p]rominently included [among situations in which courts reject the use of alter egos] are *those wherein the corporate fiction would enable circumvention of a statute*." *Quinn*, 510 F.2d at 758 n.95 (emphasis added) (citing *Anderson v. Abbott*, 321 U.S. 349, 362-63 (1944)); *cf. Capital Tel. Co.*, 498 F.2d at 738 n.10 (explaining that where a "*statutory purpose could be easily frustrated* through the use of separate corporate entities[,], a regulatory commission is entitled to look through corporate entities and treat the separate entities as one for purposes of regulation").

Enabling "circumvention of a statute"—namely, FOIA's disclosure mandate as well as the public accountability provisions of both FOIA and FACA—is exactly what is at stake in this case. The CEO of the Council/NCC, Inc. has admitted as much, conceding in her sworn Declaration that the purportedly separate status of NCC, Inc. is being relied on to prevent the public from learning whether "NCC, Inc.'s operations *and NCC reports are dominated by certain members*" with financial interests in promoting the coal industry, a "practice" that "FACA prohibits," Gellici Decl. ¶ 7 (emphasis added), and that Congress regarded as "[o]ne of the greatest dangers in [the] unregulated use of advisory committees . . . ." H.R. Rep. 92-107, *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496.

Even further undercutting DOE's position, it is not mere happenstance that the illusory distinction between the Council and NCC, Inc. is being invoked to circumvent the public's right to know the extent to which particular representatives of the coal industry are subsidizing the work of an influential federal advisory committee in which the industry has a direct interest. As noted in Plaintiffs' opening brief (at 10 n.2)—again, with no rebuttal from DOE—the attorney who established NCC, Inc. has publicly proclaimed that affording "protection" from scrutiny by members of the public (described as "opponents" and "people who did not care for our business") was the central motivation behind the creation of NCC, Inc. Pl. Ex. B at 50.

Under Circuit precedent that makes it even more imperative that the Court reject DOE's reliance on NCC, Inc. as a justification for avoiding disclosure. *See Island Architectural Woodwork*, 892 F.3d at 370-71 (explaining that, in refusing to allow an alter ego to avoid compliance with fair labor practices, the court gave "substantial weight" to "evidence of a company's motive to evade its obligations" under fair labor laws). Any other result would establish a judicially-sanctioned blueprint for sidestepping public access and accountability obligations that otherwise apply to federal advisory committees. *See* Pl. Ex. B at 50 (explanation by the attorney who devised NCC, Inc. that "we had identified, oh, well over a hundred different FACA committees, but *none of them seemed to offer the kind of protection which was on my mind at the time; that is, to create a structure that could withstand an assault by opponents*") (emphasis added)).

In sum, contrary to DOE's conclusory, unsubstantiated assertion that the Council and NCC, Inc. are not alter egos, the evidence is overwhelming that the two entities are, and were designed to be, so intricately intertwined that it would "work[] a clear and manifest injustice" to allow DOE to avoid public disclosure merely by pointing to NCC, Inc. as the entity that

furnished the materials at issue. *In re 1438 Meridian Place, N.W., Inc.*, 15 B.R. 89, 96 (Bankr. D.D.C. 1981); *see also Founding Church of Scientology of Washington, D.C., Inc. v. Webster*, 802 F.2d 1448, 1452 n.5 (D.C. Cir. 1986) (explaining that the "'fiction of corporate entity may be and should be disregarded in the interests of and to promote justice") (quoting *Fletcher Cyclopedia Corporations* § 25, at 305; *Quinn*, 510 F.2d at 758 n.107 (observing that "[m]any other courts for a variety of purposes have similarly disregarded the corporate fiction where its recognition would pervert the truth") (citations omitted). In light of DOE's concession that the *National Parks* test would apply but for the purported distinction between the Council and NCC, Inc., and given DOE's failure to advance any argument in its opposition/reply that the *National Parks* test can be satisfied here, Plaintiff is entitled to summary judgment with respect to the Exemption 4 materials withheld as "confidential."[6]

B. DOE HAS NOT ESTABLISHED THAT ANY OF THE WITHHELD MATERIALS ARE "PRIVILEGED."

In response to Plaintiff's argument that DOE failed to establish that any of the withheld documents are "privileged," *see* Pl. Mem. at 33-37, DOE contends that it has properly withheld one document in its entirety (Doc. 3), on the basis that it is "subject to the protections of the

[6] Even if DOE were correct in applying the *Critical Mass* test, DOE has still fallen short of justifying its withholdings. Under *Critical Mass*, the withheld information must be 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). Even assuming that NCC, Inc. (an idiosyncratic entity that has no function other than to support the work of a federal advisory committee) can be said to have any "customary" practice at all, the fact is that the Council/NCC. Inc. routinely publicizes some information regarding *who* is financially contributing to the advisory committee's work, even if the specific level of the contribution is not regularly disclosed. *See, e.g.*, Pl. Ex. J (public document stating "Thank You NCC Supporters 2016" and identifying "Level 1," "Level 2," and "Level 3" "Annual Dues Contributors"); Pl. Ex. L (advertising the "Event Hosts" and "Break/Breakfast Hosts" at a Council meeting, including Soap Creek Energy and Southern Company).

work product privilege." DOE Opp/Reply at 7.[7] However, DOE, as before, has not supported its invocation of the work-product privilege. Although DOE asserts that the document was prepared by NCC, Inc.'s "outside counsel for NCC, Inc.'s [in house] counsel in potential private litigation," *id*., DOE has submitted nothing from either "counsel" attesting that the document was in fact prepared "in anticipation of litigation," as required for invocation of the work-product privilege. Fed. R. Civ. P. 26(b)(3). Moreover, while DOE has belatedly submitted a Declaration from a Council/NCC, Inc. official (Ms. Gellici), she says nothing about Doc. 3, much less information to support the proposition that it meets the strictures of the work-product privilege.

Rather, DOE's only support for the claim of privilege is the two-sentence description of the document in the *Vaughn* index, which includes the now-abandoned assertion that the document "is a privileged attorney-client communication," ECF No. 16-1 at 2, and one paragraph in the supplemental Declaration submitted by DOE's *FOIA Officer*. That paragraph says that the document concerns "litigation strategies in a potential private litigation related to NCC, Inc.," Supp. Morris Decl. ¶ 22, but says nothing further about whether any litigation actually ensued, what role (if any) the document played in preparing for the litigation, the circumstances under which the document was provided to DOE, or any other specific facts that might bear on a work-product claim. *See National Ass'n of Criminal Defense Lawyers v. Dep't of Justice Executive Office for U.S. Attorney*, 844 F.3d 246, 252-53 (D.C. Cir. 2016) (explaining that the Court of Appeals applies a "because of" test in ascertaining work-product status, "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 in the prospect of litigation")

[7] DOE has abandoned any argument that the document could be withheld under the attorney-client privilege. *See* Pl. Mem. at 33-35 (explaining that disclosure of the documents to DOE waived any assertion of the attorney-client privilege).

(citation omitted). Such an amorphous statement by an agency FOIA Officer with no discernible personal knowledge of the circumstances surrounding the document's creation or dissemination is inadequate to support a claim of work-product privilege especially where, as here, the public has a significant interest in learning about the activities of a federal advisory committee and 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) (quotation omitted).[8]

II. DOE DID NOT CONDUCT A SEARCH REASONABLY CALCULCATED TO UNCOVER ALL RESPONSIVE RECORDS.

Plaintiff's motion enumerated a number of specific ways in which DOE failed to conduct a reasonable search for all responsive records. *See* Pl. Mem. at 39-44. Rather than rebut Plaintiff's arguments, DOE has confirmed them.

First, DOE concedes that it searched for responsive records *only* within the Office of Fossil Energy ("FE"), and did not search anywhere else within the Department, including the Office of the Secretary. *See* Supp. Morris Decl. ¶ 7. DOE justifies this limited search on the grounds that DOE "determined, based on the nature of Plaintiff's request and the staff's knowledge of DOE's organization structure, that responsive documents for Plaintiff's FOIA request *would be located within the Office of Fossil Energy*." *Id*. ¶ 7 (emphasis added).

Plainly, however, the fact that responsive records "would be located" within FE does not mean that this one part of DOE is the *only* location where physical and/or electronic records

[8] Even if DOE had demonstrated that any part of Doc. 3 could be withheld on work-product grounds, the agency did not support withholding the five-page document in its entirety. DOE's FOIA Officer says only that the document was "withheld in full" because it "regard[s] litigation strategies in a potential private litigation," Supp. Morris Decl. ¶ 22, but the he does not address whether there is any segregable portion of the document that could be disclosed, such as a narrative description of the dispute to which the document pertains. *See also* Pl. Mem. at 37-39 (explaining agency's obligation to furnish all reasonably segregable non-exempt materials).

would likely be found. An agency's search may be upheld as reasonable only if the agency's "affidavits or declarations . . . aver that *all files likely to contain responsive materials* (if such records exist) were searched." *Coffey v. Bureau of Land Mgmt*., 249 F. Supp. 3d 488, 497 (D.D.C. 2017) (Boasberg, J.) (emphasis added) (quoting *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). There is no such attestation in DOE's Declarations; nor could there be.

Most clearly, as Plaintiff stressed in its opening brief—with no response from DOE in either its reply memorandum or supplemental Declaration—DOE should at bare minimum have searched the Office of the Secretary of Energy, *the DOE official to whom the Council/NCC, Inc. provides its formal recommendations*. *See* Pl. Mem. at 40; *see also Public Emps. for Envtl. Responsibility. v. U.S. EPA*, __ F. Supp. 3d __, No. 17-652 (BAH), 2018 WL 2464463, at *3 (D.D.C. June 1, 2018) ("'[I]f an agency has reason to know that certain places may contain responsive records, it is obligated under FOIA to search barring an undue burden.'") (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999)).

Second, with regard to Plaintiff's argument that DOE itself said that it searched only for physical and electronic records containing the search term "National Coal Council" and made no mention of the use of "NCC, Inc." as a search term (or any other search term designed to locate documents in categories 6-13 of Plaintiff's request), *see* Pl. Mem. at 42, DOE's response is a non sequitur. DOE says that "as evidenced by the fact that NCC, Inc. documents were, in fact, located, DOE did search for responsive documents related to NCC, Inc." DOE Opp/Reply at 3. But the unsurprising fact that DOE's search turned up some documents pertaining to NCC, Inc. in files searched using the search term "National Coal Council" does *not* mean that DOE conducted a search reasonably calculated to locate *all* documents relating to NCC, Inc.

What DOE conspicuously does not say in its Declarations (and evidently cannot say) is that it conducted a search of either its physical or electronic files specifically using "NCC, Inc." as a search term, although Plaintiff's request was heavily focused on the creation and use of NCC, Inc. as the Council's alter ego. This omission also renders the search facially inadequate under Circuit precedent. *See Coffey*, 249 F. Supp. 2d at 498 (holding that agency's search was legally deficient because the court could not "confirm that the agency's choice [of search terms] was '*reasonably* calculated to lead to [all] responsive documents'") (quoting *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015)).[9]

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's opening brief, the Court should grant Plaintiff's motion for summary judgment and (1) order DOE promptly to disclose the documents withheld on Exemption 4 grounds, because Plaintiff is entitled to those documents as a matter of law and there is a significant public interest in their disclosure; and (2) order DOE to conduct a new search.

[9] These deficiencies in the search also help to explain why DOE admittedly did not locate a single document predating 2008, *see* Pl. Mem. at 43, although DOE attributes that to the agency's "historical document management practice." Supp. Morris Decl. ¶ 13. Moreover, DOE's explanation for why it did not locate any physical or electronic records encompassing 22 years of the Council's existence makes no sense in view of what DOE *has* produced. DOE's FOIA Officer says that prior to 2015, "records [pertaining to advisory committees] could be transferred to [the National Archives and Records Administration] *when they were three years old*." *Id*. (emphasis added). But that would not explain why DOE located some 2008 records that were *nine years old* when DOE searched for documents responsive to Plaintiff's request and yet, at the same time, DOE failed to locate a single responsive document dated between 1986 and 2008. This unexplained discrepancy in DOE's explanation for the meager results of its search further reinforces why DOE should be ordered to conduct a more thorough search.

Respectfully submitted,

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