Exhibit C

NRDC

July 1, 2019

Via email to: hq.foia@epa.gov

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

Re: Freedom of Information Act Appeal - Request EPA-HQ-2017-006487

Dear FOIA Officer:

I am writing to appeal EPA's denial of FOIA request number EPA-HQ-2017-006487. As explained below, EPA failed to justify its decision to withhold all responsive records, and failed to demonstrate that an adequate search was performed.

The FOIA request was filed on behalf of the Natural Resources Defense Council (NRDC) on April 24, 2017. The request sought records pertaining to the content of speeches, talks, remarks or presentations made by Administrator Pruitt to people outside the federal government. The request is attached here as Exhibit A. On May 3, 2017, EPA granted NRDC's fee waiver request.

On October 26, 2017, EPA proposed a search strategy that included some suggested custodians, and estimated a completion date of May 30, 2018. The letter is attached as Exhibit B. NRDC requested that additional custodians be added to the list, and noted that EPA had given no good reason for such an extensive delay in producing documents. This email is attached as Exhibit C. EPA did not respond.

On April 9, 2019, EPA emailed a letter dated April 4 denying the FOIA request in full. The denial letter is attached as Exhibit D. EPA claimed that its search resulted in 94 pages of responsive records, but the agency determined that *all* records would be withheld pursuant to the "deliberative process" privilege. By way of explanation, EPA gave only the conclusory statement that the records are "predecisional and deliberative and would harm agency decision-making if released."

This is appeal is timely as it is within 90 days of EPA's adverse determination. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

ARGUMENT

Deliberative Process Privilege

The deliberative process privilege protects an agency's internal, pre-decisional policy deliberations. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). EPA has the burden to show that the privilege is applicable, and "conclusory assertions" are insufficient. *See id.* at 861; *id.* at 868 ("[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process."). EPA has failed to meet that burden: the denial letter contains only a conclusory assertion. EPA gave no explanation for *why* the withheld documents were deliberative—it merely stated that they were.

First, it is implausible that every record pertaining to the substance of the Administrator's public speeches contains exclusively privileged "deliberations." Records that reflect what the Administrator actually said in a public speech, or the agency's final decision about what the Administrator would say, are unquestionably not deliberative and must be released. *See Judicial Watch, Inc. v. U.S. Dep't of State*, 349 F. Supp. 3d 1, 9-10 (D.D.C. 2018) (denying privilege for emails conveying the agency's "final public position," "finalized talking points that were already used," and "final versions" of talking points); *id.* at 11 (denying privilege for documents that "read like prepared, bulleted talking points and canned answers to expected questions"); *Seife v. U.S. Dep't of State*, 298 F. Supp. 3d 592, 620 (S.D.N.Y. 2018) (agency did not justify application of the privilege where, among other things, it failed to "specify whether the proposed talking points at issue are in draft or final form, or whether they were the talking points actually implemented by State Department officials in communication with the press"); *Carter, Fullerton & Hayes, LLC v. FTC*, 637 F. Supp. 2d 1, 6 (D.D.C. 2009) (finding that the "final version" of a speech, as opposed to drafts, would not be protected); *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 702 (D.D.C. 1983) (ordering the release of proposed language and contents of a speech where "there is no basis for determining whether this is a 'draft' or the final text of the speech itself"). Because many government speeches "elude recording or transcription," "stretching the deliberative process privilege" to this extent "would put many important public statements outside FOIA's grasp." *Judicial Watch*, 349 F. Supp. 3d at 8.

Second, some courts have found that even deliberations about what an agency might say or should say to the public are also not privileged. "Deliberations about how to present an already decided policy to the public, or documents designed to explain that policy to—or obscure it from—the public, including in draft form, are at the heart of what should be released under FOIA." *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011); *id.* at 756 (ordering release of records reflecting deliberations over how an existing policy should be communicated to the public); *see also Citizens Union of City of New York v. Attorney Gen. of New York*, 269 F. Supp. 3d 124, 164-65 (S.D.N.Y. 2017); *Fox News Network, LLC v. U.S. Dep't of Treasury*, 911 F. Supp. 2d 261, 276 (S.D.N.Y. 2012) ("[C]ommunications concerning how to present agency policies to the press or public, although deliberative, typically do not qualify as substantive policy decisions protected by the deliberative process privilege."); *id.* at 282 (same); *id.* at 283 (requiring release of staff communications "on the messages and themes to include in the Secretary's speech").

Finally, even courts that may apply the privilege to some deliberations regarding an agency's public statements also recognize that not *all* such discussions are automatically privileged—the agency must still justify the withholding as predecisional and deliberative, with reference to the purposes of the exemption. *See, e.g., Seife*, 298 F. Supp. 3d at 618 (finding privilege insufficiently justified, with respect to emails about agency announcements, where there was no showing that the documents included "recommendations or proposals" or "reflect the views of the authors rather than of the agency"). At least one court has explained that the privilege protects only "messaging" deliberations if the "messaging" decision is "of the type that Congress has actually (if perhaps only impliedly) asked the agency to make." *New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 4853891, at *2 (S.D.N.Y. Oct. 5, 2018); *see id.* at *3 (finding draft talking points, among other records, not privileged where there was "no basis to conclude that [the agency] was exercising its essential policymaking role in those routine messaging decisions").

EPA must either release the responsive documents or, at a minimum, provide an adequate explanation for withholding them.

Adequacy of the Search

EPA has given no reason to believe it performed an adequate search for responsive records. *See Seife*, 298 F. Supp. 3d at 607 (requiring agencies to make a good faith effort to search for requested documents using methods reasonably calculated to produce responsive records). EPA's initial suggested list of custodians, *see* Exhibit B, was patently inadequate. Among other deficiencies (as pointed out by NRDC's email suggesting additional custodians, *see* Exhibit C), the agency did not even suggest searching the Administrator's own files for records pertaining to his speeches and remarks. EPA never acknowledged NRDC's request that the agency include more custodians. Thus it is not clear that an adequate search was performed.

Thank you for your prompt consideration of this appeal.

Respectfully submitted,

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