UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL and ENVIRONMENTAL DEFENSE FUND, Plaintiffs, -v- UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	18 Civ. 11227 (PKC) (DCF)

MEMORANDUM OF LAW IN SUPPORT OF EPA'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Defendant the Environmental Protection Agency ("EPA"), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in opposition to the motion to expedite and for summary judgment of Plaintiffs Natural Resources Defense Council and Environmental Defense Fund (together, "Plaintiffs") in this case under the Freedom of Information Act ("FOIA").

PRELIMINARY STATEMENT

The Court should uphold EPA's withholding of a nonfinal version of the Optimization Model for reducing Emissions of Greenhouse gases from Automobiles, or OMEGA, under the deliberative process privilege. Plaintiffs' FOIA request sought updated versions of the core model, along with input data and other data processers used in connection with OMEGA. EPA fully released the latest set of input data and data processors compatible with the current version of the model, but withheld the current draft of the core OMEGA model, version 1.4.59.

The sole issue before the Court is EPA's withholding of the most recent interim draft version of the core OMEGA model pursuant to the deliberative process privilege under FOIA exemption 5, 5 U.S.C. § 552(b)(5). Because that withholding was appropriate, the Court should grant summary judgment to EPA. First, the latest draft of the core model is predecisional. EPA has released versions of the OMEGA model in the past, but it has only done so when a specific version of OMEGA was in fact used by EPA as the basis for agency rulemaking—and thus at a point when the relevant core model was "finalized" for purposes of a specific agency decision. The current draft, version 1.4.59, has not been used as the basis for such an agency final decision, though EPA may use the core model to inform rulemakings on vehicle emissions in the future. The model thus reflects the tentative views of program staff rather than the views of the agency itself. Therefore, the current draft of the core model is nonfinal and predecisional.

Second, the draft core OMEGA model is deliberative. The current draft was created to assist EPA in its deliberative process concerning forthcoming iterations of the OMEGA model itself, as well as for its broader deliberations concerning how best to assess greenhouse gas emissions standards in future agency rulemakings. It is well established that factual information, including data and scientific modeling, may be protected by the deliberative process privilege when its release would reveal the agency's internal deliberations, as release of the current OMEGA core model draft would here. Because the current interim version of the core model reflects the give-and-take of EPA's consultative process, it is protected by the deliberative process privilege. EPA's withholding of the model should thus be upheld.

Finally, Plaintiffs have not demonstrated good cause to expedite this action and do not qualify for expedited treatment under FOIA. Accordingly, the Court should grant EPA's motion for summary judgment and deny Plaintiffs' motion.

BACKGROUND[1]

A. The OMEGA Model

The OMEGA model is a computer model that contains a series of algorithms designed to evaluate the relative cost and effectiveness of available technologies and apply them to a defined vehicle fleet to help facilitate the analysis of the costs and benefits of reducing greenhouse gas emissions. Declaration of William L. Wehrum ("Wehrum Decl.") ¶¶ 5-6; Declaration of William Charmley ("Charmley Decl.") ¶¶ 8-9. In the past, EPA has publicly released the latest

[1] Pursuant to the usual practice in this district in FOIA cases, EPA has not submitted a counterstatement to Plaintiffs' Local Rule 56.1 statement, Dkt. No. 45. *See, e.g., N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012). In following the practice of not submitting a Rule 56.1 statement or responding to Plaintiffs' statement, EPA does not admit the accuracy or the materiality of any purported fact asserted by Plaintiffs in their Rule 56.1 statement. *See NAACP Legal Def. & Educ. Fund, Inc. v. HUD*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *1 n.1 (S.D.N.Y. Nov. 30, 2007). EPA reserves the right to respond to Plaintiffs' Rule 56.1 statement should the Court deem a response appropriate in this action.

updated version of the source code for the OMEGA model and other model components only when the agency formally relied upon it in its analysis of a regulatory action such as a proposed or final rule. Wehrum Decl. ¶ 7; Charmley Decl. ¶ 15.

EPA has publicly released five versions of the OMEGA model since its first iteration, each of which corresponded to a particular regulatory action. Wehrum Decl. ¶ 7. EPA first released a version of the OMEGA model in October of 2009 to support a joint EPA-National Highway Traffic Safety Administration ("NHTSA") rule governing light-duty vehicle greenhouse gas emissions standards for model years 2012-2016. *Id.* ¶ 10; *see* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (final rule); 74 Fed. Reg. 49,454 (Sept. 28, 2009) (proposed rule).

The OMEGA model has grown and developed since its inception. Wehrum Decl. ¶ 11. In addition to the monthly or even weekly updates to the OMEGA model by the Office of Transportation and Air Quality staff who work with it closely, upper-level EPA decisionmakers may work with technical staff on a longer timeline to make more substantive analytical changes to the core OMEGA model, giving it further functionality to allow EPA's policy decisions to be as well-informed as possible. *Id.*

The regulatory development process and the process of making upgrades to the OMEGA model have traditionally proceeded in parallel. *Id.* ¶ 12. As a regulation develops, EPA's high-level policymakers may realize that they need a different or more substantial type of analysis in a certain area to determine the available policy options that are supported by a robust technical record. *Id.* The OMEGA model only becomes final and appropriate for public release, and has only been publicly released in the past, when the regulatory development process has become similarly final. *Id.* ¶ 13. Release of an updated draft version of the OMEGA model before that

point would reveal whether or not substantive analytical changes have been made or explored in the current version of the core OMEGA model, and thus would reveal the agency's deliberative process in developing policy in this area. *Id.* ¶¶ 13-14. The OMEGA model has been updated by EPA program staff in various ways since its last public release in 2016. Charmley Decl. ¶ 16.

B. EPA's Proposed Safer Affordable Fuel Efficient (SAFE) Vehicles Rule for Model Years 2021-2026

On August 24, 2018, EPA and NHTSA jointly proposed the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (hereinafter "SAFE Vehicles Rule"); *see* Wehrum Decl. ¶ 3. If finalized, that rule would amend certain existing Corporate Average Fuel Economy ("CAFE") and tailpipe carbon dioxide emissions standards for passenger cars and light trucks and establish new standards, all covering model years 2021 through 2026. *See id.* In their analysis, "the agencies . . . determined it is reasonable and appropriate" to use the U.S. Department of Transportation's CAFE model for analysis of regulatory alternatives for the SAFE Vehicles Rule. SAFE Vehicles Rule, 83 Fed. Reg. at 43,000; *see* Wehrum Decl. ¶ 4. Because EPA and NHTSA decided to use the CAFE model, EPA did not rely on the OMEGA model in the development of the SAFE Vehicles Rule. Wehrum Decl. ¶ 8; Charmley Decl. ¶¶ 17-21.[2] Therefore, consistent with prior practice, EPA did not release an updated version of the OMEGA model at the time the SAFE Vehicles Rule was proposed, nor has it done so since then. Wehrum Decl. ¶ 8. However, EPA may use the OMEGA model to inform rulemakings relating to vehicle emissions in the future. *Id.* ¶ 9.

[2] EPA "briefly used the results from an interim version of the OMEGA model (v.1.4.59)" as part of an interagency review process for the SAFE Vehicles Rule, but "did not actually rely on the OMEGA model for analysis or otherwise in the rulemaking process." Charmley Decl. ¶ 19.

C. Procedural History

Plaintiffs submitted a FOIA request to EPA in August 2018, seeking a variety of records related to the OMEGA model. *See* Charmley Decl. ¶¶ 5-6 & Ex. A ("FOIA Request"). Plaintiffs filed this action on December 3, 2018. Dkt. No. 1. On December 28, 2018, before EPA's answer was due, Plaintiffs filed a motion purporting to seek the entry of partial summary judgment and to expedite EPA's response to a "priority" subset of the FOIA Request. Dkt. Nos. 12-15. EPA opposed Plaintiffs' motion to expedite in February 2019, Dkt. No. 24, after a stay of the case due to a lapse in appropriations to the Department of Justice, *see* Dkt. Nos. 10, 19. In its response, EPA noted that it planned to respond to the "priority" portion of Plaintiffs' FOIA Request by March 4, 2019—before the date on which Plaintiffs' motion requested that the Court order a response as to the same records. *See* Dkt. Nos. 23, 24.

The Court took no action on Plaintiffs' motion to expedite. EPA made a partial response on March 4, 2019, by producing input files for OMEGA version 1.4.59, and withholding the latest version of the core OMEGA model under the deliberative process privilege. *See* Charmley Decl. ¶¶ 10, 22 & Ex. B (EPA letter dated Mar. 4, 2019). After EPA's production of records, Plaintiffs withdrew their motion to expedite and unilaterally narrowed their request to include only "the current full version of EPA's OMEGA model and the files necessary to fully utilize it." Dkt. No. 33 (Plaintiffs' letter dated Mar. 13, 2019). On March 29, 2019, after conferral, the parties agreed that only specified files compatible with version 1.4.59 of the OMEGA model remain at issue in the action, pursuant to Plaintiffs' narrowed FOIA request. Dkt. No. 37 (Joint Status Report). EPA responded to the remaining portions of the request on April 1, 2019, and released in full all "OMEGA pre-processors" and "post-processors," including the OMEGA "Machine" tool. Charmley Decl. ¶¶ 10, 23-24 & Ex. C (EPA letter dated Apr. 1, 2019).

EPA and Plaintiffs now cross-move for summary judgment concerning the propriety of EPA's withholding of the latest draft version of the core OMEGA model—its sole withholding in response to Plaintiffs' narrowed request.[3]

ARGUMENT

FOIA "expresses a public policy in favor of disclosure so that the public might see what activities federal agencies are engaged in." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). At the same time, FOIA is intended to strike "a workable balance between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Thus, under FOIA, an agency must disclose those responsive records "in its possession unless they fall under one of nine enumerated and exclusive exemptions." *N.Y. Times v. DOJ*, 101 F. Supp. 3d 310, 317 (S.D.N.Y. 2015); *see also* 5 U.S.C. § 552(a)-(b). The exemptions to disclosure under FOIA "reflect Congress' recognition that releasing certain records might prejudice legitimate private or governmental interests." *A. Michael's Piano*, 18 F.3d at 143.

"Summary judgment is the procedural vehicle by which most FOIA actions are resolved." *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 73 F. Supp. 3d 350, 355 (S.D.N.Y. 2014) (quotation marks omitted). Under Rule 56, summary judgment is warranted when, viewing the evidence in the light most favorable to the nonmovant, the Court determines that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the burden of showing that it is entitled to summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The nonmoving party, however, may not rely solely on "conclusory allegations or

[3] In their motion, Plaintiffs do not challenge the adequacy of EPA's search for records responsive to their narrowed request, which is thus not an issue before the Court.

unsubstantiated speculation" to defeat a motion for summary judgment. *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998).

"In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment as to the applicability of a FOIA exemption is "warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (quotation marks omitted). "Affidavits submitted by an agency are accorded a presumption of good faith," and a court may award summary judgment if the affidavits provided by the agency are "adequate on their face." *Carney*, 19 F.3d at 812 (quotation marks omitted). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner*, 592 F.3d at 73 (quotation marks omitted).

I. EPA PROPERLY WITHHELD THE LATEST DRAFT VERSION OF THE CORE OMEGA MODEL PURSUANT TO THE DELIBERATIVE PROCESS PRIVILEGE UNDER FOIA EXEMPTION 5

EPA's sole withholding here was of its latest interim version of the core OMEGA model. The withheld version of the model, version 1.4.59, is a predecisional draft that was properly withheld pursuant to the deliberative process privilege under FOIA's exemption 5.

A. Legal Standards

FOIA's exemption 5 excludes from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). That language "incorporate[s] . . . all the normal civil discovery

privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991).

Exemption 5 encompasses the "'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Id.* "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). Thus, the deliberative process privilege "protect[s] open and frank discussion" among government decisionmakers by protecting their decisionmaking process. *Id.* at 9. "Congress adopted Exemption 5 because it recognized that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl." *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 194 (2d Cir. 2012) (quoting *Wolfe v. HHS*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc)).

Information in an agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision," *Hopkins*, 929 F.2d at 84 (quoting *Grumman*, 421 U.S. at 184), and if it "precedes, in temporal sequence, the 'decision' to which it relates," *Grand Cent. P'ship*, 166 F.3d at 482. However, the government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975). As long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002).

"A document is 'deliberative' when it is actually related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (quotation marks and ellipsis omitted). In determining whether a document is deliberative, courts inquire whether it "formed an important, if not essential, link in [the agency's] consultative process," whether it reflects the opinions of the author rather than the policy of the agency, and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]." *Id.* at 483.

"It is well-settled that draft documents, by their very nature, are typically predecisional and deliberative. They reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation by their authors or by their superiors." *Color of Change v. DHS*, 325 F. Supp. 3d 447, 453 (S.D.N.Y. 2018) (quoting *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 518 (S.D.N.Y. 2010)); *accord, e.g.*, *Nat'l Council of La Raza v. DOJ*, 339 F. Supp. 2d 572, 583 (S.D.N.Y. 2004) ("Drafts and comments on documents are quintessentially predecisional and deliberative.").

B. EPA's Withholding of the Draft OMEGA Model Was Proper Under the Deliberative Process Privilege

1. EPA's Draft OMEGA Model Is Predecisional

The current draft of the OMEGA model, version 1.4.59, is predecisional. As Plaintiffs acknowledge, the OMEGA model was developed "to assist agency decisionmakers in establishing standards for [greenhouse gas] emissions from new automobiles under the Clean Air Act." Dkt. No. 40 ("Pl. Br.") at 21; *see* Wehrum Decl. ¶ 6. The interim OMEGA draft that Plaintiffs seek was "prepared in order to assist an agency decisionmaker in arriving at [a] decision" on issues related (1) to the regulation of greenhouse gas emissions and (2) to future final versions of OMEGA, and is thus predecisional. *Tigue*, 312 F.3d at 80 (quoting *Grand Cent. P'ship*, 166 F.3d at 482); Wehrum Decl. ¶¶ 11-14. EPA has thus "established [the] deliberative

process[es] . . . involved, and the role played by the documents in issue in the course of th[ose] process[es]." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

As noted above, the current version of the OMEGA model has not been used as the basis for a formal agency decisionmaking process, and specifically was not used as a basis for the proposed SAFE Vehicles Rule. Wehrum Decl. ¶ 8.[4] Thus, the current interim version has not been finalized in the manner that it would be for use as part of a final agency decision, *see id.* ¶¶ 8, 12-14, 16-20; Charmley Decl. ¶¶ 17-21. Because OMEGA version 1.4.59 has not been relied upon in the agency's rulemaking process, and because the current interim core model is not a finalized version, it necessarily precedes any potential final agency decision. *See Grand Cent. P'ship*, 166 F.3d at 482.

Plaintiffs incorrectly contend that because the withheld version was not used to develop the proposed SAFE Vehicles Rule, it thereby "did not play *any* role in the course of EPA's decisionmaking process." Pl. Br. at 21 (alterations and quotation marks omitted). Plaintiffs are wrong. The relevant question is whether version 1.4.59 of the core OMEGA model, like other interim versions, was prepared in the course of EPA's decisionmaking concerning the broader regulation of auto emissions and future final versions of OMEGA—and it was. Wehrum Decl. ¶¶ 5-6, 11-14, 16. Accordingly, the draft model is predecisional. *See Tigue*, 312 F.3d at 80 (document was predecisional where it was "prepared . . . in order to assist the [agency] in its decisionmaking regarding the future of [an agency program]"); *see also Taxation with Representation Fund v. IRS*, 646 F.2d 666, 677-78 (D.C. Cir. 1981) ("[T]he courts have

[4] As EPA notes, the OMEGA model may be used for agency vehicle emissions determinations in the future. Wehrum Decl. ¶ 9. Additionally, as noted above, EPA "briefly used the results from an interim version of the OMEGA model (v.1.4.59)" as part of an interagency review process for the SAFE Vehicles Rule, but "did not actually rely on the OMEGA model for analysis or otherwise in the rulemaking process." Charmley Decl. ¶ 19.

recognized little public interest in the disclosure of 'reasons supporting a policy which an agency has rejected, or reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground.'" (quoting *Sears*, 421 U.S. at 152)).

Moreover, the OMEGA model may be used for other EPA decisions in the future. Wehrum Decl. ¶ 9. EPA does not need to "identify a specific decision" it plans to make in the future using the evolving versions of the OMEGA model to establish the predecisional nature of the current draft of the model. *Sears*, 421 U.S. at 151 n.18; *accord Color of Change*, 325 F. Supp. 3d at 454. "[T]hat the government does not point to a specific decision made by the [agency] in reliance on the [deliberative material] does not alter the fact that the [material] was prepared to assist [agency] decisionmaking on a specific issue." *Tigue*, 312 F.3d at 80. Contrary to Plaintiffs' argument, the deliberative process privilege is not "contingent on later events[,] such as whether the draft ultimately evolved into a final agency position." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014). Indeed, "to require release of drafts that never result in final agency action would discourage innovative and candid internal proposals by agency officials and thereby contravene the purposes of the privilege." *Id.*[5]

Therefore, EPA has established that version 1.4.59 of the OMEGA model is predecisional, and Plaintiffs' arguments to the contrary should be rejected.

[5] The fact that the version of the core OMEGA model sought by Plaintiffs is the current *latest* draft does not make it a final version. This misconception "has been rejected by both the Second and D.C. Circuits." *Color of Change*, 325 F. Supp. 3d at 454; *see ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016) (concluding that document that was never ultimately published was nonetheless "a draft and for that reason predecisional"); *Nat'l Sec. Archive*, 752 F.3d at 463 (there "may be no final agency document because a draft died on the vine"—but a "draft is still a draft and thus still pre-decisional and deliberative").

2. The Current Draft Version of OMEGA Is Deliberative, and Its Release Would Expose the Agency's Consultative Process

The current draft version of OMEGA is deliberative. Agencies are "engaged in a continuing process of examining their policies," which entails the creation of "recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears*, 421 U.S. at 151 n.18. In like fashion, EPA is in a continuing process of considering updates to the OMEGA model. *See* Wehrum Decl. ¶¶ 11-12; Charmley Decl. ¶¶ 13-16. The release of the latest interim version would reveal "whether or not substantive analytical changes have been made or explored in the current version of the OMEGA model, which would betray the deliberative give and take of the policy development process." Wehrum Decl. ¶ 14. EPA has established that the current draft version of the core model constitutes a part of its deliberations as to (1) future versions of the OMEGA model and the features of such a model, as well as (2) broader questions concerning methodologies for future vehicle emissions standards. *Id.* ¶¶ 9, 11-14, 16-20. OMEGA version 1.4.59 reflects only the preliminary thinking of EPA program staff, and their modifications have not been reviewed or approved by upper-level EPA policymakers. *Id.* ¶ 20. Thus, the interim core model is deliberative, as it "reflects the give-and-take of the consultative process" by which agency decisions and policies are formed. *Brennan Ctr.*, 697 F.3d at 202 (quotation marks omitted). "Materials that allow the public to reconstruct the predecisional judgments of the administrator are no less inimical to exemption 5's goal of encouraging uninhibited decisionmaking than materials explicitly revealing his or her mental processes." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1122 (9th Cir. 1988).

Plaintiffs argue that the current draft of the OMEGA model contains only "factual, investigative" material unprotected by the deliberative process privilege. Pl. Br. at 16-17. The Court should reject Plaintiffs' simplistic view, which relies on a supposed dichotomy between

facts and deliberation. But the deliberative process privilege "was intended to protect not simply deliberative *material*, but also the deliberative *process* of agencies." *Mapother v. DOJ*, 3 F.3d 1533, 1538 (D.C. Cir. 1993) (emphasis added) (quoting *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974)). For this reason, it is "well-established law" that "the deliberative process privilege operates to shield from disclosure agency decision-making reflecting the collection, culling and assessment of factual information or scientific data." *Ctr. for Biological Diversity v. EPA*, --- F. Supp. 3d ---, No. 16 Civ. 175, 2019 WL 1382903, at *12 (D.D.C. Mar. 27, 2019) (collecting cases); *see, e.g.*, *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) ("To the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5."); *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) ("disclosure of factual portions of the report may reveal the deliberative process of selection").

Courts have concluded that scientific models, studies, and tools like OMEGA may be protected by the deliberative process privilege. In *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009), the court considered a parallel challenge to the withholding of an EPA "draft groundwater flow model." The requester—like Plaintiffs here—asserted that "the model is purely factual and facts cannot be deliberative." *Id.* The *Goodrich* court squarely rejected this argument, holding that the

> model reflects EPA's deliberative process because evolving iterations of the Model's inputs and calibration reflect the opinions of the staff currently developing the Model, which may not represent EPA's ultimate opinions relating to these matters. Therefore, even if the data plugged into the model is itself purely factual, the selection and calibration of data is part of the deliberative process to which Exemption 5 applies. Therefore, EPA has properly withheld the groundwater flow model, even though it plans to release the complete or final model in the future.

Id. at 189-90 (internal citations and quotation marks omitted).

Similarly, in *Urban Air Initiative, Inc. v. EPA*, 271 F. Supp. 3d 241 (D.D.C. 2017), the court considered a requester's challenge to the withholding of a study that EPA conducted as part of the agency's process of creating an "updated emissions model that considered the effect of individual fuel properties on emissions from vehicles." *Id.* at 247. The court upheld EPA's withholding of information concerning the study, concluding that it was protected by the deliberative process privilege. *Id.* at 260-61. In creating the study, EPA "had to make critical decisions" concerning "types of fuel blends it could and should test," and also "defined the scope of the study, estimated costs, determined test procedures, and selected the fuel parameters and vehicles"—the "sorts of decisions" that are "exactly the type of agency judgments that the deliberative process privilege protects." *Id.* at 261 (quotation marks omitted). Thus, the *Urban Air Initiative* court rejected the plaintiff's argument that "deliberations that are technical in nature" do not "relate to any policy-oriented judgment." *Id.* at 260.

These holdings support EPA's withholding of the draft core OMEGA model. EPA's ongoing process of updating and modifying the core OMEGA model is protected by the deliberative process privilege. The "evolving iterations" the OMEGA model "reflect the opinions of the staff currently developing" it, but may "not represent EPA's ultimate opinions relating to these matters." *Goodrich*, 593 F. Supp. 2d at 189 (quotation marks omitted). Moreover, EPA's future changes may include consideration of specific modifications to the OMEGA model, including the addition of "an economic simulation or consumer choice sub-model as an analytical tool." Wehrum Decl. ¶¶ 17-20. Indeed, the release of the current version of the core model would compromise internal agency considerations even if it were to reveal only that the agency did not add such features. *See id.* ¶¶ 14, 19.

The agency's determinations in updating the model are "committed to the expertise and

judgment of EPA." *Urban Air Initiative*, 271 F. Supp. 3d at 261. The fact that EPA's internal deliberations concerning such changes may have "entailed considerations of scientific principles does not mean that those discussions were not 'deliberative.'" *Id.* Indeed, Plaintiffs' notion that scientific deliberations are unprotected "makes little sense" in the context of EPA, whose "core mission is directly related to and affected by science." *Id.*; *accord Ctr. for Biological Diversity*, 2019 WL 1382903, at *11 (fact that agency decision "depends on a scientific assessment . . . does not divest the agency's decisionmaking process of eligibility for Exemption 5 protection").

The cases cited by Plaintiffs are inapposite. The principal case they cite is *Reilly v. EPA*, 429 F. Supp. 2d 335 (D. Mass. 2006), where the court concluded that *outputs* from a computer model—as opposed to the model itself—were not protected by the deliberative process privilege. *Id.* at 348-52. The *Reilly* court first held that the relevant model outputs were simply "raw data or empirical evidence used by the EPA in its rulemaking," and on this basis concluded that the "requested [model] runs fall closer to fact and would not reveal the agency's protectable thought processes." *Id.* at 352 (quotation marks omitted). But the relevant version of the computer model in *Reilly* was already "available for use by the public," "with its intrinsic assumptions and information." *Id.* at 350, 353. Therefore, *Reilly* is distinguishable, as it did not involve the withholding of a draft version of a model itself, whose release would reveal the agency's deliberative process in revising and updating the draft.[6]

The other decisions Plaintiffs cite are also distinguishable. *Lahr v. NTSB* involved a final

[6] Even were its holding applicable, *Reilly* also appears to have been incorrectly decided. As the court there conceded, its decision necessarily revealed the "agency's thought process" by exposing the agency's choice of inputs. *Reilly*, 429 F. Supp. 2d at 352. The court departed from this premise to the conclusion that "[i]n a larger sense everything could be considered deliberative," but acknowledged that the case was "not easily decided" and came down to "where one draws the line between protected and non-protected material." *Id.*

version of a computer flight path simulation that the NTSB in fact "used in determining the probable cause of the crash of Flight 800 and the safety recommendations that followed." *Lahr v. NTSB*, No. 03 Civ. 8023, 2006 WL 2854314, at *23 (C.D. Cal. Oct. 4, 2006). This, of course, is unlike the current draft OMEGA model, which is not in final form and which has not been used in final agency decisionmaking; in particular, it was not used as the basis for EPA's Safe Vehicles Rule. Wehrum Decl. ¶¶ 7-8. Moreover, *Lahr* concluded that the NTSB computer simulation was not deliberative because the court found "no evidence that, by reviewing the disclosed source file, a reader would be able to understand or reconstruct the [agency's] deliberative process," nor that "disclosure of this program would disclose the content of [the agency's] review and co[mm]ent." *Lahr*, 2006 WL 2854314, at *24.[7] This is not the case here: given prior releases of the OMEGA model, the agency's consultative processes would be disclosed because its decisions about modifications to the program would be revealed by comparison to past released versions. *See* Wehrum Decl. ¶¶ 16-20. And *Carter v. U.S. Dep't of Commerce* involved the release of *data* derived from a calculation—not the calculation methodology or material revelatory of the deliberative process that generated that methodology. 186 F. Supp. 2d 1147, 1156-57 (D. Or. 2001) ("The data sought are numbers. It may be that a deliberative process led to the methodology which generated the numbers, but the numbers are the result of the deliberative process. They are not the process."), *aff'd*, 307 F.3d 1084 (9th Cir. 2002). Moreover, in *Carter*, the agency had already "disclosed a significant amount of the calculations, assumptions, hypotheses, equations, analysis, and discussion relevant to the

[7] This was, in part, because the only version of the program at issue was the "executable file, which consists of binary machine language (0s and 1s)." *Lahr*, 2006 WL 2854314, at *23.

[withheld] adjusted data." *Id.* at 1156.[8]

Nor do Plaintiffs successfully distinguish *Cleary, Gottlieb, Steen & Hamilton v. HHS*, in which the court—like the courts in *Goodrich* and *Urban Air Initiative*—concluded that computer programs used to study epidemiology were protected by the deliberative process privilege because their release would reveal the "decision-making process behind the culling and selection of relevant facts." 844 F. Supp. 770, 783 (D.D.C. 1993). As the court there held, the computer programs, which were continually modified, "reflect[ed] their creator's mental processes." *Id.* at 782-83. Just so with the current draft of the core OMEGA model, which "reflect[s] the opinions of the staff developing the model, [and] may not represent EPA's ultimate opinions regarding these matters." Wehrum Decl. ¶ 17; *see id.* ¶¶ 19-20.

Plaintiffs deny by *ipse dixit* that they can understand EPA staff's mental processes through "iterative revisions" to the OMEGA model, Pl. Br. at 20, but they do not explain why comparing the current draft of OMEGA to the last released version would not allow them to do precisely that. *See* Wehrum Decl. ¶¶ 14-20. Indeed, such a comparison between a draft and a final version is precisely the kind of disclosure that the deliberative process privilege is meant to preclude. *See Lead Indus.*, 610 F.2d at 86 ("If [a withheld] segment [of a draft] did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so. . . . [S]uch disclosure of the internal workings of the agency is exactly what the law forbids."); *Shinnecock*

[8] Plaintiffs also cite *Kansas ex rel. Schmidt v. U.S. Dep't of Def.*, 320 F. Supp. 3d 1227, 1244 (D. Kan. 2018), for the proposition that "deliberative process privilege does not protect estimates made where the estimator followed a strict set of guidelines and made few subjective guesses." *See* Pl. Br. at 19 n.5. But this in fact undermines Plaintiffs' argument: EPA is not following "a strict set of guidelines" in revising OMEGA. Instead, the release of the current draft version would reveal the agency's deliberations about what the "guidelines" for analysis under the model should be—not simply the result of a predetermined formula.

Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 371 (E.D.N.Y. 2009) ("[A]ny differences between the first memorandum . . . and the second memorandum would only be non-cumulative to the extent that they revealed the evolution of the draft. However, such a disclosure would infringe upon the deliberative process privilege.").

For these reasons, EPA has established that the current draft version of the OMEGA model is deliberative; Plaintiffs' arguments to the contrary are unavailing.

3. Release of the Draft OMEGA Model Would Cause the Types of Harm That the Deliberative Process Privilege Is Intended to Prevent

At a loss under the principal elements of the deliberative process test, Plaintiffs suggest that the Court should look to the "animating purposes" of the privilege. Pl. Br. at 21-22. But here, too, their arguments fail, as the release of the draft OMEGA model would foreseeably cause harm protected by the deliberative process privilege.

First, Congress created the deliberative process privilege in part to prevent the "harm to the candor of present and future agency decisionmaking" that would result from the release of predecisional and deliberative materials. *Nat'l Sec. Archive*, 752 F.3d at 464. It is clear that "the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl because the full and frank exchange of ideas on . . . policy matters would be impossible." *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011) (quotation marks omitted).

The release of nonfinal, interim versions of the core OMEGA model would harm EPA's decisionmaking processes. Release "would chill free and open discussions of EPA staff regarding their opinions on the appropriate analytical tools to be included in the model," because agency program staff "would be less likely to test or experiment with new calibrations or tools that could help create a more effective and robust version of the OMEGA model" if their

nonfinal work product was constantly susceptible to release to the public before it was finalized. Wehrum Decl. ¶ 21. "This chilling effect would impact EPA's decisionmaking processes and ability to have internal discussions and consultations while designing and updating complex models like OMEGA, and may harm the agency's decisionmaking capabilities in the future regulatory development process." *Id.*

Plaintiffs' arguments to the contrary are unconvincing. They contend that because the model "is not the work of any one employee," it could not lead an employee to be "singled out for criticism." Pl. Br. at 22. But this does not follow: nothing in logic or law suggests that the premature release of deliberative materials is less likely to chill discussions when created by a team rather than a single individual. *Cf. Brennan Ctr.*, 697 F.3d at 206 (release of deliberative materials will dissuade "subordinates within an agency" from "provid[ing] the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism" (quotation marks omitted)). Next, Plaintiffs misstate OMEGA's release history. It was not subject to "routine disclosure," Pl. Br. at 22, in *draft* form, but instead was released only when "the agency formally relied upon it in its analysis of a regulatory action such as a proposed or final rule," Wehrum Decl. ¶ 7—that is, when the model was *final* for relevant policy purposes. Last, Plaintiffs claim that the model's code cannot reflect recommendations, Pl. Br. at 22, but this is wrong. Revelation of draft modifications to the model may reveal EPA program staff's consideration of policy choices that may not ultimately become the position adopted by EPA—or may, by the same process, indicate that no such changes were made. *See* Wehrum Decl. ¶¶ 14-21; *see also Goodrich*, 593 F. Supp. 2d at 189 ("The draft groundwater flow model reflects EPA's deliberative process because evolving iterations of the Model's inputs and calibration reflect the opinions of the staff currently developing the Model, which may not

represent EPA's ultimate opinions relating to these matters." (quotation marks omitted)).

Second, release of the draft OMEGA model would lead to public confusion. "[O]rdering release of . . . never-finalized [materials] would fail to safeguard and promote agency decisionmaking processes by . . . not protecting against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Brennan Ctr.*, 697 F.3d at 206 (brackets and quotation marks omitted)). Here, the "current version of the OMEGA model does not represent the final form that the model would take if it were tied to a regulatory action, nor does it reflect final decisions about how the model should be calibrated and run, or which analytical tools it should contain." Wehrum Decl. ¶ 22. Moreover, the "OMEGA model was not relied on in development" of the SAFE Vehicles rule; releasing the current version "in draft form would confuse the public as to the agency's final policy decisions regarding that rule." *Id.*

Plaintiffs again make the flawed argument that disclosure of the current version of the OMEGA model will not disclose proposed policies or cause confusion because it was not used in the development of the SAFE Vehicles Rule. Pl. Br. at 22-23. This is erroneous for the same reasons outlined in Part I.B.1: the draft OMEGA model forms a part of EPA's broader consideration of how best to regulate auto emissions under the Clean Air Act in addition to its deliberations about future versions of OMEGA; moreover, the OMEGA model may be used for other EPA rulemakings in the future. Wehrum Decl. ¶¶ 5-6, 8-9, 11-14, 16-20. Therefore, release of draft OMEGA model version 1.4.59 would foreseeably cause precisely the types of harm that the deliberative process privilege is intended to prevent. *See Urban Air Initiative*, 271 F. Supp. 3d at 262 (withholding of internal EPA study served purposes of protecting "open and frank discussions" among agency staff and also to prevent "public confusion if certain reasons,

rationales, and conclusions that were not in fact ultimately the position of the EPA were released" (quotation marks omitted)).

4. Plaintiffs' "Letter or Memorandum" Argument Is Unavailing

Finally, the Court should reject Plaintiffs' apparently novel argument that the OMEGA model cannot be withheld under exemption 5 because it does not constitute a protected "memorandum" or "letter." Pl. Br. at 14-15. But Plaintiffs cite no law supporting such a narrow reading of exemption 5; indeed, the law is to the contrary. "Congress enacted Exemption 5 to protect the executive's deliberative processes—not to protect specific materials." *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) (concluding that courts may "in some instances reach plainly inappropriate results" by "focusing merely on the nature of the material sought"); *see also Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (exemption 5 "protects not only communications which are themselves deliberative in nature, but all communications which, if revealed, would expose to public view the deliberative process of an agency").

The deliberative process of the agency is not limited to information in documents taking the form of letters or memoranda. In recognition of this fact, many courts have concluded that the disclosure of information in non-communication forms are protected. For instance, the Second Circuit has concluded that "tabular or graphic summaries" of data were protected by exemption 5 because they constituted "a part of the deliberative process," and "their disclosure would 'compromise the confidentiality of deliberative information.'" *Lead Indus.*, 610 F.2d at 85 (quoting *EPA v. Mink*, 410 U.S. 73, 92 (1973)). For analogous reasons, the D.C. Circuit concluded that Navy "cost estimates" prepared in the process of the Navy's selection of "homeports for ships in a new battleship group" were protected. *Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990). Accordingly, the fact that deliberative materials may take a

form that is not characterized as a "letter," "memorandum," or other communication with an author and recipient, *see* Pl. Br. at 15, is of little moment. *See Montrose Chem. Corp.*, 491 F.2d at 67-71 (summaries of factual information from record of EPA administrative hearing regarding pesticide registrations were protected by deliberative process); *Charles v. Office of the Armed Forces Med. Exam'r*, 935 F. Supp. 2d 86, 95 (D.D.C. 2013) (draft autopsy reports protected by exemption 5); *see also Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 949-50 (11th Cir. 1992) ("adjusted block level data" generated by methodology ultimately rejected by the agency was "a proposal or a recommendation" subject to deliberative process privilege, despite the fact that the "advice" took "the form of numbers").[9]

C. EPA Properly Concluded That No Reasonable Segregation of the OMEGA Core Model Was Possible but Released Other Updated OMEGA Files

FOIA provides that "[a]ny 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." 5 U.S.C. § 552(b). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). "[T]he law is clear that the reasonable segregation requirement of FOIA does not require [an agency] to commit significant time and resources to a task that would yield a product with little, if any, informational value." *Amnesty Int'l*, 728 F. Supp. 2d at 529 (quotation marks omitted). If "factual materials are 'inextricably intertwined' with policy making recommendations so that their disclosure would 'compromise the

[9] Plaintiffs cite *Tigue v. DOJ* for the proposition that "Exemption 5 protects only 'intra-agency' or 'inter-agency' communications." Pl. Br. at 15 (quoting *Tigue*, 312 F.3d at 77). But *Tigue*'s holding had no bearing on Plaintiffs' "letter or memorandum" argument. Instead, the Second Circuit concluded that even documents prepared *outside* the federal government by a consultant could be protected by exemption 5—even though they are not "intra-agency" or "inter-agency" documents, as the text of the exemption suggests. *Tigue*, 312 F.3d at 77-79. *Tigue* does not support, and in fact undermines, Plaintiffs' proposed reading of exemption 5.

confidentiality of deliberative information that is entitled to protection under Exemption 5,' the factual materials themselves fall within the exemption." *Lead Indus.*, 610 F.2d at 85 (quoting *Mink*, 410 U.S. at 92) (citation omitted).

EPA reasonably segregated its release here by disclosing the OMEGA input files, pre-processors, and post-processors compatible with version 1.4.59, and withholding the latest interim core model in full. Charmley Decl. ¶¶ 22-24. Any factual information within the draft core OMEGA model was properly withheld because it would reveal EPA's deliberative process by indicating what information EPA considered central to policy determinations concerning nonfinal iterations of the model as well as broader issues of auto emissions regulation. Wehrum Decl. ¶¶ 15-16 ("selection of the factual information contained in the OMEGA model was a part of the deliberative process of creating those draft versions or discussions of accompanying regulations"); *see Kempthorne*, 652 F. Supp. 2d at 371 ("[W]hen the facts are so intertwined with a policy recommendation and thereby embody the judgment of its author, revealing those facts is akin to revealing the opinions of the author and the give-and-take of the deliberative process.").

II. PLAINTIFFS HAVE NOT DEMONSTRATED GOOD CAUSE TO EXPEDITE THIS ACTION

In conjunction with their motion for summary judgment, Plaintiffs once again move to expedite this action pursuant to the Civil Priorities Act, which permits a court to expedite consideration of an action "if good cause therefor is shown." 28 U.S.C. § 1657(a). There is no good cause to expedite consideration here; accordingly, Plaintiffs' request should be denied.

Initially, Plaintiffs do not qualify for FOIA's expedited processing provision. Indeed, in their complaint to this Court, they did not challenge EPA's administrative denial of expedited processing. *See* Dkt. No. 1 ("Compl."); Charmley Decl. ¶ 7. "[U]nder FOIA, plaintiffs are entitled to expedited processing of their requests only if they demonstrate a 'compelling need'

for expedition." *Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001) (citing 5 U.S.C. § 552(a)(6)(E)(i)(I)). Congress intended that the rule permitting expedited processing be "narrowly applied." *Id.* at 310 (quotation marks omitted). FOIA defines a "compelling need" to mean, in the context of a request "made by a person primarily engaged in disseminating information," an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v); *see* 40 C.F.R. § 2.104(e) (EPA regulations).[10]

Plaintiffs do not qualify for expedited processing under FOIA's statutory requirements. Principally, Plaintiffs are not primarily engaged in disseminating information. This requirement "does not include individuals who are engaged only incidentally in the dissemination of information"; rather, "information dissemination must be *the* main activity of the requester," though it "need not be [the requester's] sole occupation." *ACLU of N. Cal. v. DOJ*, No. 04 Civ. 4447, 2005 WL 588354, at *9 (N.D. Cal. Mar. 11, 2005) (emphasis in original). Courts usually find that "reporters and members of the media qualify" under this prong, but have rejected such requests by groups—like Plaintiffs—that engage "in both litigation and information dissemination." *Nat'l Day Laborer Org. Network v. ICE*, 236 F. Supp. 3d 810, 816-17 (S.D.N.Y. 2017) (citing cases); *accord ACLU of N. Cal.*, 2005 WL 588354, at *14 (concluding ACLU affiliate was not primarily engaged in disseminating information); *see Century Found. v. Devos*, No. 18 Civ. 1128 (PAC), 2018 WL 3084065, at *5 (S.D.N.Y. June 22, 2018) ("non-partisan think-tank" did not qualify for expedited processing).

Plaintiffs also have not shown an urgency to inform the public, an analysis that focuses on factors including "whether the request concerns a matter of current exigency to the American

[10] Plaintiffs do not argue that the withholding of the requested records would "pose an imminent threat to the life or physical safety of an individual." 5 U.S.C. § 552(a)(6)(E)(v)(I).

public" and "whether the consequences of delaying a response would compromise a significant recognized interest." *Al-Fayed*, 254 F.3d at 310. Plaintiffs do not identify any "imminent action indicating that the requested information will 'not retain its value if procured through the normal FOIA channels.'" *Long v. DHS*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) (quotation marks omitted). Plaintiffs contend that they need the OMEGA model to provide their analysis of a potential final agency rulemaking, Pl. Br. at 24, but their argument is unconvincing. Plaintiffs state that agency action will take place in the "near future," without a specific deadline, and they concede that they could request that EPA reconsider any decision. *Id.* at 24-25 & n.6.[11] They do not show that the model would not retain its value if received in the ordinary course. *See Long*, 436 F. Supp. 2d at 43. Thus, Plaintiffs are not entitled to expedited processing under FOIA.

Plaintiffs attempt to avoid the FOIA expedited processing standard by requesting that the Court expedite this matter under 28 U.S.C. § 1657(a) instead. But the Court should look to FOIA's own standards to determine whether expedition is appropriate. Because Plaintiffs do not qualify, and have otherwise failed to demonstrate good cause, the Court should deny Plaintiffs' request to expedite this matter pursuant to 28 U.S.C. § 1657(a).[12]

CONCLUSION

For the foregoing reasons, EPA's motion for summary judgment should be granted, and Plaintiffs' motion for summary judgment and to expedite should be denied.

[11] The relevant deadline to which Plaintiffs pointed in their complaint was a notice-and-comment window on a proposed rule that closed in October 2018; Plaintiffs conceded that they submitted comments during this period. *See* Compl. ¶¶ 6, 53-59.

[12] The cases on which Plaintiffs rely for their § 1657(a) argument are distinguishable. In *Brennan Ctr. for Justice v. U.S. Dep't of State*, 300 F. Supp. 3d 540, 547-48 (S.D.N.Y. 2018), the requester was *granted* expedited processing by the agency. Here, as noted above, EPA denied Plaintiffs' expedited processing request; Plaintiffs did not challenge that denial in their complaint. And *Ferguson v. FBI*, 722 F. Supp. 1137 (S.D.N.Y. 1989), was decided before Congress amended FOIA to add the expedited processing provision, leaving the court without the guidance Congress has now provided concerning which FOIA matters deserve expedition.

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Respectfully submitted,

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