UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, Plaintiff, v. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendant.	20 Civ. 3063
DOW JONES & COMPANY, INC. and CHRISTOPHER WEAVER, Plaintiffs, v. DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendant.	20 Civ. 3145

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Defendant Department of Health & Human Services ("HHS") by its attorney, Audrey Strauss, Acting United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

These consolidated cases arise out of separate requests submitted pursuant to the Freedom of Information Act ("FOIA") to HHS by Plaintiff The New York Times Company and Plaintiffs Dow Jones & Company, Inc. and Christopher Weaver, both seeking a report commissioned by the Indian Health Service ("IHS") which sought to assess the impact of specific IHS policies and procedures on IHS' ongoing efforts to provide safe and high quality medical care to its patients. In particular, a former pediatrician employed by IHS was convicted of sexually abusing minor patients, and – in response to these tragic circumstances – IHS commissioned an independent medical quality assurance review to assess relevant IHS policies and procedures, and to determine what systematic changes might be needed to improve patient safety and medical care.

As a record that emanates from an IHS medical quality assurance review, however, the report sought by Plaintiffs is subject to 25 U.S.C. § 1675. Section 1675 unequivocally makes the report confidential and privileged and bars its disclosure under FOIA, thereby rendering the record exempt under Exemption 3, 5 U.S.C. § 552(b)(3). This statutorily mandated confidentiality is a vital feature of the medical quality assurance review process as it encourages participants to be candid in their review of the quality of health care provided. Moreover, the report is properly withheld under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), as the report is protected by the deliberative process privilege. For the reasons stated below, the agency

properly withheld the report in question and the Court should grant its motion for summary judgment.

BACKGROUND

A. IHS Office of Quality and the Integritas Report

The IHS Office of Quality was created in 2018 to strengthen IHS' ongoing efforts to ensure the delivery of high-quality health care at federally operated facilities serving American Indian and Alaska Native people. *See* August 14, 2020 Declaration of Jonathan Merrell ("Merrell Decl.") ¶ 4. Among other things, the Office of Quality provides national leadership and promotes consistency in health care quality across the agency; consolidates and enhances oversight of quality assurance and improvement; improves processes to monitor and upgrade patient safety; and provides training to support compliance with required certifications/ accreditations and ongoing improvements in quality and safety of medical care. *Id.*

On February 22, 2019, IHS issued a contracting opportunity to find a contractor to perform a medical quality assurance review for the purpose of assessing the effectiveness of IHS's policies and procedures governing the reporting of allegations of sexual abuse by an IHS health care provider. *Id.* ¶ 7. Specifically, IHS, including the Office of Quality, concluded that a medical quality assurance review was necessary to determine what steps IHS could take to correct the patient safety and medical care issues arising from Stanley Patrick Weber's sexual abuse of minors while he was employed as a pediatrician by IHS. *Id.* Weber, who left IHS in 2016, had by that time been convicted of sexually abusing patients while he was a pediatrician at an IHS hospital in Montana as well as patients in South Dakota. *Id.* at ¶ 8.

To accomplish IHS's goal of evaluating the relevant policies and procedures, IHS sought to (1) conduct a thorough review and analysis of the agency's compliance with existing laws, regulations, and policies regarding patient safety and protection of patients from sexual abuse

and assault, (2) identify facts relating to IHS's policies and procedures regarding the reporting of allegations of sexual abuse of IHS patients by clinical staff, (3) identify any possible process or system failures and the contributing causes of any such process or system failures, and (4) identify improvements IHS could implement to better protect patients and provide quality medical care. *Id.* ¶ 9.

On May 10, 2019, IHS awarded a contract to Integritas Creative Solutions LLC ("Integritas") to conduct the medical quality assurance review. *Id.* ¶ 10. To accomplish this task, Integritas performed a fact-finding inquiry and record reviews at IHS headquarters in Rockville, Maryland and several IHS area offices, reviewing records dating back to 1986. *Id.* ¶ 11. The contractor had access to documentation including agency policies and procedures, contracts and other agreements, personnel files, credentialing and privileging files, and agency correspondence. *Id.* Integritas also interviewed current and former IHS employees, community members, tribal members, law enforcement, and others. *Id*.

From the outset, IHS, including the Office of Quality, intended that the assessment performed by the contractor would be a confidential and privileged medical quality assurance review pursuant to 25 U.S.C. § 1675. *Id.* ¶ 12. The agency's efforts to maintain confidentiality over the review was to encourage people to participate in such reviews and to provide candid information. *Id*. Participants had an expectation that the information they provided would be kept confidential, and the agency determined that a breach of such confidentiality would have a chilling effect on future participation. *Id*. Integritas also signed a Quality Assurance Records Sharing and Confidentiality Agreement to govern how IHS would share its confidential and privileged medical quality assurance records. *Id.* ¶ 13.

As it was contracted to do, in January 2020, Integritas provided IHS with a report detailing its review, its conclusions, and its recommendations for protecting IHS patients and thereby ensuring their access to proper medical care (the "Integritas Report"). *Id.* ¶ 14. IHS used the findings of the patient safety medical quality assurance review to formulate and revise policies and standard operating procedures, including the order in which required steps should be performed, templates and timelines to establish clear reporting channels and timelines to hold IHS staff accountable. *Id*. ¶ 15. The confidentiality of the Integritas Report has been strictly maintained within IHS, and each page of the report indicates that its contents should only be disclosed in accordance with 25 U.S.C. § 1675. *Id*. ¶ 16.

B. FOIA Requests

On January 30, 2020, Dow Jones & Company, Inc. and Christopher Weaver submitted a request pursuant to Freedom of Information Act ("FOIA") seeking, in substance, a copy of the Integritas Report. *Id*. ¶ 17. On February 24, 2020, The New York Times Company submitted a FOIA request seeking the same. *Id*. By letters dated May 21, 2020, the FOIA Office of IHS responded to the two FOIA requests, advising Plaintiffs that the entire report is privileged and confidential under 25 U.S.C. § 1675 and is being withheld in full pursuant to Exemption 3 of the FOIA, 5 U.S.C. § 552(b). *Id.* ¶ 18.

ARGUMENT

A. Legal Framework

Congress's purpose in enacting FOIA was "to reach 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) (quoting H.R. Rep. No. 89-147 at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). Thus, while FOIA requires disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the

public interest," *CIA v. Sims*, 471 U.S. 159, 166-67 (1985), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *see also Martin v. DOJ*, 488 F.3d 446, 453 (D.C. Cir. 2007) ("Recognizing, however, that the public's right to information was not absolute and that disclosure of certain information may harm legitimate governmental or private interests, Congress created several exemptions to FOIA disclosure requirements."). The FOIA Exemptions, each established by Congress in light of a compelling countervailing interest to disclosure, are "intended to have meaningful reach and application." *John Doe*, 493 U.S. at 152.

Summary judgment is the preferred procedural vehicle by which most FOIA claims are resolved. *N.Y. Times v. U.S. Dep't of Justice*, 101 F. Supp. 3d 310, 317 (S.D.N.Y. 2015); *see also Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) ("In resolving summary judgment motions in a FOIA case, a district court proceeds primarily by affidavits in lieu of other documentary or testimonial evidence . . . ."); [1] *see also e.g.*, *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if a movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-586 (1986). 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

[1] Defendant has not submitted a Local Rule 56.1 statement. "The general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment," and Local Civil Rule 56.1 statements are not required. *New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (internal quotations marks and alterations omitted).

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

B. Exemption 3 Applies to the Integritas Report

Exemption 3 applies to records that are "specifically exempted from disclosure by statute . . . if that statute . . . (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In examining an agency's invocation of Exemption 3, a court must consider, first, whether the statute identified by the agency as a withholding statute, and second, whether the withheld material satisfies the criteria of the exemption statute. *See Sims*, 471 U.S. at 167 (1985); *A. Michael's Piano Inc. v. Fed. Trade Comm'n*, 18 F.3d 138, 143 (2d Cir. 1994). "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents," *Wilner v. NSA*, 592 F.3d 60, 72 (2d Cir. 2009) (quotation marks and citation omitted), a court should "not closely scrutinize the contents of a withheld document; instead, [it should] determine only whether there is a relevant statute and whether the document falls within that statute," *Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993).

Here, § 1675 is a withholding statute under 5 U.S.C. § 552(b)(3)(A)(i), and the Integritas Report satisfies the criteria of this statute. Accordingly, the agency properly withheld the report under Exemption 3.

1. Section 1675 Is a Withholding Statute

Section 1675 is plainly a withholding statute within the meaning of Exemption 3. The statute states unequivocally that "[m]edical quality assurance records created by or for any Indian health program . . . as part of a medical quality assurance program are confidential and privileged." 25 U.S.C. § 1675(c). Subject to exceptions not relevant here, "[s]uch records may

not be disclosed to any person or entity," and "[n]o part of any medical quality assurance record . . . may be subject to discovery or admitted into evidence in any judicial or administrative proceeding." *Id.* The statute expressly provides that such medical quality assurance records "may not be made available to any person under [FOIA]." § 1675(g).

2. Integritas Report Satisfies the Criteria Set Forth in § 1675

The Integritas Report, as a report emanating from a medical quality assurance program carried out on behalf of IHS, also falls squarely within the ambit of § 1675. Under the statute, the term medical quality assurance program is defined as:

> any activity carried out . . . by or for any Indian health program or urban Indian organization to assess the quality of medical care, including activities conducted by or on behalf of individuals, Indian health program or urban Indian organization medical or dental treatment review committees, or other review bodies responsible for quality assurance, credentials, infection control, patient safety, patient care assessment (including treatment procedures, blood, drugs, and therapeutics), medical records, health resources management review, and identification and prevention of medical or dental incidents and risks.

§ 1675(a)(2). A "medical quality assurance record" is in turn defined as "proceedings, records, minutes, and reports that – (A) emanate from quality assurance program activities . . .; and (B) are produced or compiled by or for an Indian health program or urban Indian organization as part of a medical quality assurance program." 25 U.S.C. § 1675(a)(3).

In crafting § 1675, Congress chose to use language similar to that in another statute, 10 U.S.C. § 1102, which governs the quality assurance privilege related to medical care provided to Department of Defense beneficiaries.[2] In establishing the confidentiality of these types of

[2] Section 1102(j)(1) defines "medical quality assurance program" as "any peer review activity carried out . . . by or for the Department of Defense to assess the quality of medical care, including activities conducted by individuals, military medical or dental treatment facility committees, or other review bodies responsible for quality assurance, credentials, infection control, patient care assessment (including treatment procedures, blood, drugs, and therapeutics),

records in the Department of Defense context, Congress observed that "to be effective, this type of collegial review process must operate in an environment of confidentiality in order to elicit candid appraisals and evaluations of fellow professionals." S. Rep. No. 331, 99th Cong., 2d Sess. 245, reprinted in 1986 U.S. Code Cong. & Admin. News 6413, 6440; *see also In re United States*, 864 F.2d 1153, 1154 (5th Cir. 1989). The same purpose lies also behind a similar statute that applies to certain medical quality assurance records within the Department of Veteran's Affairs. *See* 38 U.S.C. §5705; *Salazar v. United States*, No. 17 Civ. 3645, 2018 U.S. Dist. LEXIS 96128, *4 (S.D.N.Y. Jun. 7, 2018) ("The purpose of protecting medical quality assurance documents from disclosure is to encourage health professionals to be candid in their review of the quality of health care provided.").

"[I]n light of the [§ 1675's] policy of encouraging medical institutions to improve their level of patient care and make appropriate corrective or preventative measures," courts have afforded a broad reading to the statute. *Soto v. United States*, No. 13 Civ. 2359, 2014 U.S. Dist. LEXIS 133134, at *8 (S.D. Cal. Sep. 22, 2014), *see also Parker v. United States*, No. 18 Civ. 123, 2020 U.S. Dist. LEXIS 24911, at *24-25 (D. Neb. Feb. 13, 2020). In fact, § 1675 encompasses an even broader range of activities than the Department of Defense statute. Whereas § 1102 defines medical quality assurance program to include "any peer review activity," 25 U.S.C. § 1102(j)(1), the IHS statute does not limit itself to peer review activities. Rather "*any* activity . . . to assess the quality of medical care" is covered in the definition of a medical quality assurance program. § 1675(a)(2).

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medical records, health resources management review and identification and prevention of medical or dental incidents and risks." A "medical quality assurance record" is defined as "the proceedings, records, minutes, and reports that emanate from quality assurance program activities described in paragraph (1) and are produced or compiled by the Department of Defense as part of a medical quality assurance program." 10 U.S.C. § 1102(j)(2).

Here, the Integritas Report falls within § 1675's prohibition on disclosure. The report is a record emanating from the medical quality assurance review commissioned by IHS and performed by Integritas. Specifically, as noted above, the review carried out by Integritas on behalf of IHS sought to assess the impact of the agency's policies and procedures relating to the reporting of allegations of sexual abuse on patient safety and the provision of medical care. Merrell Decl. ¶ 7. The review sought to determine if and how IHS policies and procedures may have acted to deprive IHS patients of safe and high quality medical care. *Id.* In its report, Integritas detailed its factual findings, its conclusions and its recommendations relating to the safety of IHS patients and ensuring their access to proper medical care. *Id.* ¶ 14. IHS in turn utilized the Integritas Report to formulate and revise relevant policies and procedures within the agency. *Id.*

As in *Parker v. United States*, the medical quality assurance review at issue here reflects an assessment of a "sentinel event associated with a specific practitioner, a serious practitioner-specific complaint, . . . [a] significant safety violation, or repeated or egregious unprofessional conduct," and it is "exactly the type of record emanating from an 'activity carried out . . . to assess the quality of medical care' of the IHS and are therefore protected from disclosure under § 1675." *Parker*, 2020 U.S. Dist. LEXIS 24911, at *29 (quoting 25 U.S.C. § 1675(a)(2)).

Finally, the confidentiality afforded to this medical quality assurance activity also served to encourage staff to participate in the review and provide candid information. Merrell Decl. ¶ 12. Participants had an expectation that the information they provided would be kept confidential, and disclosure of this record would have a chilling effect on future participation in these types of reviews. *Id.*

C. Exemption 5 Applies to the Integritas Report

FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, [the deliberative process] privilege) are protected from disclosure under Exemption 5." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (quoting *Grand Cent. P'ship v. Cuomo*, 166 F.3d at 481).[3]

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." *Hopkins*, 929 F.2d at 84; *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process" (quotation marks omitted)). "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)).

[3] It is well established that outside consultants' recommendations to an agency are regularly deemed protected under exemption 5. *See Tigue v. DOJ*, 312 F.3d 70, 77-78 (2d Cir. 2002); *see also Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 512 F.3d 677, 684 (D.C. Cir. 2008) ("When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." (quoting *Ryan v. DOJ*, 617 F.2d 781, 789-90 (D.C. Cir. 1980))); *Fox News Network*, 739 F. Supp. 2d at 540.

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*, 166 F.3d at 482 (citations omitted). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). The government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record, *Sears*, 421 U.S. at 151 n.18; *accord Tigue*, 312 F.3d at 80. So long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Id*.

"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 alteration 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; *accord Hopkins*, 929 F.2d at 84. The privilege "focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84-85 (quoting *Sears*, 421 U.S. at 150).

Here, the Integritas Report is both predecisional and deliberative. First, as set forth in the Merrell Declaration, IHS commissioned the Integritas Report "for the purpose of assessing the effectiveness of IHS's policies and procedures governing the reporting of allegations of sexual abuse by an IHS health care provider," and "to determine what steps IHS could take to correct [] patient safety and medical care issues." Merrell Decl. ¶ 7. Because the report "was prepared to

assist [agency] decisionmaking on a specific issue," it is predecisional. *Sears*, 421 U.S. at 151 n.18. Second, the document is also deliberative. It reflects IHS' efforts to review and analyze the agency's compliance with relevant laws, regulations and policies, to identify the relevant facts, to identify possible failures in IHS's processes, and to obtain advice regarding improvements IHS could implement to better protect patients and provide quality medical care. Merrell Decl. ¶ 9. The report sets forth the details of Integritas' review, conclusions, and recommendations. *Id*. ¶ 14. In other words, the report "'reflect[s] advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84-85 (quoting *Sears*, 421 U.S. at 150).[4]

[4] Defendants further note that, not only do Exemptions 3 and 5 apply, but Exemption 6 would also exempt certain information contained in the report from disclosure. Exemption 6 exempts from disclosure information from personnel, medical, or other similar files where disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). The Integritas Report contains information about patients, staff and other individuals, the disclosure of which would plainly be an unwarranted invasion of personal privacy.

CONCLUSION

For the reasons stated herein, the Government's motion for summary judgment should be granted in its entirety.

Dated: August 14, 2020
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