UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*, *Plaintiffs*, v. CENTRAL INTELLIGENCE AGENCY, *Defendant*.	No. 18-cv-2784 (CJN)

PLAINTIFFS' RESPONSE TO DEFENDANT'S SUPPLEMENTAL DECLARATION AND VAUGHN INDEX

As attachments to its reply in support of summary judgment ("Reply"), ECF No. 29, Defendant has submitted a "supplemental" declaration and Vaughn index, ECF Nos. 29-1–29-3. Plaintiffs submit this response to make clear their position on Defendant's supplemental filings.

1. Defendant's supplemental declaration and Vaughn index, like its original filings, fail to establish that Defendant has complied with its obligations under the Freedom of Information Act.

a. The new information provided in Defendant's supplemental filings is modest at best. *Compare, e.g.*, Entry 36, ECF No. 25-4 at 27–28 *with* Entry 36, ECF No. 29-2 at 27–28.

b. Defendant's supplemental filings, like its original filings, do not provide the information necessary to litigate and adjudicate whether the withheld records are exempt from disclosure under FOIA. *See* Pls. Mem. of Points and Auth. in Opp. to Defs. Mot. for Summ. J. ("Opp.") 9–33, ECF No. 27.

c. Defendant's supplemental filings, like its original filings, do not address Exemption 5's foreseeable-harm requirement with the particularity the law requires. *See* Opp. 33–38. Recent decisions by courts in this district underscore the point. *See, e.g.*, *Farmworker*

Just. v. U.S. Dep't of Agric., No. 19-CV-1946 (DLF), 2021 WL 827162, at *5 (D.D.C. Mar. 4, 2021); *Jud. Watch, Inc., v. U.S. Dep't of Just.*, No. 19-cv-800 (TSC), 2020 WL 5798442, at *2–4 (D.D.C. Sept. 29, 2020).

d. Defendant's supplemental filings, like its original filings, do not establish that all of Defendant's withholdings are non-segregable. *See* Opp. 42–45. Indeed, by Defendant's latest count, the withheld-in-full entries in the representative Vaughn index encompass 1,234 pages of responsive material.[1] That this quantity of responsive material contains no non-exempt, segregable information strains credulity.

Entry 106, for example, represents a 91-page record. *See* ECF No. 29-3 at 94. According to Defendant, this record "consists of email exchanges between CIA attorneys providing legal advice and recommendations for draft language regarding a draft letter with documents for reference attached." *Id.* Although Defendant asserts the deliberative-process and attorney-client privileges over Entry 106, Defendant makes no effort to explain (i) what portion of the 91 withheld pages consists of "email exchanges providing legal advice and recommendations," as opposed to "documents for reference"; or (ii) the nature of the "documents for reference," including whether or why they fall entirely within the claimed exemptions. *See also, e.g.*, Entry 35, ECF No. 29-2 at 26–27 (describing a 93-page record consisting of an email exchange and documents attached for reference, but failing to explain how many of the 93 withheld pages consist of documents attached for reference, which exemptions apply to which portions of the record, or how purportedly exempt material is distributed throughout the record); Entry 129, ECF No. 29-3 at 108 (describing an 11-page record consisting of "a letter written in response to a

[1] Plaintiffs do not know the total number of pages withheld in full, but it is inevitably much greater.

Senator's inquiry with the attachment of an internal Agency personnel document," but failing to explain how many of the withheld pages consist of the letter or how the claimed exemptions—(b)(3) and (b)(6), but not (b)(5)—are distributed throughout the record).[2]

Plaintiffs respectfully suggest that the Court test Defendant's segregability analysis by conducting an *in camera* review of these three records (Entries 35, 106, and 129) to determine whether they truly lack any non-exempt, non-segregable material. As the D.C. Circuit has explained, this Court has a "statutory duty to make a responsible de novo determination" of each claimed exemption, and where "the affidavits submitted by the parties are conclusory—if the documents and justifications for withholding are not described in sufficient detail to demonstrate that the claimed exemption applies—*in camera* review may be necessary to allow meaningful de novo review." *Carter v. U.S. Dep't of Com.*, 830 F.2d 388, 392 (D.C. Cir. 1987). Given the conclusory nature of Defendants' declarations on this point, "the court's responsibility to conduct *de novo* review is frustrated" in the absence of *in camera* review. *Id*. at 393.

2. The supplemental filings call into question the thoroughness of Defendant's review and highlight the need for specific guidance from the Court.

a. Even while maintaining that it is entitled to summary judgment on the basis of its *original* filings, Reply 1, Defendant acknowledges that four of the entries in the original Vaughn index contained substantive inaccuracies, including an erroneous privilege assertion, Suppl. Blaine Decl. ¶ 2 n.1; *id.* ¶ 9 n.2.

b. Additionally, the supplemental filings contain at least four anomalies—some of which are holdovers from Defendant's original filings, and some of which are new. First, the

[2] To be clear, Plaintiffs do not concede that any portions of entries 35 or 106 are exempt from disclosure under the deliberative-process or attorney-client privileges.

original version of Entry 80 states that Defendant withheld a "draft document attached" to an email exchange, but the supplemental version of Entry 80 omits reference to an attachment. *Compare* ECF 25-4 at 67 *with* ECF 29-3 at 68. It is not clear whether this inconsistency represents a correction or another error, as Defendant fails to address it.

Second, the "Description" field of Entry 111 states that Defendant invoked "Exemption (b)(3) (National Security Act) [over] certain material that is classified under 1.4(c) of E.O. 13526 and reflects intelligence sources and methods (intelligence activity)." ECF No. 29-3 at 98. Yet the "Exemptions Cited" field of Entry 111 contains no mention of Exemption (b)(3).[3] *Id.*

Third, the "Description" field of Entry 114 states that Defendant invoked (b)(6) over the withheld record. Yet the "Exemptions Cited" field of Entry 114 contains no mention of Exemption (b)(6). ECF No. 29-3 at 99–100.[4]

Fourth, the supplemental declaration fails to note that Defendant revised Entry 127. *Compare* ECF 25-4 at 104 *with* ECF 29-3 at 106; *see* Suppl. Blaine Decl. ¶ 2 (listing revised entries).

c. The D.C. Circuit has made it clear that "'FOIA litigants are entitled to assume that the agency's Vaughn index is accurate in every detail' and that '[t]here is no excuse for submitting a Vaughn index that contains errors, even minor ones.'" *Pub. Emps. for Envtl. Resp. v. Envtl. Prot. Agency*, 213 F. Supp. 3d 1, 18 (D.D.C. 2016) (quoting *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992), *abrogated on other grounds by Milner v. Dep't of Navy*, 562 U.S. 562 (2011) (second alteration in source)).

[3] This anomaly was also present in the original version of Entry 111. *See* ECF No. 25-4 at 96.

[4] This anomaly was also present in the original version of Entry 114, *see* ECF No. 25-4 at 97–98, and Plaintiffs pointed it out in their own filings, *see* Exhibit 2 to Declaration of Charles Hogle at 4 n.1, ECF No. 27-4. Curiously, Defendant updated Entry 114 in the supplemental Vaughn index, but failed to reconcile the "Description" and "Exemptions Cited" fields.

d. The Court should order Defendant to produce a declaration and representative Vaughn index that (1) contain no errors or anomalies and (2) explain the reasons for Defendant's withholdings with the level of specificity and detail required by law. Additionally, to facilitate review, the Court should order that Defendant's new declaration and Vaughn index be filed in text-searchable PDF format, as required by Local Rule 5.4(a).

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Respectfully submitted,

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