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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ALLIANCE OF CALIFORNIANS FOR COMMUNITY EMPOWERMENT; HOUSING AND ECONOMIC RIGHTS ADVOCATES; URBAN REVIVAL dba CITY LIFE/VIDA URBANA; THE COLORADO FORECLOSURE RESISTANCE COALITION; HOME DEFENDERS LEAGUE; NEW JERSEY COMMUNITIES UNITED; NEW YORK COMMUNITIES FOR CHANGE,

Plaintiffs,

v.

FEDERAL HOUSING FINANCE AGENCY,

Defendant.

CASE No.: 13-cv-05618-KAW

PLAINTIFFS' REPLY

Hearing Date: July 18, 2014
Time: 11:00 a.m.
Location: Oakland U.S. Courthouse
Courtroom 4, 3rd Floor
Judge: Magistrate Judge Kandis A. Westmore

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I. INTRODUCTION

FHFA's repeated complaint that Plaintiffs have not pointed to material fact disputes is irrelevant because Defendant has still not met its burden of demonstrating an adequate search and justifying each withholding with non-conclusory affidavits. *See* 5 U.S.C. §552(a)(4)(B); *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985); *Wiener v. F.B.I*, 943 F.2d 972, 977 (9th Cir. 1991). Although it has submitted eight additional declarations with its opposition and reply, FHFA cannot make up with volume what its declarations still lack in specificity.

II. ARGUMENT

A. FHFA Has Still Not Met Its Burden of Performing an Adequate Search

FHFA faults Plaintiffs for having "failed to establish that FHFA's search was inadequate." Def. Opp. & Reply (ECF No. 47) at 1. But the "burden is on the agency" to establish the adequacy of the search, not on Plaintiffs to establish its inadequacy. *See* 5 U.S.C. § 552(a)(4)(B). Nevertheless, Plaintiffs have highlighted numerous defects in the search. *See* Pl. Cross & Opp. (ECF No. 41) at 7-13. Implicitly acknowledging as much, FHFA attempted to remedy some of these deficiencies with its second filing, but it has still failed to meet its burden.

1. FHFA Has Not Met Its Burden of Showing That It Has Searched Records of *All* Custodians Likely to Have Responsive Records

On summary judgment, FHFA must "show beyond material doubt … that it has conducted a search reasonably calculated to uncover *all* relevant documents." *Weisberg v. United States Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (emphasis added); *see also Zemansky*, 767 F.2d at 571 (adopting *Weisberg* standard in Ninth Circuit). Its conclusory affidavits do not justify the limited group of custodians whose records it has searched, in particular, its refusal to search records of administrative assistants.

In their initial FOIA request, Plaintiffs expressly requested that FHFA search specified offices within the Agency and "all relevant employees." *See* Silver-Balbus Decl. (ECF No. 42) at ¶ 20 & Exh. 17 at 4. However, FHFA only searched the records of the head of each of the identified FHFA offices, justifying its refusal to search additional employees on the ground that

the heads were the employees "most likely to have [responsive] documents." *See* Easter Decl. (ECF No. 38) at ¶ 10. The fact that supervisors are *most* likely to possess responsive materials does *not* mean that additional employees do not *also* possess responsive records. Plaintiffs previously explained why the Agency must also search the records of Mario Ugoletti, Meg Burns, and Pat Lawler, as well as administrative assistants to FHFA officials involved in eminent domain discussions. *See* Pl. Cross & Opp. at 7-10. FHFA has now agreed to search the records of these three employees, but it still refuses to search records of assistants. *See* Def. Opp. & Reply at 7.

The "record itself reveals 'positive indications'" that administrative assistants are likely to have responsive records because they provide their supervisors with assistance in scheduling meetings. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999) (citation omitted). Plaintiffs' FOIA request seeks, *inter alia*, "[a]ll documents related to any and all communications or meetings between FHFA leadership and representatives of the [financial industry] and any other firms or trade groups pertaining to the use of eminent domain to purchase mortgages." *See* Silver-Balbus Decl. at ¶ 20 & Exh. 17 at 3-4. This request encompasses both substantive correspondence between FHFA and trade groups about eminent domain, and all documents related to meetings about eminent domain. Documents relating to the scheduling of meetings between FHFA officials and trade groups are both responsive to this FOIA request and also serve its overall purpose – to shed light on the extent and nature of the financial industry's contact with FHFA.

FHFA initially justified its refusal to search administrative assistants' records on the ground that "assistants do not, by practice, monitor or maintain the email correspondence of their supervisors." Easter Decl. at ¶ 24. But, as Plaintiffs explained, even if assistants do not maintain their supervisors' email correspondence, they may still assist their supervisors in scheduling meetings, and thus possess records relating to meetings between FHFA and the trade groups about eminent domain. *See* Pl. Cross & Opp. at 9-10. Indeed, the record shows that administrative assistants provide exactly this kind of assistance, as evidenced by a calendar

entry showing an administrative office manager as the organizer of an August 16, 2012 meeting for numerous FHFA officials on "Eminent Domain with Richard Dorfman and Joseph Cox from SIFMA." *See* Silver-Balbus Decl. at ¶ 27 & Exh. 23 at Bates 5.

FHFA dismisses the significance of the common sense proposition and record evidence showing that administrative assistants are likely to have records related to their supervisors' meetings, contending that if an assistant "made an electronic appointment on behalf of a senior agency official, that appointment would have been reflected" in that person's calendar, not the assistant's. Lee Decl. (ECF No. 50) at ¶ 7. But Plaintiffs point to the electronic appointment entry related to the August 16, 2012 meeting not because they are exclusively interested in electronic appointment entries, but to show that assistants provide scheduling assistance to their supervisors. While FHFA contends that assistants would not "have likely communicated with any of the *outside* entities identified by Plaintiffs in their FOIA request," *id.* (emphasis added), its declarations nowhere aver that assistants do not communicate *internally* with their supervisors about meetings – for example, about the logistics of finding a meeting room, arranging for supervisors' travel, or assisting with reimbursements for travel expenses. Unless administrative assistants provide *no* administrative assistance to their supervisors with respect to meetings whatsoever – something FHFA could have stated in its numerous declarations but has not – it is likely they will have some records related to their supervisors' meetings. FHFA also states that assistants confirmed that they did not maintain any electronic or hard copy files "*on behalf of*" specified FHFA officials. *Id.* (emphasis added). But it does not address whether the administrative assistants possess *their own* responsive records, for example, emails with their supervisors about administrative support in connection with meetings. The record suggests they provide their supervisors with meeting support, in which case they are likely to possess responsive records, and FHFA has not rebutted this point.

2. FHFA's Promise to Conduct Additional Searches and Responsive Records Does Not Discharge Its Burden on Summary Judgment

In its opposition and reply, FHFA now acknowledges that its search of Mary Ellen

Taylor's records was flawed and that it is conducting a revised search. The Agency has also finally agreed to search the records of Mr. Ugoletti, Ms. Burns, and Mr. Lawler. But it has not yet produced the records from any of these searches, and the record raises serious questions as to the adequacy of the searches performed to date. At this juncture, FHFA has not discharged its burden of demonstrating that it has conducted an adequate search.

a. The Court Cannot Yet Determine the Adequacy of the Search For Records Not Yet Produced

FHFA states that at some future unspecified date, it "will produce any responsive documents" from its revised search of Ms. Taylor's records and its new search of the Ugoletti, Burns, and Lawler records. Def. Opp. & Reply at 6-7. But it has not yet actually done so.

An agency's conclusory allegations about the adequacy of a search are never sufficient, but that is especially true given the record here. The Agency previously asserted that it had performed the requisite searches of various employees' records. Only after Plaintiffs reviewed the records produced and pointed out obvious deficiencies with the search did the Agency recognize a major oversight in its search process – it had neglected to process and search archived emails for at least one employee, Mary Ellen Taylor. *See* Supp. Easter Decl. (ECF No. 48) at ¶ 6; Supervielle Decl. (ECF No. 53) at ¶ 8. This incident demonstrates why conclusory statements are insufficient to carry FHFA's burden. The Agency's initial search declaration stated that it had "use[d] the agency's new electronic discovery search tool to conduct a search of emails and electronic files/folders to conduct a search of" various employees' files. Easter Decl. at ¶ 16(a). Without questioning Ms. Easter's good faith in offering her statement at the time she made it, the declaration illustrates why it is insufficient simply to state that the Agency conducted a search of files and folders: Had the Agency attempted to provide a more specific explanation of precisely what files and folders were searched, it would have discovered the search tool's failure to produce Ms. Taylor's archived emails.

Without having reviewed the promised production of the Taylor, Ugoletti, Burns, and Lawler records, neither Plaintiffs nor the Court can determine whether the Agency's search is

adequate. The Court should be particularly hesitant to grant summary judgment for FHFA on the adequacy of its search, given that it was only Plaintiffs' careful review of the Agency's document production that drew attention to the search's inadequacy.

Moreover, the description of the promised search of the Ugoletti, Burns, and Lawler files is utterly conclusory. The Agency states that for these three employees, it "decided to conduct a search of the emails and electronic files of these three individuals using" specified search terms and a specified date range. Lee Decl. at ¶ 6. This statement is comparable to Ms. Easter's initial declaration which stated that the Agency searched emails and electronic files. *See* Easter Decl. at ¶ 16(a). FOIA requires more precise descriptions of the files searched and not searched (*see* Pl. Cross & Opp. at 12), and FHFA has already shown that its searches may overlook important repositories of responsive records.

b. The Agency Has Not Met Its Burden With Respect To Employees Whose Records Were Previously Searched

Ms. Easter's statement that the Agency used its discovery tool to search emails and electronic files/folders of identified custodians (Easter Decl. at ¶ 16(a)) is similarly inadequate, as it also fails to explain the precise files and folders that were searched. While the Agency now submits a second declaration averring that, unlike the search of Ms. Taylor's files, searches of other custodians' records included archived emails (Superveille Decl. at ¶ 9), it nonetheless fails to "provide sufficient detail for the court itself to determine the search's adequacy." *Morley v. C.I.A.*, 508 F.3d 1108, 1121 (D.C. Cir. 2007). Neither declaration contains an explanation of the Agency's electronic recordkeeping system, what documents are included in the "files/folders" searched, and whether documents are kept in any other "files/folders." Pl. Cross & Opp. at 12.[1]

[1] In fact, Ms. Easter's supplemental declaration only compounds concerns. She states that the Agency's Office of Technology and Information Management's Help Desk ("OTIM") collects email and archived emails "from the locations where they are stored at FHFA, specifically, FHFA's server *and* the employee's hard drive"; it also collects non-mail electronic files "from the employee's FHFA home, or U: drive." Supp. Easter Decl. at ¶ 4 (emphasis added). She does not explain whether the employee's "U: drive" is located on the Agency's server or the employee's hard drive, and there is no indication that it encompasses files in both locations. Thus, while OTIM searches for emails on *both* the Agency's server and the employee's hard

3. The Agency Must Search Agency Phone Messages

Plaintiffs' FOIA request sought all phone messages relating to the topic of eminent domain from individuals in financial industry trade groups, as well as any other phone messages related to the City of Richmond's offer to buy underwater mortgages. *See* Silver-Balbus Decl. at ¶ 20 & Exh. 17 at 3-4. Although FHFA initially stated that it "does not retain phone messages as agency records" (*id.* at ¶ 24 & Exh. 20 at Bates 6), it now acknowledges that it does "maintain[] its electronic voice messages as audio (.wav) files." Def. Opp. & Reply at 8.

FHFA has abandoned any argument that the phone messages are not "agency records" within the meaning of FOIA. It justifies its refusal to search these records on the ground that it "does not have a tool with which it can search the content of such files." *Id*. But the Agency can obviously review phone messages without a "tool," or employees would not be able to listen to the messages left for them. FHFA has not explained why such a search would be unreasonably burdensome. *See Public Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (requiring "a sufficient explanation why a search of the paper files would be unreasonably burdensome"); *see also Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (agency must search files likely to contain responsive information "if it cannot provide sufficient explanation as to why such a search would be unreasonably burdensome"). Searches are not unreasonably burdensome merely because they are time-consuming or costly. *See, e.g.*, *Public Citizen*, 292 F. Supp. 2d at 6 (rejecting agency's claim that it need not conduct search of "25,000 paper files [that] would be 'costly and take many hours to complete,'" and would require "send[ing] the files from Texas to California, or employees from California to Texas").

FHFA also states that "Plaintiffs' FOIA request did not identify any individuals who may have called the Agency, or any phone numbers from which such calls may have been

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drive, it only searches for non-email electronic files in *one* location. Like searches of emails, searches of other electronic files should extend to both the employee's drive on the agency's server and the employee's hard drive. The Agency's failure to do so renders inadequate its search for employees whose records it has already searched.

placed." Def. Opp. & Reply at 8. But it is FHFA's burden to conduct a reasonably adequate search; FHFA officials are plainly aware of the individuals with whom they spoke. In any event, the record shows that FHFA officials exchanged phone calls and phone messages with trade group representatives about eminent domain:

* A July 23, 2012 email from Michael Powers at FHFA to Jon Greenlee at FHFA forwards a statement by SIFMA about eminent domain and reads: "Not sure you are aware of this – *I received a lengthy voicemail from Richard Dorfman*. You may want to give him a call." Second Silver-Balbus Decl. at ¶ 3 & Exh. 1 at Bates 1 (emphasis added). Richard Dorfman is cc'd on the email and has a "sifma.org" email address. His number is presumably known to the Agency, as it is redacted from this very email exchange. *See id.*

* An April 18, 2013 email from Chris Killian, with a "sifma.org" email address, to Alfred Pollard, FHFA General Counsel, cc's Richard Dorman, and forwards an email about SIFMA sending letters to officials in Richmond, CA and North Las Vegas, NV opposing eminent domain proposals. The email from Killian to Pollard reads: "I wanted to send this your way; Richard may have given you a heads up *earlier this week when you spoke*. … Have a good weekend *if we don't speak*." *Id.* at Exh. 1 at Bates 2 (emphasis added).

* A June 11, 2013 email from Chris Killian to Alfred Pollard forwards an "Eminent Domain Update." The email reads: "It may make sense for us to talk"; Pollard responds "Will call." *Id.* at Exh. 1 at Bates 3. Mr. Killian's number is presumably known to the Agency, as it is redacted from this email exchange. *See id.*

Responsive phone messages exist. FHFA officials know exactly who they spoke to and who, as a result, may have left phone messages. It has a duty to search for these responsive records.

B. FHFA is Unlawfully Withholding Information

1. Exemption 4: FHFA Has Not Met Its Burden of Showing the Information is Confidential or Privileged

FHFA continues to withhold in full six documents pertaining to Fannie Mae and Freddie Mac (Documents A36, A37, C1, C2, C4, and C5) pursuant to Exemption 4. In an effort to cure previous deficiencies, FHFA has now submitted five new declarations in support of this claimed exemption. *See* Def. Opp. & Reply at 10-12 (citing Griffith Decl. (ECF No. 49); Mayara Decl. (ECF No. 51); Pollard Decl. (ECF No. 52); Wolf Decl. (ECF No. 54); Supp. Wright Decl. (ECF No. 55)). Nevertheless, it has still failed to meet its burden of demonstrating that the information is either "confidential" or "privileged" within the meaning of Exemption 4.

a. The Documents Are Not Confidential

FHFA correctly states that Exemption 4 applies to confidential financial information if

disclosure would "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." *See GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994); Def. Opp. & Reply at 10. Even with its five new declarations, FHFA has still failed to make either showing.

(1) FHFA's Admission that Fannie Mae and Freddie Mac Are *Required* to Submit the Information Defeats Any Showing of Impairment

FHFA's new declarations are replete with assertions that the documents contain various kinds of "confidential" information. *See, e.g.*, Supp. Wright Decl. at ¶ 6; Griffith Decl. at ¶¶ 5, 6, 7. But "confidentiality" does not turn on the Agency's or third party's preferred characterization of the document. "[T]he test for confidentiality is an objective one." *GC Micro*, 33 F.3d at 1113 (internal quotation marks, citation omitted). The standard, previously set forth by Plaintiffs, is clear, and FHFA makes no effort to rebut it. Where, as here, third parties are "required to provide" the information, courts hold that disclosure would not impair the ability of the Government to obtain it in the future. *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (financial information provided by concessioners to "Park Service pursuant to statute" not subject to Exemption 4); *see also GC Micro*, 33 F3d at 1112-13 (adopting *National Parks* in Ninth Circuit). The Ninth Circuit has expressly held that "whether the information is of a type which would normally be made available to the public, or whether the government has promised to keep the information confidential, is not dispositive under Exemption 4." *GC Micro*, 33 F.3d at 1113.

FHFA acknowledges that Fannie Mae and Freddie Mac are required to submit the information to FHFA. Def. Opp. & Reply at 10-11. As a matter of law, this defeats the Agency's conclusory assertion that disclosure would limit "its ability to obtain such information from Fannie Mae and Freddie Mac." *Id.* at 11; *see also* Wright Decl. at ¶ 18.

In *American Civil Liberties Union of Northern California v. Drug Enforcement Administration*, N.D. Cal. Case No. C 11-01997 RS, *17 (N.D. Cal. Oct. 28, 2011) ("*ACLU v.*

DEA"), attached as Silver-Balbus Decl. at ¶ 35 & Exh. 26, the agency similarly claimed that disclosure of certain forms "would impede its ability to obtain similar disclosures … in the future." But Judge Seeborg rejected the assertion of Exemption 4 because drug companies were legally required to submit the forms: "The agency bears the burden of establishing that disclosure would hinder its ability to obtain the requested information in the future, and here it cannot credibly do so." *Id.* at *16-17. The same conclusion applies here.

(2) FHFA Has Not Shown Substantial Competitive Harm

Nor has FHFA demonstrated that disclosure would cause substantial competitive harm. "Competitive harm analysis is … limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position." *Watkins v. United States Bureau of Customs and Border Prot.*, 643 F.3d 1189, 1195 (9th Cir. 2011) (internal quotation marks, citation omitted). "[C]onclusory and generalized allegations of substantial competitive harm ... are unacceptable and cannot support an agency's decision to withhold requested documents." *Id.* (internal quotation marks, citation omitted). Information is "confidential" within the meaning of Exemption 4 only if an agency can show "(1) *actual* competition in the relevant market; *and* (2) a likelihood of *substantial* competitive injury if the information is released." *Id.* at 1194 (emphasis added). As in its initial Motion, FHFA in its opposition and reply has still failed to establish either of these two prongs.

(a) FHFA Has Not Shown Actual Competition in the Relevant Market

FHFA has not met its burden of establishing that Fannie Mae and Freddie Mac face *actual* competition in the market relevant to the information sought to be withheld. To prove competitive harm, an agency "must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985) (cited by *GC Micro*, 33 F.3d at 1113). In *Raher v. Federal Bureau of Prisons*, 749 F. Supp. 2d 1148 (D. Oreg. 2010), the court held that

the Bureau of Prisons had "not produced sufficient evidence of actual competition in the marketplace for the private detention of foreign nationals." *Id.* at 1156. This was so even though the agency's declaration stated that CCA, the entity that submitted the information,

> is operating in a competitive marketplace with substantial competitors bidding on every new federal private prison project and re-bids of existing contracts. CCA faces meaningful day-to-day competition with businesses offering similar services. Disclosure of this information would provide CCA's competitors with valuable insights into CCA's strengths and weaknesses in its winning bid responses in this section of their submittal.

Id. The court found this declaration "conclusory" because, *inter alia*, "the submitters are among a small number of entities," and "[t]here is no evidence that businesses other than the submitters are qualified, available, and capable of providing services and facilities that would compete with the secure detention facilities and services already provided by the submitters to BOP or that the submitters even compete against each other in any significant way." *Id.* at 1156-57.

As Plaintiffs previously observed, FHFA offered *no evidence* with its opening brief that Fannie Mae and Freddie Mac, two government-sponsored enterprises, face actual competition.[2] Even augmented by FHFA's new declarations, the record before the Court now contains only a single allegation about the competition faced by either of the enterprises. *See* Griffith Decl. at ¶ 7. Jonathan Griffith, General Counsel for Fannie Mae, states that:

> Fannie Mae primarily competes with Freddie Mac, FHA, Ginnie Mae, and the Federal Home Loan Banks. But, the company also faces competition from others in the financial services industry for qualified employees, who may be able to utilize information about organizational structure and employee development to recruit Fannie Mae employees.

Id. This statement provides none of the "factual or evidentiary material" required to sustain Exemption 4. *Sharyland*, 755 F.2d at 399. Indeed, FHFA's declaration provides much *less* information than the declaration found inadequate in *Raher*. It does not even identify the market in which Fannie Mae supposedly competes with Freddie Mac, FHA, Ginnie Mae, and the

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[2] FHFA contends that Plaintiffs' effort to "rebut" this point is "based on inadmissible hearsay evidence that Fannie Mae and Freddie Mac constitute a 'duopoly' over the mortgage market." Def. Opp. & Reply at 12. But FHFA bears the burden of proving competition; Plaintiffs do not bear the burden of disproving a proposition the Agency has failed to establish.

Federal Home Loan Banks. *But cf. Raher*, 749 F. Supp. 2d at 1156 (alleging "competition in the marketplace for the private detention of foreign nationals"). In any event, the alleged competitors, numbering only five, are clearly "among a small number of entities." *Id.* And the Agency has submitted "no evidence that businesses other than" Freddie Mac, FHA, Ginnie Mae, and the Federal Home Loan Banks are "qualified, available, and capable of providing [the] services" in this unspecified market. *Id.* at 1157. "[T]he record as it now stands[] does not establish actual competition in the relevant market." *Id.*

FHFA's bare-bones assertion of competition for qualified employees is similarly conclusory. *See Sharyland*, 755 F.2d at 399 (affirming district court's conclusion that Exemption 4 did not apply where declaration stated only that rural water supply corporation competes with municipalities and subdivision developers).[3]

(b) FHFA Has Not Shown a Likelihood of Substantial Competitive Injury

With regard to substantial competitive injury, FHFA's new declarations remain too conclusory. FHFA now alleges four ways in which disclosure of the withheld information could lead to injury. It could: (1) "mak[e] it more difficult for Fannie Mae to enter into confidential

[3] Nor has FHFA shown that Fannie Mae and Freddie Mac face competition, assuming it exists, in the "relevant market." *Watkins*, 643 F.3d at 1194. The relevant market is determined by the scope of Plaintiffs' FOIA request. *See id.* at 1196 ("Watkins specified the relevant market by requesting *all* Notices of Seizure [for all imported goods]. Therefore, Watkins established the relevant market as the entire market for imported goods."). Here, Plaintiffs asked for all documents in the Agency's possession related to the use of eminent domain to purchase mortgages. Silver-Balbus Decl. at ¶ 20 & Exh 17 at 3-4. FHFA must therefore show that Fannie Mae and Freddie Mac face "actual competition" in their operations *as they relate to eminent domain*. The Griffith declaration asserts competition with FHA and a handful of other entities. *See* Griffith Decl. at ¶¶ 6-7. But it does not specify the market in which Fannie Mae is acting when it competes with these entities (the market for secondary mortgages, hiring economists, hiring secretaries, or renting office space?), and certainly provides no indication that any such competition is relevant to eminent domain and this FOIA request. The declaration also states that Fannie Mae competes "for qualified employees." *Id*. at ¶ 7. "[C]ommon sense" dictates that the majority of Fannie Mae employees have nothing to do with eminent domain. *Watkins*, 643 F.3d at 1196 (embracing "common sense approach" to "determining actual competition in the relevant market"). As such, many of the alleged competitors seeking to recruit its employees likewise operate in markets wholly unrelated to eminent domain and this FOIA request.

agreements in the future"; (2) "mak[e] Fannie Mae vulnerable to having its employees recruited by others"; (3) "disadvantage [Freddie Mac] in legal and business proceedings"; and (4) "disadvantage[] [Freddie Mac]." Def. Opp. & Reply at 12. These are exactly the type of conclusory assertions that courts have found insufficient, because they are not "detailed enough to allow the court to make an independent assessment of the government's claim." *Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004); *see also Watkins*, 643 F.3d 1189 at 1195 ("[C]onclusory and generalized allegations of substantial competitive harm … are unacceptable and cannot support an agency's decision to withhold requested documents.") (internal quotation marks, citation omitted).

In *ACLU v. DEA*, N.D. Cal. Case No. C 11-01997 RS at *17, the court found the government's declaration insufficient where it asserted, without elaborating, that disclosure would "undercut future contracts between [company] and other government agencies." The court held that "[t]he lack of detail substantiating the claim that disclosure would harm [either company's] competitive posture is fatal, as it is the [agency's] burden to establish the applicability of Exemption 4." *Id.* Likewise, in *Torres Consulting & Law Grp., LLC v. Dep't of Energy*, CV-13-00858-PHX-NVW, 2013 WL 6196291 (D. Ariz. Nov. 27, 2013), the court found a subset of affidavits overly broad and conclusory because they did not provide enough "supporting facts." *Id.* at *5. The *Torres* court then found a separate subset of affidavits sufficient because they provided much greater detail. *Id.* The adequate affidavits provided a detailed explanation of how disclosure of "the hours worked by individual employees, net and gross wages, payroll deductions, and other withholdings" would injure competition in the construction industry by allowing competitors to "underbid" each other for government contracts "because labor production rates are a significant element of a contractor's price." *Id.* at *4.

Here, FHFA has provided no supporting facts or detail for its claim of competitive harm, leaving its position entirely unsubstantiated. It asserts that disclosure could make it more difficult to enter into confidential agreements, but there is no explanation of the subject matter

of any such agreement or how disclosure would make it difficult to enter into them. It claims disclosure could disadvantage Freddie Mac in legal or business proceedings, but again, there is no explanation of the type of legal or business proceedings or how they would be disadvantaged. Unlike the adequate affidavits in *Torres*, FHFA's declaration provides no information about the specific factors that competitors in the relevant market would use to undercut each other.

b. The Documents Are Not Privileged

FHFA continues to withhold pursuant to Exemption 4 three documents which it claims are privileged. *See* Def. Opp. & Reply at 13; 5 U.S.C. § 552(b)(4). The Agency now contends Document C1 is protected by the attorney-client privilege, and Documents A36, A37, and C1 are protected by the work product privilege. Def. Opp. & Reply at 13.[4]

(1) Any Privilege Was Waived Through Disclosure to FHFA

Because the documents at issue were all generated by Fannie Mae or Freddie Mac and produced to FHFA, any attorney-client or work product privilege that might have attached has been waived. It is well established that disclosing attorney-client or work product documents to a third party waives the privilege. *See, e.g.*, *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012); *United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990).

Without citing any legal authority, FHFA claims that Fannie Mae's and Freddie Mac's disclosure of these documents to a third party (FHFA) does not defeat the privileges because FHFA has "succeeded to all of Fannie Mae's rights and privileges." Def. Opp. & Reply at 14 (citing Wright Decl. at ¶¶ 7-11). The portion of the Wright Declaration to which FHFA cites for

[4] FHFA has waived its claims of privilege for these documents. While its opening brief summarily asserted that Documents A36 and A37 are "protected by the attorney client communication and attorney work produce privileges" (Def. Mot. (ECF No. 35) at 16), it offered no supporting argument or analysis; its Exemption 4 discussion was focused entirely on confidentiality. Moreover, FHFA did not previously assert any privilege argument with respect to Document C1, which it now claims to be covered by the work product and attorney-client privileges, and it now claims only work product for Documents A36 and A37, which it previously asserted were also protected by the attorney-client privilege. We nevertheless explain why FHFA has not met its burden as to any of these documents for either privilege.

this proposition nowhere states that FHFA has "succeeded to" Fannie Mae's and Freddie Mac's "rights and privileges," nor does it set forth any facts in support of such a conclusion. *See* Wright Decl. at ¶¶ 7-11. Rather, Mr. Wright's declaration states that FHFA has "regulatory and oversight authority" for Fannie Mae and Freddie Mac. *See id.* at ¶ 8. FHFA does not cite any legal authority for the proposition that disclosure to a government regulator constitutes an exception to the third-party waiver rule. *See Plache*, 913 F.3d 1379 ("party asserting the privilege has the burden to prove the privilege applies"). And disclosure of attorney-client or work product documents by an entity to its government regulator typically results in waiver of the privilege. *See, e.g., Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (corporation "destroyed the confidential status of the seven attorney-client communications by permitting their disclosure to the [Securities and Exchange Commission]").

Notably, in *In re Pacific Pictures*, the Ninth Circuit *rejected* the "highly controversial" "selective waiver" theory, that is, the argument that because the attorney-client documents were "disclosed … to the government, as opposed to a civil litigant, [disclosure] did not waive the privilege to the world at large." 679 F.3d at 1127. "Officers of public corporations," the court explained, have "cooperate[d] with the government" even in the absence of a selective waiver rule and such a rule "does little, if anything, to serve the public good underpinning the attorney-client privilege," *viz.*, to encourage full disclosure to one's own attorney. *Id.* Moreover, "there have been multiple," but unsuccessful, "legislative attempts to adopt a theory of selective waiver." *Id.* at 1128. "Given that Congress has declined broadly to adopt a new privilege to protect disclosures of attorney-client privileged materials to the government," the Ninth Circuit expressly declined to do so. *Id.*; *id.* at 1127 (noting that, except for Eighth Circuit, "selective waiver" theory "rejected by every other circuit to consider the issue since"). FHFA essentially urges this Court to adopt a theory the Ninth Circuit has rejected.

FHFA also argues that finding waiver through disclosure to the government would render Exemption 4 a nullity because, on its face, it protects privileged material. Def. Opp. & Reply at 14. This ignores the fact that Exemption 4 extends to other privileges that (unlike the

attorney-client and work product privileges) are not necessarily waived through disclosure to a third-party government entity. *See, e.g.*, *Washington Post Co. v. United States Dep't of Health and Hum. Serv.*, 603 F. Supp. 235, 237 (D.D.C. 1985) (Exemption 4 protection for confidential report privilege), *rev'd on procedural grounds and remanded*, 795 F.2d 205 (D.C. Cir. 1986).[5]

(2) The Attorney-Client Privilege Does Not Apply

Even assuming the privilege has not been waived, FHFA failed to establish the factual predicates necessary to show that Documents A36, A37, and C1 are attorney-client privileged.

"The [attorney-client privilege] does not allow the withholding of documents simply because they are the product of an attorney-client relationship." *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977). Nor does it apply to all communications between attorney and client. *See United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). Rather, it applies under the following, limited circumstances: "(1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client's instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived." *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002) (citation omitted). The privilege extends to confidential communications from an attorney to a client (and not just communications from client to attorney), but only if (9) that communication is based on confidential information provided by the client. *Mead Data Central*, 566 F.2d at 254. *See also* Pl. Cross & Opp. at 17-18.

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[5] The cases on which FHFA rely do not support its argument. *Margolin v. Nat'l Aeronautics & Space Admin.*, 3:09-CV-00421-LRH, 2011 WL 1303221, *7 (D. Nev. Mar. 31, 2011), is premised on the very notion that disclosure to the government agency results in waiver of the attorney-client privilege. The court held that the documents were *confidential* under Exemption 4 precisely because disclosure to the agency would waive the privilege, dissuade companies "from turning over such information in the future," and thus impair the government's future ability to obtain the information. *Id.; see also Indian Law Resource Center v. Dep't of Interior*, 477 F. Supp. 144, 148 (D.D.C. 1979) (work product document found "confidential" because disclosure would lead firm to submit information to agency in future in "less useful [format] for monitoring purposes"). Here, the documents are neither privileged (due to waiver from disclosure to FHFA) nor confidential (because Fannie Mae and Freddie Mac, unlike the third parties in *Margolin* and *Indian Law Resource Center*, are required to provide them to FHFA and so the Agency will not suffer any impairment of its future ability to obtain the information).

FHFA has now provided additional information about Documents A36 and A37:

* A36 is a five-page memorandum prepared by Freddie Mac's in-house counsel and addressed to FHFA's General counsel, and reflects "the legal advice [Freddie Mac] provided to FHFA's General Counsel." Wolf Decl. at ¶ 4(a). An FHFA declaration states that "[t]he memo sets out Freddie Mac's recommendations regarding legal strategies," "specifically requests FHFA's authorization to act on those recommendations," and was "maintained in a confidential state by FHFA." Supp. Wright Decl. at ¶ 4.

* A37 is a one-page email, prepared by Fannie Mae's General Counsel, to FHFA's General Counsel. Wright Decl. at ¶ 16 & Exh. A (Vaughn Index) at 4. It discusses "legal advice and litigation strategies under consideration by the Enterprise in response to the eminent domain legal efforts of the City of Richmond," *id.*, and "contains legal analysis of the City of Richmond's eminent domain efforts, and seeks FHFA's authorization to take certain legal actions." Supp. Wright Decl. at ¶ 4. It was "located in Mr. Pollard's confidential files relating to his legal analysis." *Id.* Finally the newly submitted Griffith Declaration describes it as "regarding potential litigation." Griffith Decl. at ¶ 5.

The length of the descriptions do not make up for what they lack in substance. These declarations fail to show that: (1) these documents were transmitted to or from a "client" and could thus be deemed a "communication" (these documents were prepared by Fannie Mae and Freddie Mac and transmitted to FHFA, but no factual predicate has been laid for the proposition that FHFA is either Freddie Mac's or Fannie Mae's client);[6] (2) any transmission occurred "in confidence" (the declarations only state that it was maintained in confidence by FHFA once received from Freddie Mac and Fannie Mae, neither of which treated it as confidential when they disclosed it to FHFA, a third party); or (3) these documents were based on confidential information provided by a client. *Martin*, 278 F.3d at 999; *Mead*, 566 F.2d at 254.

Document C1 is "a draft summary of a management committee meeting dated August 2013" which "contains a section that reflects legal advice provided by Freddie Mac's in-house counsel … to senior management regarding the eminent domain matter." Wolf Decl. at ¶ 4(b). There is no explanation of how this document came into the possession of FHFA, save for FHFA's Senior Counsel statement that the document was "obtained from [Freddie Mac]," and then "maintained in a confidential state by FHFA." Supp. Wright Decl. at ¶ 6. This declaration

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[6] Indeed, the theory that FHFA is either enterprise's "client" is inconsistent with FHFA's other theory that the Agency is the "successor" to their rights and privileges. Def. Opp. & Reply at 14.

fails to show that: (1) this document was ever transmitted to a client and could thus be deemed a "communication"(the document is a draft summary of a meeting at which legal advice was communicated from Freddie Mac's in-house counsel to its senior management; there is no indication that the document itself was ever transmitted to senior management and its status as a "draft" suggests it was not); (2) any transmission occurred "in confidence" (the declarations only state that it was maintained in confidence by FHFA once received from Freddie Mac, but the fact that FHFA mysteriously "obtained" the notes from Freddie Mac indicates that Freddie Mac did not treat it in confidence because Freddie Mac disclosed it to FHFA, a third party); or (3) the document was based on confidential information provided by a client. *Martin*, 278 F.3d at 999; *Mead*, 566 F.2d at 254.

Because FHFA's declarations fail to establish all elements of the privilege, they are insufficient. *See Center for Biological Diversity v. Office of Mgmt. & Budget*, 625 F. Supp. 2d 885, 892 (N.D. Cal. 2009) (rejecting Vaughn Index entries that failed to show how the document met each element of the privilege); *see also National Resources Defense Council v. U.S. Dept. of Defense*, 388 F. Supp. 2d 1086, 1104 (C.D. Cal. 2005) (records not exempt under FOIA, where agency failed to establish documents involved the provision of legal advice, were intended to be confidential, and were kept confidential).

(3) The Attorney Work Product Privilege Does Not Apply

The Agency has also failed to establish the elements of the work product privilege. "The party seeking to invoke the work product doctrine bears the burden of establishing all the requisite elements, and any doubts regarding its application must be resolved against the party asserting the protection." *In re Application of Republic of Ecuador*, 280 F.R.D. 506, 514 (N.D. Cal. 2012). To qualify as work product immune from disclosure, "documents must have two characteristics: (1) they must be 'prepared in anticipation of litigation or for trial,' and (2) they must be prepared 'by or for another party or by or for that other party's representative.'" *In re Calif. Public Util. Com'n.*, 892 F.2d 778, 780-81 (9th Cir. 1989) (quoting Fed. R. Civ. P. 26(b)(3)) (hereinafter "*In re CPUC*"). FHFA has not establish the first or second element.

First, FHFA must show that these documents were prepared in anticipation of an identifiable prospect of litigation (*see* Pl. Cross & Opp. at 20-22), meaning that the documents must have been "prepared with a *specific* claim supported by *concrete* facts which would likely lead to litigation in mind." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980) (emphasis added); *see also Fox v. California Sierra Fin. Servs.*, 120 F.R.D. 520, 525 (N.D. Cal. 1988) ("[I]n order for documents to qualify as attorney work-product, there must be an identifiable prospect of litigation (*i.e.*, specific claims that have already arisen) at the time the documents were prepared."). Document C1 is variously described as "reflect[ing] legal advice … regarding the eminent domain matter" (Wolf. Decl. at ¶ 4b), and as a "single sentence" discussion of "eminent domain." Griffith Decl. at ¶ 6. Neither description's fleeting reference to "eminent domain" is sufficient to establish an identifiable prospect of litigation. The issue of eminent domain arose in multiple jurisdictions across the country. There is no identification of a specific fact pattern that had "already arisen" "at the time the document[] [was] prepared." *Fox*, 120 F.R.D. at 525. *See infra* Section II-B-2-b (discussing distinction between general legal standards and claims arising out of particular fact patterns).

With respect to the second element, "[a]lthough some courts have extended the work product privilege outside the literal bounds of the rule," the Ninth Circuit has "conclude[d] that the rule, on its face, limits its protection to one who is a party (or a party's representative) to the litigation in which discovery is sought." *In re CPUC*, 892 F.2d at 781. *In re CPUC* involved a subpoena in litigation between a power company and a nuclear generator supplier on a third party, the California Public Utilities Commission ("CPUC"), for "documents either authored or gathered by CPUC staff attorneys for actual or potential use in past, pending or contemplated CPUC proceedings." *Id.* at 780. The Ninth Circuit held that the work product privilege did not shield the documents from disclosure because the second element of the test was not satisfied – the CPUC was not a party to the suit between the power company and the supplier. *Id.* at 781. Here, too, the second element of the work product test has not been met because the agencies

that generated the documents (Fannie Mae and Freddie Mac) are not a party to this proceeding.[7]

2. Exemption 5: FHFA Has Not Met Its Burden

a. The Attorney-Client Privilege Does Not Apply

In its opening brief, FHFA invoked Exemption 5 to withhold eight documents on the basis of the attorney-client privilege. *See* Wright Decl. at ¶ 19 (A32, A33, A38,[8] A39, A40, A41, A42, and B30). In its opposition and reply, FHFA now asserts the privilege only as to one document, B30. Def. Opp. & Reply at 15. Any assertion of the privilege as to Documents A32, A33, A39, A40, A41, and A42 is waived and meritless for the reasons Plaintiffs previously set forth. *See* Pl. Cross & Opp. at 17-20.

A newly submitted declaration by FHFA General Counsel Pollard sets forth information about B30 not previously provided. The document is a two-page email exchange that "starts with an email from Richard Dorman of the Securities Industry and Financial Markets Association (SIFMA) to [General Counsel Pollard], other FHFA employees, as well as several others outside of FHFA," and "sets out Mr. Dorfman's perspective on" an eminent domain proposal in San Bernardino County. Pollard Decl. at ¶ 14. The redacted portion is an exchange between Mr. Pollard and the then-Acting FHFA Director about a reply to Mr. Dorfman. *Id.* FHFA's declaration *negates* one of the essential elements of the attorney client privilege – that the communication must be based on confidential information *provided by a client*. *See Mead*,

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[7] Although it acknowledges that there is no statutory exemption under FOIA for non-responsive material, FHFA seeks only to produce the portions of the responsive documents that relate to eminent domain. *See* Def. Opp. & Reply at 12 n.5. The Department of Justice disagrees with FHFA's approach: "If any of the information on a page of a document falls within the subject matter of a FOIA request, then that entire page should be included as within the scope of that request." U.S. Dept. of Justice, Office of Information Policy, Determining the Scope of a FOIA Request, OIP Guidance: FOIA Update, Vol. XVI, No. 3 (1995), *available at* http://www.justice.gov/oip/foia_updates/Vol_XVI_3/page3.htm. With respect to longer, multiple-subject documents, "the requester should be fully informed of any 'scoping' determination in all instances and should be given an opportunity to question or disagree with it. In any instance in which a requester disagrees, the document pages involved should be included without question by the agency." *Id.*; *see also* 2006 FOIA Post at 4 (DOJ guidance allowing for "scoping" within a single page of a document, but prohibiting agencies from making a unilateral decision to withhold parts of documents as non-responsive without giving requestor an opportunity to request and obtain the entire document) (citing 1995 FOIA Update, Vol. XVI, No. 3), *available at* http://www.justice.gov/oip/foiapost/2006foiapost3.htm.

[8] Plaintiffs do not challenge the withholding of Document A38 pursuant to Exemption 5.

566 F.2d at 254. Here, the communication was based on information from SIFMA, certainly not Mr. Pollard's client, and the information it contained was not confidential, as it was provided to FHFA and "others outside of FHFA." Pollard Decl. at ¶ 14. The declaration also nowhere states that the redacted information was transmitted in confidence. *See Martin*, 278 F.3d at 999.

b. The Attorney Work Product Privilege Does Not Apply

FHFA initially invoked the attorney work product privilege for Documents A32, A33, A39, and A42. *See* Wright Decl. at ¶ 19. In its opposition and reply, the Agency now suddenly invokes the privilege as to Documents A40 and A41. Def. Opp. & Reply at 17. FHFA has waived the privilege for A40 and A41, but Plaintiffs nevertheless explain why the privilege does not apply to any of these documents.

"The work-product rule does not extend to every written document generated by an attorney." *Coastal States*, 617 F.2d at 864 (internal quotation marks, citation omitted). "The documents must at least have been prepared with a *specific claim* supported by *concrete facts* which would likely lead to litigation." *Id.* at 865 (emphasis added). "The protection applies 'if the prospect of litigation is identifiable because of specific claims that have already arisen.'" *QST Energy, Inc. v. Mervyn's*, 2001 WL 777489, *5 (N.D. Cal. May 14, 2001) (citation omitted). "While it may be true that the prospect of future litigation touches virtually any object of a [government] attorney's attention, if the agency were allowed 'to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated.'" *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 586-87 (D.C. Cir. 1987) (citation omitted) (DOJ affidavits too conclusory to justify withholding as work product documents prepared in the course of DOJ investigation into homicide of political activists). In the FOIA context, courts dealing with government documents pertaining to litigation have drawn the distinction between documents of general applicability and documents analyzing particular transactions. Only the latter are protected. In *Jordan v. United States Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978), the D.C. Circuit held that guidelines and manuals for U.S. Attorneys were not work product,

and were subject to disclosure under FOIA, because they contained "general standards to guide the Government lawyers" on particular topics, but were not "prepared in anticipation of a *particular* trial."[9] *Id.* at 775 (emphasis added); *see also American Immig. Council v. United States Dep't of Homeland Security*, 905 F. Supp. 2d 206, 222 (D.D.C. 2012) (documents relating to role of counsel in immigration proceedings not covered by work product and subject to disclosure under FOIA because they did not "ensu[e] from any 'particular transaction.'").

The newly submitted Pollard Declaration provides identical descriptions of the six documents. Each document's purpose was apparently two-fold, as each was prepared: (1) in anticipation of litigation that FHFA "*could* initiate challenging *any* local or state action using eminent domain to restructure mortgage contracts," and (2) in anticipation of "litigation that *could* result from challenges to agency orders and regulations instructing the regulated entities to limit their activities within the jurisdictions using eminent domain." Pollard Decl. at ¶¶ 8-12 (emphasis added). It is clear from this declaration that the documents were *not* an analysis of any *particular* jurisdiction's eminent domain proposal, or an Agency order arising from a *specific* jurisdiction's use of eminent domain. Rather, like the U.S. Attorney's Manual ordered disclosed in *Jordan*, they were "general standards" on a particular topic (here, eminent domain) and were not "prepared in anticipation of a *particular* trial." 591 F.2d at 775 (emphasis added).

c. The Deliberative Process Privilege Does Not Apply

FHFA is withholding eight documents on the basis of the deliberative process privilege (Documents A32, A33, A39, A40, A41, A42, B21, B30). *See* Def. Opp. & Reply at 19; Wright Decl. at ¶ 20. Despite submitting several additional declarations, the Agency still fails to meet its burden of describing the specific "role played" by each document at issue in the deliberative process. *Electronic Frontier Found. v. CIA*, 2013 WL 5443048, *12 (N.D. Cal. Sept. 30, 2013)

[9] *Jordan* also held that the disputed documents were not exempt under Exemption 2, for "personnel rules and practices." 591 F.2d at 763 (quoting 5 U.S.C. § 552(b)(2)). The D.C. Circuit subsequently rejected *Jordan*'s analysis of Exemption 2. *See Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (finding exempt Bureau of Alcohol, Tobacco and Firearms training manual prescribing investigative techniques). But *Crooker* left undisturbed *Jordan*'s Exemption 5 analysis.

("*EFF*"); *Senate of Puerto Rico*, 823 F.2d at 585-586; *Coastal States*, 617 F.2d at 868.

"The need to describe each withheld document when Exemption 5 is at issue is particularly acute because 'the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." *Animal Legal Def. Fund, Inc. v. Dep't of Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (quoting *Coastal States*, 617 F.2d at 867). The Ninth Circuit has "rejected the application of the privilege … where the agency could point only to speculative or generalized purposes for which the information would be used." *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009).

The newly submitted Pollard Declaration provides identical, boilerplate descriptions for six of the eight documents. Documents A32, A33, A39, A40, A41, and A42 "were used in developing [Pollard's] legal advice and recommendations for the Agency" with regard to the FHFA Statement and accompanying General Counsel Memorandum. Pollard Decl. at ¶¶ 8-13. The remaining two documents, B21 and B30, contributed to a different Agency decision, namely the decision to solicit public input regarding eminent domain issues through an August 9, 2012 Notice in the Federal Register. *Id.* at ¶ 14; Supp. Wright Decl. at ¶ 5. The Documents are described, respectively, as: "contribut[ing] to Mr. DeMarco's decision making with respect to the decision to seek public input" (B21) (Supp. Wright Decl. at ¶ 5), and containing advice "provided as part of the development of recommendations for the Agency's determination on eminent domain" (B30). Pollard Decl. at ¶ 14. Disclosure, the Agency asserts, would discourage the frank exchange of ideas. *See id.*

While FHFA's declarations assert that the documents contributed to two Agency decisions, they do not explain *how* they contributed to that decision, that is, they fail to explain for each document "what … role, if any," it played "in a specific deliberative process." *EFF*, 2013 WL 5443048, at *14; *id.* at *13 (declaration by Office of Director of National Intelligence that documents contributed to "deliberations related to [agency's] reporting and oversight obligations" found "insufficient to satisfy the reasonable specificity standard"); *see also Coastal*

States, 617 F.2d at 868 ("agency has the burden of establishing … the role played by the documents" in deliberative process).

FHFA's declarations provide the same type of boilerplate, conclusory assertions found inadequate in *Hajro v. U.S. Citizenship & Immigration Servs.*, 832 F. Supp. 2d 1095 (N.D. Cal. 2011). In that case, the court held that the agency had not met its burden of establishing the deliberative process privilege where its declaration stated that records were "generated during the deliberative process" regarding adjudication of an individual's citizenship application and that they would "reveal[] the inner thoughts of agency decision-makers." *Id.* at 1112. The court found these statements insufficient to support the agency's assertion that disclosure would chill candid discussion and the free exchange of ideas. *Id.* at 1113. Here, "[t]he problem is that," FHFA, like the agency in *Hajro*, "has failed to substantiate … legitimate concern[s] [about the impact on the deliberative process] with any detailed affidavit or even a description \ … in a non-conclusory manner, [of] their role in the agency's process." *Id.* at 1114. While it may seem that "the burden imposed on the agency is substantial," "this merely exemplifies Congress' intention to preference disclosure over non disclosure." *Id.* at 1114 n.104.

3. FHFA Has Not Met Its Burden of Demonstrating the Documents Are Not Segregable

FHFA has still failed to meet is burden of showing that any exempt information is not segregable. *See* 5 U.S.C. § 552(b); *Army Times Pub. Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993) ("the agency bears the burden of showing that no such segregable information exists"). The Ninth Circuit requires district courts to "make specific findings on the issue of segregability." *Wiener*, 943 at 988 (9th Cir. 1991) ("[R]eversible error for the district court 'to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof.'") (citation omitted).

The government has redacted or withheld in full fifteen documents. *See* Def. Opp. & Reply at 21; Wright Decl. at ¶ 15, Exh. A. FHFA's declarations on segregability consist entirely of Ms. Easter's and Mr. Wright's identical, boilerplate statements that each "reviewed and

evaluated the contents of each of these documents (or portions of documents) for segregability and releasability, with the goal of releasing factual and otherwise non-exempt responsive material whenever it was reasonably segregable" (Easter Decl. at ¶ 28, Wright Decl. at ¶ 13), and Mr. Wright's supplemental statement that he "reviewed each of the documents withheld by FHFA pursuant to Exemptions 4 and 5 and determined that there is no further segregable information." Supp. Wright Decl. at ¶ 10. Although counsel has offered lengthy arguments that the Agency met its segregation obligations (*see* Def. Opp. & Reply at 20-21), "agencies are required to provide the Court with *facts* which will enable it" "to make a *factual* determination of whether all non-exempt portions of these documents have been released." *Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992). "This is particularly true with regard to Exemption 5, because it appears improbable that long documents are *entirely* 'analytical,' and do not contain any segregable *factual* material." *Id.* "[B]oilerplate, conclusory statement[s]," such as those in the Easter and Wright declarations, asserting that "[n]o segregation of non-exempt, meaningful information can be made for disclosure" "provide[] no facts from which the Court can evaluate that assertion, and thus fail[] to provide the Court with the information necessary for it to make its decision." *Id.*; *see also National Resources Defense Council*, 388 F. Supp. 2d at 1105 (court found insufficient declaration that stated "none of the withheld documents contain reasonably segregable information that is not exempt").

C. Defendant's Objections to Plaintiffs' Declaration and Exhibits Are Meritless

Defendant's volley of objections to the Silver-Balbus declaration and attached exhibits are wide of the mark. *See* Def. Opp. & Reply at 22-24. A number of objections are frivolous, such as FHFA's authentication objection to Exhibit 26, which is the opinion of another court of this District in *ACLU v. DEA*. The matter was litigated by counsel for Plaintiffs in this action, and Ms. Silver-Balbus obtained an authentic copy from her office's files. Silver-Balbus Decl. at ¶ 35. As the decision was unpublished, a copy was provided for the Court's convenience. Similarly meritless are FHFA's hearsay and/or authentication objections to Exhibits 12, 24, and

25, which include an FHFA press release, an FHFA announcement about Mr. Ugoletti, and a Congressional Statement by FHFA General Counsel Pollard. *See* Fed. R. Evid. 801(d)(2) (party admission not hearsay); Fed. R. Evid. 902(5) ("publication purporting to be issued by a public authority" is self-authenticating).

FHFA's remaining objections are to Exhibits 1 through 11, 12 through 16, 27, and 28, to which FHFA objected on hearsay, relevance, and/or authentication grounds. Def. Opp. & Reply at 22-24.[10] These exhibits consist of news articles, and academic and public policy reports which "place this controversy in some context." *Assembly of State of Calif. v. United States Dep't of Commerce*, 797 F. Supp. 1554, 1556 (E.D. Cal. 1992). In FOIA actions, courts frequently find it "necessary to provide background for the … dispute." *Id.* Plaintiffs could have simply cited the articles directly in the text of their brief, but appended them for the Court's convenience. *See also* Fed. R. Evid. 902(6) ("Printed material purporting to be a newspaper or periodical" is self-authenticating). Also unavailing are Defendant's objections to paragraphs of the Silver-Balbus declaration. Ms. Silver-Balbus personally reviewed the documents produced in this action and her declaration contains descriptions based on her personal knowledge.

III. CONCLUSION

For the forgoing reasons, the Court should deny FHFA's motion for summary judgment and grant Plaintiffs' cross-motion for partial summary judgment. In particular, the Court should order the Agency to: (1) produce the records of Mary Ellen Taylor, Mario Ugoletti, Meg Burns, and Pat Lawler; (2) search the records of administrative assistants to FHFA officials; (3) conduct an adequate search of employees whose records it previously searched; (4) search the Agency's phone messages; and (5) release the information that the Agency has withheld under Exemptions 4 and 5.[11]

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[10] FHFA did not object to Exhibits 17 through 23.

[11] Defendant requests that this Court conduct an *in camera* review before ordering any documents released. Def. Opp. & Reply at 24. "*In camera* review does not permit effective advocacy." *Wiener*, 943 F.2d at 979. "*In camera* review may supplement an adequate *Vaughn* index but may not replace it." *Id.* Because Defendant has not met its burden on summary judgment, it should grant Plaintiffs' cross-motion and order the withheld information released.

Dated: July 10, 2014

Respectfully submitted,

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