

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-1643 (RWR)
	)	
FEDERAL BUREAU OF	)	
INVESTIGATION,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION AND ORDER

Judicial Watch, Inc. sued the Federal Bureau of Investigation under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), seeking disclosure of documents pertaining to the FBI's alleged role in flying members of the Saudi Royal family out of the United States in the days immediately after September 11, 2001. In response, the FBI produced to Judicial Watch an explanatory declaration and 220 pages of agency documents and records -- many of which were partially or completely redacted and annotated with references to statutory exemptions -- and then moved for summary judgment. Judicial Watch opposed the motion, contesting the validity of certain exemptions, asking for an immediate order directing the release of certain records, and arguing that the FBI disclosures did not fairly meet the requirements of the law. Because the FBI's

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disclosures in this case do not provide (1) an adequate description of each discrete redaction, (2) a specific citation to and explanation of the authority to refuse to disclose that is correlated with each discrete redaction, and (3) sufficient information to determine whether all reasonably segregable information has been segregated and disclosed, the FBI's motion for summary judgment will be denied and the FBI will be directed to file disclosures that fairly meet the requirements of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977), and their progeny.

#### BACKGROUND

The October 2003 issue of *Vanity Fair* magazine contained an article entitled "Saving the Saudis" that raised questions about the role of the FBI, the State Department and the President in evacuating members of the extended Bin Laden and Saudi royal families in the days immediately following the attacks on the World Trade Center towers and the Pentagon on September 11, 2001. Shortly after the article appeared, Judicial Watch sent a FOIA request to the FBI, seeking access to records relating to the following subjects:

a. The decision to allow subjects of the Kingdom of Saudi Arabia, including but not limited to members of the House of Saud and/or members of the Bin Laden family, to leave the United States within 10 days of the terrorist attacks of September 11, 2001[1].

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b. Flights containing subjects of the Kingdom of Saudi Arabia, including but not limited to members of the House of Saud and/or members of the Bin Laden family, allowed to leave the United States between September 11, 2001 and September 15, 200[1].

c. A September 13, 2001 flight between Raytheon Airport Services, Tampa International Airport and Blue Grass Airport in Lexington Kentucky.

d. The decision to allow subjects of the United Kingdom of Saudi Arabia, including but not limited to members of the House of Saud and/or members of the Bin Laden family, to leave the United States by airplane after September 11, 2001 without being interviewed by the FBI.

e. All communication between the CIA, and/or FBI, and or FAA and/or the State Department and the Executive Office of the President (EOP) and/or the Office of the Vice President and/or any agent or representative of President George W. Bush concerning the decision to allow subjects of the Kingdom of Saudi Arabia, including but not limited to the members of the House of Saud and/or members of the Bin Laden family, to leave the United States by airplane after September 11, 2001.

f. A list of all subjects of [the] Kingdom of Saudi Arabia, including but not limited to members of the House of Saud and/or members of the Bin Laden family permitted to leave the United States between September 11th, 2001 and October 1, 2001.

(Compl., Ex. 1, FOIA Request, Oct. 8, 2003; see also Compl., Ex 2.) The *Vanity Fair* article was attached to the FOIA request and Judicial Watch told the FBI that it intended to disseminate any information it obtained from the request to members of the media. (Compl., Ex. 1.)

The FBI initially denied Judicial Watch's request in its entirety, asserting that the requested documents were entirely

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exempt from production as "records or information compiled for law-enforcement purposes" that, if produced, "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Judicial Watch's appeal to the Department of Justice ("DOJ") was denied. Judicial Watch filed this suit seeking a declaratory judgment and an injunction prohibiting the FBI from continuing to withhold records responsive to its FOIA request.

In the course of this litigation, the FBI identified more than 200 pages containing material responsive to Judicial Watch's FOIA request and prepared an annotated production, withholding a substantial amount of information as to which it asserted various statutory exemptions. (See Def.'s Mot. for Summ. J., Decl. of Nancy L. Steward, Apr. 8, 2005 ("Steward Decl."), Ex. A.) With the annotated production, the FBI submitted a declaration providing general explanations for the types of information withheld. (See Steward Decl.)

The parties remain in dispute as to whether the FBI's annotated production and the accompanying Steward declarations together meet the requirements of specificity and segregability set forth in Vaughn and Mead Data, and whether the FBI has justified its exemptions under 5 U.S.C. §§ 552(b)(1) (relating to information that is classified by Executive Order to protect national interests in defense or foreign policy), (b)(5)

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(relating to inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency), (b) (6) (relating to personnel, medical or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy), and (b) (7) (C) (relating to records or information compiled for law enforcement purposes if disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy).

DISCUSSION

Summary judgment is permitted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). In a FOIA suit, an agency is entitled to summary judgment once it bears its burden of demonstrating that no material facts are in dispute and that all information that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001); Weisberg v. Dep't of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980). In other words, here, the FBI must show that there is no genuine issue that it properly invoked the statutory exemptions authorized by §§ 552(b) (1), (b) (5), (b) (6), and (b) (7) (C) to

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withhold information, and that all non-exempt information that is reasonably segregable has been segregated and disclosed.

The FOIA was intended "to permit access by the citizenry to most forms of government records," Vaughn, 484 F.2d at 823, and created a judicially enforceable public right to compel an agency to disclose information. EPA v. Mink, 410 U.S. 73, 80 (1973). To protect competing privacy interests for both agencies and individuals, Congress balanced the right to information with nine statutory exemptions that were "plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." Id. at 79. However, because the clear legislative intent behind the FOIA was to "assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests[,] . . . the policy of the Act requires that the disclosure requirement be construed broadly, [and] the exemptions narrowly." Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (quotation marks and citations omitted). Accordingly, a document that contains exempt material cannot be withheld in its entirety if non-exempt material in that document can reasonably be segregated and disclosed. "The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material. It has long been a rule in this Circuit that non-exempt portions

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of a document must be disclosed unless they are inextricably intertwined with exempt portions." Mead Data, 566 F.2d at 260. Thus, if the agency locates records but withholds all or part pursuant to an exemption, it must assert one or more of the nine statutory exemptions codified at 5 U.S.C. § 552(b) as justification and correlate the exemption with the precise segment of non-disclosed information to which it applies.

Compliance with the FOIA is tested in the adversary system upon a challenge by the party denied access to the records it seeks. In order for a FOIA challenge to be meaningful, the agency resisting disclosure of the records must disclose sufficient information about the records to permit a FOIA plaintiff to make an informed opinion about whether the agency has complied with the law. To be legally sufficient, an agency response to a FOIA request must provide information sufficiently precise and explanatory that a requestor can "present its case effectively" to the court. Mead Data, 566 F.2d at 251; see also Vaughn, 484 F.2d at 823-24, 828 (noting that disclosing sufficient information will permit a more adequate adversary testing of the issues).

Where, as here, a FOIA plaintiff challenges an agency's assertion of FOIA exemptions, a court is required to conduct a *de novo* review of the application of the exemptions. 5 U.S.C. § 552(a)(4)(B). While an *in camera* inspection of the documents

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containing the information at issue may be undertaken at the court's discretion, *in camera* inspections are not advisable in light of the judicial resources such a task requires. Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978); see also Weissman v. CIA, 565 F.2d 692, 698 (D.C. Cir. 1977) (stating that a court should undertake an *in camera* inspection of documents only where the agency's disclosures are inadequate to support a *de novo* review). Rather, a court should be able to conduct its *de novo* review on the basis of the agency's disclosures and affidavits. The government's submissions should "provide a reviewing court with sufficient information to determine, without the disclosure of actual documents, whether information withheld by an agency falls within the claimed FOIA exemption." Voinche v. FBI, 412 F. Supp. 2d 60, 65 (D.D.C. 2006). The agency's disclosures and affidavits must "provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlat[e] those claims with the particular part of a withheld document to which they apply." Mead Data, 566 F.2d at 251. "[I]t is important that the affidavit indicate the extent to which each document would be claimed as exempt under each of the exemptions. The courts cannot meaningfully exercise their responsibility under the FOIA unless the government affidavits are as specific as possible." Ray, 587 F.2d at 1197.



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A "sweeping and conclusory citation of an exemption" does not satisfy the burden the law places on an agency in receipt of a FOIA request. Mead Data, 566 F.2d at 251. An agency's FOIA response must be sufficiently precise and explanatory that a court can "effectively and efficiently . . . evaluate the factual nature of disputed information." Vaughn, 484 F.2d at 826. Without sufficiently specific and detailed information, neither a reviewing court nor an individual seeking agency records can meaningfully evaluate an agency's response to a request for government records. Founding Church of Scientology v. Bell, 603 F.2d 945, 947 (D.C. Cir. 1979).

In sum, the agency's explanatory submissions "must adequately describe each withheld document or deletion from a released document" and "must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant" in order to permit a "court to conduct a meaningful *de novo* review of the agency's claim of an exemption." Voinche, 412 F. Supp. 2d at 65. Where disclosures are not sufficiently detailed to permit a meaningful *de novo* review, a court may order the agency to submit more detailed disclosures. Id. (quoting Coleman v. FBI, 1991 WL 333709, \*1 (D.D.C. 1991)).

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The FBI's 220-page<sup>1</sup> annotated production consists of 21 pages produced without redaction, 85 pages produced completely redacted, and the rest produced with partial redactions. Redactions are marked with citations to exemptions noted on the document itself, most often in the margins. In most instances where the FBI asserts that §§ 552(b)(6) or (b)(7) authorizes non-disclosure, the FBI employs a subcategory notation system of its own making that indicates whether the exemption relates to personal identifiers or contact information for agency staff, persons "merely mentioned" but not interviewed, persons interviewed by the FBI, or persons in whom the FBI had an investigative interest. (Steward Decl. ¶ 15.)

The accompanying Steward declaration describes broad categories of information for which an exemption is asserted and the FBI's general rationale for asserting the exemption as to that type of information. For example, the declaration explains that the FBI withheld names of special agents and support personnel, and that it asserts a particular variant, subcategory 1, of § 552(b)(6) as to such information. (Steward Decl. ¶ 47.) It also asserts the deliberative process privilege under § 552(b)(5) for four documents withheld in their entirety:

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<sup>1</sup> The production runs from page 1 through page 221, but skips page 160. Six of the 220 pages are place-holder pages, purporting to represent exact duplicates of other, specifically identified, pages in the production.

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(1) "a draft of an internal report detailing the FBI's actions taken to investigate the allegations contained in a *Vanity Fair* magazine article" (Steward Decl. ¶ 39), (2) a set of deliberations based on interviewing individuals leaving the United States (id. ¶ 40), (3) an email about the deliberations (id. ¶ 41), and (4) "a document which contains counterpoints that were prepared to address each allegation raised in the *Vanity Fair* article." (Id. ¶ 43.)

I. ADEQUATE DESCRIPTION OF EACH REDACTION

An agency "must adequately describe each withheld document or deletion." Voinche, 412 F. Supp. 2d at 65 (requiring an adequate description of the nature of the redacted information and an explanation of why a stated exemption is relevant). The FBI's disclosures do not describe the nature of the material contained in each of the withheld documents or discrete redactions. For the 85 pages that are wholly redacted without any description of their content, the absence of a description deprives the court, not to mention the plaintiff, of any basis for evaluating whether the withheld material properly falls within the claimed exemptions.

For example, if the large whole-page blocks of redacted information on pages 87, 88, 89, and 90 of the annotated production conceal only names and/or other unique personal identifiers of individuals that were merely mentioned but not

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interviewed by the FBI and persons of investigative interest to the FBI, then the exemptions noted might be proper. However, there is no statement by the agency that establishes that the redacted material contains only names and other personal identifiers and, therefore, there is no possibility of a meaningful *de novo* review of the agency's asserted exemptions.

The Steward declaration provides a brief description of each of the four documents that were withheld in their entirety under the deliberative process privilege, but leaves out certain descriptive basics, impeding proper *de novo* review. For example, because the descriptions do not indicate the length of the four entirely withheld documents, it is not possible to determine whether pages withheld in their entirety belong to those four documents or to some other document which may not be adequately described or for which such whole-page redactions are not satisfactorily explained.

In some instances, the annotated production discloses contextual information describing the information redacted. For example, on page 5 of the production, where a blank is preceded by the designation "SA," an abbreviation for "Special Agent," it is reasonable to infer that the redacted information is a proper name. Or, where a column is headed "Name," as it is on page

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199,<sup>2</sup> it is reasonable to infer that the redaction below the header conceals a list of names. However, contextual clues are not uniformly available or telling. In any case, guesswork is not a proper foundation for a *de novo* review. In a *de novo* review, a court should be able to rely on sworn statements that provide a description of the nature of the information contained in each discrete redaction.

The notation system the FBI employs in some instances incorporates a description of the redacted information. For example, it indicates in some instances that the information relates to persons interviewed or to persons not interviewed but merely mentioned. (Steward Decl. ¶ 15.) However, the exemptions noted in the FBI's annotated production are not uniformly specific, and therefore fail in some instances to demonstrate with sufficient precision why the exemption is relevant. For example, on pages 35, 91, and 92, the FBI departs from its usual notation scheme of using subcategories for exemptions under §§ 552(b)(6) and (b)(7)(C), leaving no indication as to whether the redacted information relates to investigative subjects, interviewees, persons mentioned but not interviewed, or staff of various agencies in various roles. In such instances, because the FBI has not provided a description of the nature of the

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<sup>2</sup> References in the remaining text of this opinion to specific page numbers are references to specific pages in the annotated production. (See Steward Decl., Ex. A.)

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specific redacted information from that page, there is no basis on which to make a meaningful determination of whether the FBI's asserted exemption is proper.

## II. CORRELATING REDACTIONS AND EXEMPTIONS

An agency must "state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant." Voinche, 412 F. Supp. 2d at 65. In the absence of precise correlation, an agency's disclosures effectively amount to no more than impermissibly vague, "sweeping and conclusory" citations of exemptions. Mead Data, 566 F.2d at 251. In its *de novo* review, a court must be able to know the nature of the contents of a specific redaction and associate that redaction with a specific exemption. The disclosures the FBI has made in this case are insufficient to allow such a review.

In many instances throughout the annotated production, it is not possible to associate a specific exemption with a specific redaction.<sup>3</sup> For example, on page 46, a page from which all information has been redacted, seven empty rectangles presumably indicate discrete redactions with the larger redaction covering the entire page. Three of the seven discrete redactions are

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<sup>3</sup> For an example of adequate descriptions of discrete redactions correlated with specific exemptions, see Declaration of William C. Little, Apr. 26, 2006, Exhibit O, filed at Dkt. 31 in James Cole v. United States Department of Justice et al., Civil Action No. 05-674 (RWR), available for viewing and printing on PACER.

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clearly marked as information classified at the secret level, which, relying on the Steward declaration, indicates that the FBI asserts § 552(b)(1) as to this information. In the left margin of the page, however, notations invoke exemptions under §§ 552(b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(F), as well. It is not possible to determine on the basis of the information the FBI provided whether the exemptions asserted in the margin apply to the entire page or only to a discrete portion and, if the latter, which exemption applies to which discrete portion, or to multiple portions. On page 62, another page from which all information has been redacted, an empty rectangle covering the top half of the page completely encloses another empty rectangle on the extreme right side. Beneath the larger rectangle, in the left one-third of the page, notations assert exemptions under §§ 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(F). Yet, there is no way to know whether the asserted exemptions apply equally to all the information redacted or to only one rectangle or the other, or just what difference is signified by the rectangle within the rectangle. Similarly, page 25 consists of a large blank rectangle containing seven smaller blank rectangles. There are four exemption notations in the top margin, but no way to discern which exemption applies to which rectangle. Shortcomings of this type are legion in the annotated production.

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Inferences based on the proximity of the marginal notations in this annotated production are not warranted, even where proximity can be discerned as pages 94 and 199 demonstrate. On pages 94 and 199, the unredacted information suggests that of 23 individuals, 20 individuals were interviewed by the FBI and 3 were not. The exemption notation closest to the list of 23 individuals is the exemption specifically intended for persons "merely mentioned," not the notation for those interviewed. The notation referring to the exemption for those interviewed is placed near the footnotes to that list of names, which apparently provide additional information about two of the individuals not interviewed and one that was. In addition, in many instances, proximity to any defined portion of redacted information is itself equivocal. (See, e.g., pages 33, 35, and 86.) In many other instances, an inference is unwarranted because there is no contextual information or description of the contents that would provide any basis for drawing an inference.

### III. SEGREGATED INFORMATION DISCLOSED

The FBI disclosures do not provide sufficient information to permit a meaningful assessment of whether all reasonably segregable information has been segregated and disclosed. On its face, the FBI's implied assertion that absolutely nothing in a lengthy document that purports to discuss point-by-point an article published in the popular press can be reasonably



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segregated and disclosed strains credulity. The law requires the agency to demonstrate that the exempted information is so entangled with the non-exempt information that it cannot be reasonably segregated. The FBI has not done so in this case.

#### IV. ERRORS IN THE AGENCY'S DISCLOSURES

Other errors in the agency's disclosures raise serious concerns as to the accuracy and thoroughness of the agency's exemption and segregability determinations. The Steward declaration contains several errors discernible even from the limited information provided. First, the annotated production consists of 220 pages, not 213 as the Steward declaration states (Steward Decl. ¶ 3), and not 221, as the pagination suggests. Second, although page 160 is missing, that fact is neither acknowledged nor explained. Third, the Steward declaration states that its Exhibit B contains four reprocessed pages reflecting that it was withdrawing its assertion of various exemptions originally asserted in its Exhibit A. (Steward Decl. ¶ 3 n.3.) Yet, a comparison of the four pages in Exhibit B with what are, presumably, their predecessor counterparts in Exhibit A, reveals no changes with respect to two (pages 161 and 208) of the four reprocessed pages. Fourth, the Steward declaration states that the FBI is asserting exemption (b) (7) (F) as to information on page 33, yet there is no corresponding notation on that page in the annotated production. (Cf. Steward

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Decl. ¶ 75.) Fifth, the Steward declaration states that 74 pages were withheld in accord with the deliberative process privilege under § 552(b)(5). (Steward Decl. ¶ 39.) Yet, only 72 such pages are expressly identified (Steward Decl. ¶ 44), and neither figure matches the citations to the (b)(5) exemption in the annotated production. These errors and others, discovered not as a result of a systematic search for errors but in the course of attempting a *de novo* review, raise concerns about additional errors that may exist but are not detectable because of the limited information disclosed.

#### CONCLUSION AND ORDER

The FBI's 220-page annotated production and accompanying Steward declaration together do not, as they must, provide sufficient detail or precision about the withheld information to permit a meaningful *de novo* review of the exemptions the FBI asserts. Vaughn, 484 F.2d at 826. Because the FBI's disclosures do not adequately describe each redaction, specifically and precisely correlate an exemption with a redaction, explain the exemption's relevance to the redacted information, Voinche, 412 F. Supp. 2d at 65, and demonstrate that all reasonably segregable information has been segregated and disclosed, Mead Data, 566 F.2d at 260, the FBI's motion for summary judgment will be denied. Accordingly, it is hereby

