IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 10-00302 (JDB)
v.	)	
	)	
U.S. DEPARTMENT OF TREASURY,	)	
	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc. ("Plaintiff"), by counsel, respectfully submits this reply to the opposition of Defendant United States Department of Treasury ("Defendant") to Plaintiff's cross motion for summary judgment. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

Despite ample opportunity, Defendant still fails to meet its substantial burdens under Exemption 5 of establishing that the attorney-client privilege or deliberative process privilege apply in this case. Nor has Defendant satisfied the legal standard for withholding information, whether provided voluntarily or under compulsion, under Exemption 4. Consequently, Plaintiff respectfully requests that the Court grant its cross motion for summary judgment with respect to Defendant's unsubstantiated claims of exemption.

II. Argument.

A. Defendant Continues to Improperly Withhold Information Under the Attorney-Client Privilege.

As Defendant itself noted in its initial memorandum, the attorney-client privilege protects facts disclosed by a client to his attorney in confidence, as well as any opinions given by an attorney to the client that reflect those confidential facts. Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment ("Def's Mem.") at 15 (citing *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp.2d 100, 114 (D.D.C. 2005)). Despite this fairly simple standard, Defendant's attempt to invoke the attorney-client privilege continues to be replete with ambiguities, as Plaintiff demonstrated in its opening memorandum. Plaintiff's Memorandum of Law in Opposition to Defendant United State Department of Treasury's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment ("Plf's Mem.") at 4-12. Defendant's opposition fails to resolve these ambiguities, and, because it is Defendant's burden to demonstrate that the attorney-client privilege applies, its attempt to invoke the privilege must be rejected.

With respect to the two "issues lists" attached to some of the email strings, in its opening memorandum Plaintiff noted the substantial discrepancy between Defendant's characterization of the attachment as memoranda prepared by an attorney containing legal advice and the emails' description of the records as "issue lists." Plf's Mem. at 11. While Plaintiff agrees that it is the substance of a record, not its title, that matters (*see* Defendant's Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply in Support of Defendant's Motion for Summary Judgment ("Def's Opp.") at 8), at a minimum, Defendant should have explained this

apparent contradiction. Defendant's failure to do so undermines its claim of attorney-client privilege.

Similarly, in light of Defendant's clarification that it is only invoking the attorney-client privilege with respect to facts it allegedly provided to its attorney and not with respect to facts allegedly provided by AIG (Def's Opp. at 9), it is all the more important that Defendant's claims of attorney-client privilege be unambiguous to ensure that responsive information is not being withheld improperly. It previously was unclear that Defendant was limiting its assertion of the attorney-client privilege in this manner. It continues to be unclear which particular facts were provided by which source, Treasury or AIG, for each particular record. Facts provided for the purpose of seeking legal advice from any source other than Treasury staff cannot be withheld by Defendant under the attorney-client privilege. *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir.1984) ("When an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged"); *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) ("[I]t is clear that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged"); *Amobi v. District of Columbia Dep't of Corrections*, 2009 U.S. Dist. LEXIS 114270, *13 (D.D.C. 2009) ("The communication from an attorney is only protected if it is based on confidential information provided by the client").

Given Defendant's claim that the withheld records include both facts provided by Treasury and facts provided by AIG, as well as the fact that Defendant's inconsistent redactions to the same email raised substantial questions about the propriety of all of Defendant's withholdings (*compare* Plf's Mem. at Exhibit 1, UST JWKF 000035-36 *with* Plf's Mem. at Exhibit 1, UST JWKF 000039-40), it is all the more important that Defendant's claims of privilege be scrutinized

carefully. Simply making an additional release, as Defendant has done (Def's Opp. at 11, n. 3), does not erase these questions.

B. Defendant Continues to Improperly Withhold Information Under the Deliberative Process Privilege.

In its opposition to Plaintiff's cross-motion, Defendant continues to rely on the same, legally insufficient boilerplate and conclusory evidence it submitted in support of its own motion for summary judgment. While Defendant's declarations and *Vaughn* index might parrot the language of some of the case law applying the deliberative process privilege, such evidence is insufficient as a matter of law. *Army Times Pub. Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993). Rather, in order to succeed on a deliberative process claim, the crucial inquiry is whether the agency has demonstrated that disclosure of the records at issue "would actually inhibit candor in the decision-making process if made available to the public." *Army Times Pub. Co.*, 998 F.2d at 1072 (emphasis added). "Specific and detailed proof" is required, not simply "conclusory allegations of harm." *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). As Plaintiff has demonstrated, Defendant's submissions do not meet this exacting standard and, therefore, are insufficient as a matter of law.

Moreover, Plaintiff did not, as Defendant contends, "ignore" Defendant's evidence with respect to the withholding of certain factual material allegedly culled from data provided by AIG. Def's Opp. at 6. Rather, Plaintiff again demonstrated that Defendant's submissions were insufficient. In this regard, Defendant's only evidence appears to consist of the following statement in Mr. Samarias' declaration:

> The particular facts contained in these briefing papers, recommendations, requests for advice, and other similar documents were identified, extracted, and highlighted out of a larger group of potentially relevant facts and background materials by the

> authors, in the exercise of their judgment as to the manner in which to provide their recommendations to Treasury decision makers. Accordingly, the disclosure of the facts that were selected for inclusion in memoranda would themselves tend to reveal the author's and the agency's deliberative process.

Declaration of Joseph J. Samarias at ¶ 45.

Mr. Samarias' declaration fails to explain how disclosure of the factual material contained in the records at issue and allegedly selected from some larger, unidentified set of facts would reveal anything about the sifting out of this subset of facts or the decision-making process by which Defendant chose to include any particular fact in the withheld records. Defendant does not contend that the material constitutes anything other than facts. In this regard, Defendant confuses the end result -- the facts that were selected for inclusion in the records at issue -- with the process by which those facts were selected. Stated another way, if a government official were to select three facts out of a larger universe of facts and write those three facts on a sheet of paper, the subsequent disclosure of the facts on the paper would reveal nothing about the process by which the official selected them. It simply would reflect the end result: the "final decision" and the "fact" that these particular facts were selected.[1] This is especially the case here, where the universe of facts from which the facts were selected has not been made public.

In addition, this case is nothing at all like *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), the primary authority on which Defendant relies and the case that appears to have given rise to proposition that, in certain limited circumstances, summaries of factual materials may be subject to a claim of exemption under the deliberative process. At issue in *Montrose Chemical Corp.* were summaries, made by agency staff attorneys, of evidence developed at a public hearing.

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[1] Final agency decisions are not subject to the deliberative process exemption. *Afshar v. Department of State*, 702 F.2d 1125, 1141-43 (D.C. Cir. 1983).

The summaries were prepared for and submitted to the head of the agency to assist him in his study of the record, on the basis of which he was required to make a decision. No such factual summaries or evaluations are at issue here. Moreover, although the Court in *Montrose Chemical Corp.* found the summaries were exempt under the deliberative process privilege, it qualified its holding:

> . . . our case here is to be distinguished from a situation in which the only place certain facts are to be found is in the administrative assistants' memoranda. Here *all* the facts are in the public record. What is not in, and should not be in, the public record is the administrative assistants' evaluation and selection of certain facts from the 9200-page public record. If we confront a case in which some facts are *only* found in the aide's memorandum, then . . . the Government would bear the burden of putting the record in such shape that all facts are in the public record, separate from analysis which need not be disclosed.

Montrose Chemical Corp., 491 F.2d at 70-71 (emphasis original). The Court concluded, "Where the factual material is not already in the public domain, a different result might be reached." *Id.* at 71.

Here, Defendant claims that the factual material at issue is confidential "information about AIG's historical and proposed compensation payments and structures" provided by AIG to Defendant in its data submissions. Def's Opp. at 5-6. Under *Montrose Chemical Corp*., this case thus presents precisely the type of situation in which disclosure, not secrecy, should result.

Finally, if the Court were to construe Exemption 5 as broadly as Defendant seeks to do here, it would undercut the entire distinction between factual and deliberative material that is so important to FOIA. Any fact referenced in a public record could be subject to a claim of exemption because its inclusion in that record could be claimed to be the result of a government deliberation. Obviously, such an expansive reading of the deliberative process privilege is not consistent with the letter or the spirit of FOIA.

C. Defendant Continues to Improperly Withhold Information Under FOIA Exemption 4.

Defendant continues to fail to justify its invocation of Exemption 4. With respect to AIG's "current draft talking points," Document No. W000001-9, Defendant effectively admits that the declaration of Mr. Samarias does not support its claim of exemption. Instead, it is now apparent that Defendant relies on the declaration of AIG official Eric Litzky only. However, Mr. Litzky's declaration merely parrots the language of *Critical Mass Energy Project v. NRC*, 975 F.2d 831, 879 (D.C. Cir. 1992) (en banc) *cert. denied*, 507 U.S. 984 (1993). Declaration of Eric Litzky at ¶ 4 ("The materials . . . are private, confidential materials related to corporate strategy and are not the type that AIG would customarily disclose to the public"). Such a bald assertion is insufficient. *Army Times Pub. Co.*, 998 F.2d at 1070.

In addition, when Plaintiff demonstrated that Mr. Litzky also disseminated the draft talking point to others, including persons at the Federal Reserve Bank of New York, Defendant claimed in response that limited disclosure to others does not destroy an Exemption 4 claim, citing, among other cases, *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp.2d 1, 17-18 (D.C. Cir. 2000). That case is particularly illustrative of the deficiencies in Mr. Litzky's declaration. The Court in *Ctr. for Auto Safety* found:

> The declarations of the Intervenor-Defendants demonstrate that they do not customarily disclose the information to the public. All declarants have worked for their respective employers for significant periods of time, and are knowledgeable about their companies' air bag systems and designs. All have stated that they are familiar with the information sent to NHTSA, and that it is not information that is customarily disclosed to the public. The declarants state that this information is disclosed only to employees or other entities as necessary, but always accompanied by a confidentiality agreement or protective order.

Id. Mr. Litzky's declaration pales in comparison. It fails to provide any explanation for why the draft talking points were sent to other persons outside AIG or Defendant, much less demonstrate that this dissemination was "necessary" or that steps were taken to ensure that other recipients treated the draft talking points as confidential.[2] Nor is it sufficient for Defendant to assert that Plaintiff failed to prove that the draft talking points were made public. It is Defendant's burden, as an initial matter, to prove that the exemption applies. Defendant has failed to do so.

With respect to the remainder of the withheld records, W000010-12, W000013-15, UST JWKF 000035-36, UST JWKF 000037, UST JWKF 000038, and UST JWKF 000039-40, Defendant's claim of exemption continues to fail because Defendant still has not presented any evidence of a "substantial" or "imminent" competitive injury. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *Iglesias v. C.I.A.*, 525 F. Supp. 547, 559 (D.D.C. 1981). As noted by Plaintiff in its opening memorandum, the evidence on which Defendant relies -- the Declaration of Jeffrey Hurd -- "provides no evidence that employee desertions will cause AIG to suffer 'substantial' competitive harm much less that such harm is 'imminent.'" Plf's Mem. at 19. At most, the specter of alleged harm raised by Mr. Hurd is "indirect, speculative, hypothetical, and distant" at best. *Id.*

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[2] The statement on the bottom of the email accompanying the draft talking points is nothing more than boilerplate. It does not even assert affirmatively that the email and its attachment contain confidential information, but only that they "may contain legally privileged and/or confidential information." Plf's Mem. at Exhibit 1 at UST JWKF 000018. It hardly is the equivalent of a confidentiality agreement or protective order.

III. Conclusion.

For the foregoing compelling reasons, Plaintiff respectfully requests that the Court grant Plaintiff's cross motion for summary judgment with respect to Defendant's unsubstantiated claims of exemption.

Dated: December 6, 2010

Respectfully submitted,

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