United States Department of State

Washington, D.C. 20520

Case No.: F-2016-01402
Segment: L-0001; L-0002

AUG 2 9 2016

Michael Bekesha
425 Third Street, S.W.
Suite 800
Washington, DC 20024

Dear Mr. Bekesha:

I refer you to our letter dated July 29, 2016, regarding the release of material under the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552. The search of the Office of the Legal Adviser has been completed and resulted in the retrieval of 27 documents responsive to your request. After reviewing these documents, we have determined that 10 may be released in full, 10 may be released in part, and 4 must be withheld in full.

An enclosure explains the FOIA exemptions and other grounds for withholding material. Where we have made excisions, the applicable exemptions are marked on the document. The four documents withheld in full were done so under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). All non-exempt material that is reasonably segregable from the exempt material has been released. All released material is enclosed.

We will keep you informed as your case progresses. If you have any questions, please contact Federal Programs Attorney James Bickford at (202) 305-7632. Please refer to the associated case number, F-2016-01402, and the civil action number, 1:16-cv-00574, in all communication regarding this case.

Sincerely,

Eric E. Stein, Acting Co- Director
Office of Information Programs and Services

Enclosures: As stated

The Freedom of Information Act (5 USC 552)

FOIA Exemptions

(b)(1) Withholding specifically authorized under an Executive Order in the interest of national defense or foreign policy, and properly classified. E.O. 12958, as amended, includes the following classification categories:

- 1.4(a) Military plans, systems, or operations
- 1.4(b) Foreign government information
- 1.4(c) Intelligence activities, sources or methods, or cryptology
- 1.4(d) Foreign relations or foreign activities of the US, including confidential sources
- 1.4(e) Scientific, technological, or economic matters relating to national security, including defense against transnational terrorism
- 1.4(f) U.S. Government programs for safeguarding nuclear materials or facilities
- 1.4(g) Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to US national security, including defense against transnational terrorism
- 1.4(h) Information on weapons of mass destruction

(b)(2) Related solely to the internal personnel rules and practices of an agency

(b)(3) Specifically exempted from disclosure by statute (other than 5 USC 552), for example:

ARMEX	Arms Export Control Act, 22 USC 2778(e)
CIA	Central Intelligence Agency Act of 1949, 50 USC 403(g)
EXPORT	Export Administration Act of 1979, 50 App. USC 2411(c)(1)
FSA	Foreign Service Act of 1980, 22 USC 4003 & 4004
INA	Immigration and Nationality Act, 8 USC 1202(f)
IRAN	Iran Claims Settlement Act, Sec 505, 50 USC 1701, note

(b)(4) Privileged/confidential trade secrets, commercial or financial information from a person

(b)(5) Interagency or intra-agency communications forming part of the deliberative process, attorney-client privilege, or attorney work product

(b)(6) Information that would constitute a clearly unwarranted invasion of personal privacy

(b)(7) Information compiled for law enforcement purposes that would:

- (A) interfere with enforcement proceedings
- (B) deprive a person of a fair trial
- (C) constitute an unwarranted invasion of personal privacy
- (D) disclose confidential sources
- (E) disclose investigation techniques
- (F) endanger life or physical safety of an individual

(b)(8) Prepared by or for a government agency regulating or supervising financial institutions

(b)(9) Geological and geophysical information and data, including maps, concerning wells

Other Grounds for Withholding

NR Material not responsive to a FOIA request, excised with the agreement of the requester

MAY 10 2013

Case No.: F-2012-40981

RELEASE IN FULL

Ms. Anne L. Weismann
1400 Eye St., NW, Suite 450
Washington, DC 20005

Dear Ms. Weismann:

I refer to your letter dated December 6, 2012, requesting under the provisions of the Freedom of Information Act (Title 5 USC Section 552) and/or the Privacy Act (Title 5 USC Section 552a) the release of certain records maintained by the Department of State.

The Department of State has a number of record systems. Its Central Foreign Policy Record File is an automated centralized records system, containing substantive foreign policy documents. Additionally, offices within the Department and Foreign Service posts abroad maintain files specific to their operations. Information about the Department and the mission and functions of its individual bureaus and offices, as well as its posts abroad, may be found at our website, www.state.gov or in the U.S. Government Manual published by the Government Printing Office and available at most public libraries.

Based on the subject matter of your request, we searched the files of the offices reasonably likely to maintain responsive records: the Bureau of Information Resource Management, the Executive Secretariat's Information Resources Management Office, and the Executive Secretariat's Office of Correspondence and Records. These files were searched by professional employees familiar with their contents and organization, and no records responsive to your request were located.

As background, it may be helpful for you to know that messages from the Secretary are occasionally transmitted to the Department via e-mail. However, these messages are transmitted from a "dummy" e-mail address that is not capable of receiving replies, rather than from a functioning e-mail account.

I regret that the Department's response to your request is not more positive. Please direct questions concerning the processing of your case to the Office of Information Programs and Services, A/GIS/IPS, SA-2, Room 8100, U.S. Department of State, Washington, D.C. 20522-8100, or to telephone number (202) 261-8484.

The D.C. Circuit Court of Appeals, in Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990), ruled that a "no record" response constitutes an adverse determination, thereby requiring an agency to give appeal rights to the requester. Our determination that the Department does not have any records responsive to your request may be appealed within 60 days of the date of this letter. Although I believe that our search effort has been adequate, I want to be sure that you are aware of this court decision.

Appeals should be addressed to: Chairman, Appeals Review Panel, c/o Appeal's Officer, A/GIS/IPS/PP/LC, Room 8100, SA-2, U.S. Department of State, Washington, D.C. 20522-8100. A copy of the Department's appeal procedures is enclosed. Please refer to the case control number shown above in all correspondence concerning this case.

Sincerely,

for Sheryl L. Walter, Director
Office of Information Programs and Services

Enclosure:
As stated.

RELEASE IN FULL

Smilansky, Gene M

From: Smilansky, Gene M
Sent: Monday, May 20, 2013 11:32 AM
To: Johnson, Brock A
Subject: FW: FOIA Request F-2012-40981 Oglesby
Attachments: F-2012-40981 Ogelsby.tif

Categories: 2
AttachmentsClassification: UNCLASSIFIED
Classification: UNCLASSIFIED
SensitivityCode: Sensitive
SMARTCategory: Working

Brock – FYI.

Sensitive
This email is UNCLASSIFIED.

From: Jaramillo, Edgar E
Sent: Monday, May 20, 2013 11:28 AM
To: Smilansky, Gene M
Subject: FOIA Request F-2012-40981 Oglesby

Gene – Here is the scanned letter sent on May 10th. Attached.
Edgar

Edgar E. Jaramillo
Freedom of Information Act Office
A/GIS/IPS/CR/EAN
Europe, South Central Asia, Africa & Near Eastern Affairs
202-261-8472

This email is UNCLASSIFIED.

RELEASE IN FULL

CREW | citizens for responsibility and ethics in washington

December 6, 2012

By facsimile: 202-261-8579

Office of Information Programs and Services
A/ISS/IPS/RL
U.S. Department of State, SA-2
Washington, D.C. 20522-8100

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and U.S. Department of State (State) regulations, 2 C.F.R. § 171, Citizens for Responsibility and Ethics in Washington (CREW) requests records sufficient to show the number of email accounts of or associated with Secretary Hilary Rodham Clinton, and the extent to which those email accounts are identifiable as those of or associated with Secretary Clinton. By "identifiable" we mean the extent to which the email account is in a name that would permit the public to identify it as an account of the secretary. Please note CREW does not seek the full email address(es) to the extent that would include any exempt information.

Please search for responsive records regardless of format, medium, or physical characteristics. Where possible, please produce records electronically, in PDF or TIF format on a CD-ROM. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs.

If it is your position that any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1972). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). Moreover, the *Vaughn* index must "describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis added). Further, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *Id.* at 224 (citing *Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

1400 Eye Street, N.W., Suite 450, Washington, D.C. 20005 | 202.408.5565 phone | 202.588.5020 fax | www.citizensforethics.org

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. *Mead Data Central*, 566 F.2d at 261. Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Finally, CREW welcomes the opportunity to discuss with you whether and the extent to which this request can be narrowed or modified to better enable DOJ to process it within the FOIA's deadlines. Toward that end, please feel free to contact me at 202-408-5565 or aweismann@citizensforethics.org.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 22 C.F.R. § 171.17, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government and expenditures, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. Moreover, the request primarily and fundamentally is for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii). *See, e.g.*, *McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

Specifically, these records are likely to contribute to greater public awareness of the extent to which Secretary Clinton, like the administrator of the Environmental Protection Agency (EPA), use email accounts not readily identifiable as her accounts. Recently it was reported that Administrator Jackson established alias email accounts to conduct official government business, including an account under the name "Richard Windson," which is not publicly attributable to her. *See* Brendan Sasso, House Republicans Question EPA Over Secret Email Accounts, *The Hill*, November 17, 2012 (attached as Exhibit A). Apparently this practice of alias accounts dates back to former EPA Administrator Carol Browner. Through this FOIA, CREW seeks to learn how widespread this practice is, and to evaluate the extent to which it has led to under-inclusive responses to FOIA, discovery, and congressional requests, and a failure to preserve records in a way that complies with the Federal. Records Act.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials and to ensuring the integrity of those officials. CREW is dedicated to empowering citizens to have an influential voice in government decisions and in the government

decision-making process. CREW uses a combination of research, litigation, and advocacy to advance its mission. The release of information garnered through this request is not in CREW's financial interest. In addition, CREW will disseminate any documents it acquires from this request to the public through www.scribd.com and CREW's website, which also contains links to thousands of pages of documents CREW acquired from multiple FOIA requests. *See* www.citizensforethics.org. CREW's website includes documents relating to CREW's FOIA litigation, Internal Revenue complaints, and Federal Election Commission complaints.

Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

News Media Fee Waiver Request

CREW also asks that it not be charged search or review fees for this request because CREW qualifies as a "representative of the news media" pursuant to the FOIA. In *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia Circuit found the National Security Archive was a representative of the news media under the FOIA, relying on the FOIA's legislative history, which indicates the phrase "representative of the news media" is to be interpreted broadly; "[i]t is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis added), cited in *id.*

CREW routinely and systematically disseminates information to the public in several ways. First, CREW maintains a frequently visited website, www.citizensforethics.org, that received 33,571 page views in October 2012. The website reports the latest developments and contains in-depth information about a variety of activities of government agencies and officials. In addition, CREW posts all of the documents it receives under the FOIA on www.scribd.com, and that site has received 2,287,124 visits to CREW's documents since April 14, 2010.

Second, since May 2007, CREW has published an online newsletter, *CREWCuts*, that currently has 15,564 subscribers. *CREWCuts* provides subscribers with regular updates regarding CREW's activities and information the organization has received from government entities. A complete archive of past *CREWCuts* is available at http://www.citizensforethics.org/newsletter.

Third, CREW publishes a blog, *Citizens blogging for responsibility and ethics in Washington*, that reports on and analyzes newsworthy developments regarding government ethics and corruption. The blog, located at http://www.citiznesforethics.org/blog, also provides links that direct readers to other news articles and commentary on these issues. CREW's blog had 5,664 page views in October 2012.

Finally, CREW has published numerous reports to educate the public about government ethics and corruption, including agencies' failure to comply with their record keeping responsibilities. See *Record Chaos*, which examines agency compliance with electronic record keeping responsibilities; *The Revolving Door*, a comprehensive look into the post-government activities of 24 former members of President Bush's cabinet; and *Those Who Dared: 30 Officials Who Stood Up For Our Country*. These and all other CREW's reports are available at http://www.citizensforethics.org/reports.

Based on these extensive publication activities, CREW qualifies for a fee waiver as a "representative of the news media" under the FOIA.

If you have any questions about this request or foresee any problems in releasing fully and the requested records, please contact me at (202) 408-5565. Also, if CREW's request for a fee waiver is not granted in full, please contact me immediately upon making such determination. Please send the requested records to Anne L. Weismann, Citizens for Responsibility and Ethics in Washington, 1400 Eye Street, N.W., Suite 450, Washington, D.C. 20005.

Sincerely,

Anne L. Weismann
Chief Counsel

Enclosure

RELEASE IN FULL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES LUDLAM, et al., Plaintiffs, v. UNITED STATES PEACE CORPS, Defendant.	Case No. 11-1570 (EGS)

MEMORANDUM OPINION

This Freedom of Information Act ("FOIA") case is before the Court on defendant the United States Peace Corps' Motion to Dismiss or, in the Alternative, for Summary Judgment. For the reasons explained below, the Motion to Dismiss will be GRANTED and the Motion for Summary Judgment will be GRANTED IN PART AND DENIED IN PART.

I. BACKGROUND

Plaintiffs Charles Ludlam and Paula Hirschoff are former Peace Corps volunteers. Both plaintiffs have been advocates for strengthening and revitalizing the Peace Corps; they have served on the boards of non-profit organizations supporting returned Peace Corps volunteers and testified before Congress on behalf of current Peace Corps volunteers. Compl. ¶¶ 3-5.

On April 15, 2009, plaintiffs submitted a FOIA request seeking production, in electronic format, of a country-by-country breakout of the Peace Corps' 2008 survey of its Volunteers. Compl. ¶ 18. The Peace Corps acknowledged the information existed, but stated that it "is not available in the format [plaintiffs] asked for." Compl. ¶ 24. The Peace Corps informed plaintiffs that it would cost anywhere from approximately $850 - $3100 for the Peace Corps to search for and produce the information, and that production would not be electronic. *Id.* ¶¶ 24-28.

On May 27, 2009, plaintiffs filed an appeal of the Peace Corps' decisions regarding the document production format and costs. *Id.* ¶ 29. While the appeal was pending, plaintiffs were approached by a Peace Corps staffer who informed plaintiffs that the country-by-country breakout of the 2008 survey was available, in electronic format. *Id.* ¶ 31. The staffer emailed the information to plaintiffs, who then posted it on the PeaceCorpsWiki website. *Id.* ¶ 31. On June 24, 2009, the Acting Director of the Peace Corps Office of Management emailed Ludlam, noted that the information he sought was available on PeaceCorpsWiki, and concluded "it doesn't appear necessary for

[the Peace Corps] to continue to staff your request for these." *Id.* ¶ 33.

On December 16, 2010, Ludlam submitted a second FOIA request, seeking "a copy of the Peace Corps comprehensive survey of the Volunteers for 2009 and 2010, [including] the worldwide results and the breakouts of the results country by country and program by program for each country." *Id.* ¶ 40.[1] On March 17, 2011, the FOIA officer provided aggregated worldwide summary results of the 2009 and 2010 Annual Volunteer Surveys ("AVS"), but informed Mr. Ludlam that the individual country and program survey results were withheld under Exemptions 5 and 6 of FOIA. *Id.* ¶ 48. Specifically, the agency claimed the information sought was exempt from disclosure because it was covered by the deliberative process privilege, or because it involved matters of personal privacy. *Id.*

Mr. Ludlam appealed the decision on March 18, 2011. In his appeal, Mr. Ludlam narrowed his request to omit Volunteer responses to "open-ended questions" in the AVS. *Id.* ¶ 49. On April 15, 2011, Earl Yates, Associate Director for Management at the Peace Corps, released to Mr. Ludlam the 2009 and 2010 results on a regional level. See Miller Decl. ¶ 17. However,

[1] Each Peace Corps post has a number of programs or "projects" such as education, health and agriculture. Defendant's Motion to Dismiss or for Summary Judgment ("Def.'s Mot.") Att. B, Declaration of Denora Miller ("Miller Decl.") ¶ 16.

Yates denied his appeal for country-by-country and program-by-program responses, citing the same Exemptions. *Id.* ¶ 12, 17.

Plaintiffs filed this action on August 31, 2011, challenging only the denial of the December 16, 2010 FOIA request. Shortly thereafter, the Peace Corps released additional information to Mr. Ludlam. On or about January 31, 2012, the Peace Corps provided Ludlam a significant portion of the country-by-country and program-by-program AVS results for 2009 and 2010. Miller Decl. ¶ 14. The Peace Corps continued to withhold, in whole or in part, Volunteer responses to seven questions in the 2009 AVS and ten questions in the 2010 AVS on a country-by-country and program-by-program breakouts. *Id.* On February 2, 2012, the defendant moved to dismiss, or in the alternative, for summary judgment. The motion is now ripe for the Court's decision.

II. STANDARD OF REVIEW

A. Motion to Dismiss

Exhaustion of administrative remedies in FOIA cases is "generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Oglesby v. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) (overruled in part on other grounds). FOIA requires the requester to exhaust administrative remedies; when a

defendant disputes that a FOIA plaintiff has done so, the matter is properly the subject of a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Hidalgo v. Fed. Bureau of Investigation*, 344 F.3d 1256, 1260 (D.C. Cir. 2003).

B. Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56, summary judgment should be granted if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Waterhouse v. District of Columbia*, 298 F.3d 989, 991 (D.C. Cir. 2002). In determining whether a genuine issue of fact exists, the court must view all facts in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Likewise, in ruling on cross-motions for summary judgment, the court shall grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed. *See Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 658 F. Supp. 2d 217, 224 (D.D.C. 2009) (citing *Rhoads v. McFerran*, 517 F.2d 66, 67 (2d Cir. 1975)).

C. FOIA

FOIA requires agencies to disclose all requested agency records, 5 U.S.C. § 552(a), unless one of nine specific statutory exemptions applies, *id.* § 552(b). It is designed to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citations omitted). "Given the FOIA's broad disclosure policy, the United States Supreme Court has 'consistently stated that FOIA exemptions are to be narrowly construed.'" *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988)).

"FOIA's strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citation omitted). The government may satisfy its burden of establishing its right to withhold information from the public by submitting appropriate declarations and, where necessary, an index of the information withheld. *See Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973). "If an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the

record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone." *ACLU v. Dep't of the Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011); *see id.* (an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible) (internal citations omitted).

III. DISCUSSION

A. Dismissal as to Plaintiff Hirschoff

The Peace Corps argues that plaintiff Paula Hirschoff must be dismissed from this case because she did not file the December 16, 2010 FOIA request, which is the only request at issue in this lawsuit. Def.'s Mot. at 6-8. The plaintiffs do not oppose defendant's argument. Plaintiffs' Opposition to Motion to Dismiss or for Summary Judgment at 5-6 ("Pls.' Opp'n"). Accordingly, the defendant's motion to dismiss plaintiff Hirschoff is **GRANTED**.

The parties also do not dispute that the remaining plaintiff, Charles Ludlam, has properly exhausted his administrative remedies. Accordingly, the dismissal of Ms. Hirschoff does not impact the Court's ability to consider the case on its merits.

B. Waiver

As a threshold matter, plaintiff argues that the Peace Corps has waived the right to invoke Exemptions 5 and 6 regarding the withheld responses from the country-by-country and program-by-program breakouts of the 2009 and 2010 AVS. Plaintiff claims waiver because (1) the agency previously disclosed the responses from substantially similar questions in the 2008 Volunteer survey, and (2) Peace Corps leaders are encouraged to, and do, share the 2009 and 2010 AVS responses with other with other Peace Corps staff. Pls.' Opp'n at 31-34. Defendant, by contrast, contends that the plaintiff cannot demonstrate that the responses to the 2009 and 2010 AVS surveys match the responses to the 2008 surveys; therefore, the Peace Corps has not waived any FOIA exemption. Def.'s Reply at 24-25. For the reasons discussed below, the Court agrees with defendant and finds that no waiver occurred.

In this Circuit, the "public-domain doctrine" has emerged as the dominant paradigm for evaluating the waiver of a potential FOIA exemption. "Under [the] public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (citations omitted). The logic of this doctrine is that "where information requested 'is truly public,

then enforcement of an exemption cannot fulfill its purposes.'" *Id.* (citations omitted). "[A] plaintiff asserting that information has been previously disclosed bears the initial burden of pointing to specific information in the public domain that duplicates that being withheld." *Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993). An allegation that similar information has been released is not sufficient. *Id.*

In this case, plaintiff's waiver argument fails because he has not shown that the withheld responses match any information already in the public domain. He argues only that the *questions* contained in the 2009 and 2010 AVS are substantially identical to the questions in the 2008 survey. However, as defendant notes, it is the *responses* to the surveys that plaintiff seeks, not the questions. Def.'s Reply at 25. Considering that the responses to the later surveys were provided by a different group of volunteers, regarding their experiences during a different time period, the responses will not be identical to those provided in 2008. Certainly, the plaintiff has not demonstrated, with specificity, that the previous disclosure duplicates withheld information.

The fact that the Peace Corps encouraged readers of the surveys to share information with other staff cannot salvage plaintiff's claim of waiver. While agency leaders may have

disseminated the survey results within the agency, the plaintiff has not shown that Peace Corps officials were authorized to, or did, release 2009 or 2010 survey results to the general public outside the agency. *See Muslim Advocates v. U.S. Dep't of Justice*, 833 F. Supp. 2d 92, 100 (D.D.C. 2011).

Accordingly, the Court finds that the Peace Corps has not waived its right to invoke Exemptions 5 and 6 with respect to the withheld material.

C. Exemption 6

Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). A determination of proper withholding under Exemption 6 proceeds in two stages. First, the Court must decide if the information is subject to protection, specifically, whether the information is contained in a personnel, medical, or similar file, and if so, whether "disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest. If no significant privacy interest is implicated, (and if no other Exemption applies), FOIA demands disclosure." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). If, on the other hand, a substantial privacy interest is at stake, the Court must then "weigh the privacy interest in nondisclosure

against the public interest in the release of records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999) (internal quotation marks omitted). The agency bears the burden to persuade the Court that the exemption applies. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984).

The Peace Corps argues that Exemption 6 applies to three types of questions in the 2009 and 2010 AVS. The Court will address them in turn.

1. First Type of Question: Rating Staff Performance

The Peace Corps withheld complete or partial answers to several questions regarding staff performance. First, it withheld the answers to questions F2 in the 2009 AVS survey and F3 in the 2010 survey.[2] These questions are identical, and ask "How satisfied are you with the health care received from your PCMO(s) [Peace Corps Medical Officer]?" The Volunteers can provide six possible responses ("Not at all, Minimally, Adequately, Considerably, Exceptionally and Not Used").

[2] Unless otherwise noted, the Court takes all facts regarding the questions and withheld responses from the Defendant's Motion, Exhibit 10 (Table of Withheld Responses); Exhibit 1 (2009 AVS), Exhibit 2 (2010 AVS), and Exhibit 14 (Vaughn index), as well as Plaintiff's Opposition, Exhibit 1 (Chart of Withheld Responses).

The Peace Corps also withheld partial answers to identical questions F3 (2009 AVS) and F4 (2010 AVS). These questions ask "How satisfied are you with the following support provided by in-country Peace Corps staff?" and permitted the following responses: "Not at all, Minimally, Adequately, Considerably, Exceptionally and Not Used." The questions were then broken out into separate sub-questions for ten different staff positions/ functions. Of these ten, the Peace Corps withheld responses as to four: Medical, Safety and Security, Site Selection and Preparation, and Technical Skills.

Partial responses to identical questions F6 (2009 AVS) and F6 (2010 AVS) were also withheld. These questions ask "How would you rate your interaction with post staff?" and permitted the responses of "Adequate" or "Not Adequate." The questions were broken into separate sub-questions as to four topics: "responsiveness to my issues," "informative content," "My comfort level discussing issues," and "Adequacy of Visits/Visits to your site." They were further broken out into separate sub-questions for eight different staff positions. Of these eight, the Peace Corps withheld responses for six: Country Director, Program Training Officer/Sub-Regional Program Training Coordinator, Associate Peace Corps Director/Program Manager, PCMO, Safety and Security Coordinator, Training Manager.

Finally, questions F7 (2009 AVS) and F9 (2010 AVS) ask "To what extent is your Country Director aware of Volunteer issues and concerns through interactions with Volunteers?" and permits responses of "Not at all, Minimally, Adequately, Considerably, Completely/Exceptionally."

2. Second Type of Question: Insensitive and Discriminatory Conduct/Harassment

The Peace Corps partially withheld the answer to question G2 (AVS 2010). This question asks whether Volunteers "[H]ave encountered insensitive comments or behavior toward you based on your race, ethnicity, age, gender, or sexual orientation from any of the following sources?" Volunteers could respond Yes, No, or Not Applicable. The question is separated into four categories of people who might have engaged in such conduct. The Peace Corps withheld responses for two categories: Host/Homestay Family and Community members.

Responses to question G3 (AVS 2010) were also partially withheld. This question asks Volunteers to report any discrimination/harassment they have encountered. The question identifies several types of discrimination: age, anti-American, disability, gender, racial/color, religious, sexual orientation, sexual (physical) and sexual (verbal). Volunteers could respond with the number of times they had (i) encountered that type of harassment/discrimination, and (ii) reported it to the Peace

Corps. The question is further broken down into seven different categories of persons responsible for the harassment. The Peace Corps has withheld responses for two of the categories: "counterpart, supervisor, co-worker (not Peace Corps)" and "Host Country Family Member."

3. Third Type of Question: Crime

The Peace Corps partially withheld responses to question G4 (2010 AVS), which asks whether Volunteers were victims of any of several different types of crime committed by several different categories of individuals. Volunteers could respond by identifying the number of times they had (i) experienced that type of crime, and (ii) reported it to the Peace Corps. The Peace Corps has withheld the responses to three of the crimes listed -- sexual assault, rape, and attempted rape -- for two categories of individuals - "counterpart, supervisor or co-worker (not Peace Corps)" or "host country family member."

4. Analysis

a. Only the Questions Rating Staff Performance Satisfy The Threshold Requirement for Exemption 6

Exemption 6 allows an agency to withhold personal identifying information, such as "place of birth, date of birth . . . employment history, and comparable data," if disclosure of such information "would constitute a clearly unwarranted

invasion of personal privacy." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982). By contrast, "[i]nformation unrelated to any particular person presumably would not satisfy the threshold test." *Id.* at 602 n.4. Specifically, Exemption 6 does not apply if there is no "substantial likelihood that any concrete facts about a particular individual could be inferred" as a result of the release of the withheld information. *Horner*, 879 F.2d at 878; *see also Dep't of Air Force v. Rose*, 425 U.S. at 380 n. 19 ("Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities"); *Arieff v. Department of the Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (Exemption 6 only applicable where the release of information leads to likelihood of actual identification; release of information leading to increased speculation about individuals is not subject to withholding).

In this case, the Peace Corps has met the threshold with respect to the first category of questions withheld - those related to staff ratings. The agency has explained that it withheld responses that rate specific staff positions, and at the country or project level, these positions are "typically filled by one person or a few at most." Benjamin Decl. ¶ 14. The plaintiff has provided no information to the contrary. Accordingly, there is more than a "mere possibility" that

employment ratings data could be linked to a particular individual if this information were released. Moreover, employees have a substantial privacy interest in their employment ratings data. *See, e.g., Fed'l Labor Relations Authority v. Dep't of Commerce*, 962 F.2d 1055, 1059 (D.C. Cir. 1992) (employee ratings containing either favorable or derogatory information is personal information subject to Exemption 6); *Ripskis*, 746 F.2d 1 (same).[3]

The Peace Corps has not met the threshold exemption, however, for responses to the second or third types of questions. As set forth above, the second type of question relates to insensitive comments or behavior from Volunteers' (a) host families or (b) community members, or discrimination/ harassment they have encountered from their (a) counterparts, supervisors, or co-workers, or (b) host families. On their face, these categories seem very likely to include a large number of individuals, and the agency has provided no indication to the contrary. The Peace Corps relies on the declarations of

[3] Plaintiff argues that any privacy interest in the ratings data has been abolished because the readers of the country-by-country reports are "encouraged to share the results with staff and Volunteers." Opp'n at 12. Courts have held, however, that the mere fact that some information may be known to certain members of the public does not negate an individual's privacy interest in preventing further dissemination to the public at large. *See, e.g., Forest Serv. Employees v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 n.3 (9th Cir. 2008); *Barnard v. Dept of Homeland Sec.*, 598 F. Supp. 2d 1, 12 (D.D.C. 2009) (collecting cases).

employees Denora Miller and Esther Benjamin for support, but these declarations do not demonstrate any likelihood that the withheld information could be linked to a particular individual.

Ms. Miller states that there were 7671 Volunteers in 2009 and 8655 in 2010, that the country-by-country and program-by-program numbers are significantly smaller, and then concludes "it would be possible for anyone familiar with the Peace Corps . . . to determine the identities of individuals . . . identified as sources of improper behavior or comments, or pointed to as criminals." Miller Decl. ¶ 33. This is insufficient; as discussed *supra*, the "mere possibility" of a threat to privacy interest is not sufficient to justify withholding under Exemption 6. *Rose*, 425 U.S. at 380 n. 19. Ms. Benjamin's declaration is also insufficient. She states that disclosure of information regarding discrimination, harassment and crimes on the "smaller" country or project basis,

> [M]ay easily identify or be perceived in the host country as identifying specific host family/homestay family members, specific host country citizen members of the community where the Volunteer lives and works, and counterparts/co-workers (such as co-teachers, co-workers in a health clinic, or other host country colleagues with whom a Volunteer works), or management (such as school principals, health clinic directors, agricultural cooperative managers, and other non Peace Corps management personnel).

Benjamin Decl. ¶ 15. The bare assertion that a specific individual "may easily [be] identif[ied]," unsupported by any

information such as the number of Volunteers in any country or program, the typical size of the host families with whom Volunteers stay, or the size of the communities or workplaces in which Volunteers are placed, is simply not enough for the agency to meet its burden to demonstrate that the exemption applies. *See, e.g., Gardels v. Cent. Intelligence Agency*, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982) (agency affidavits must be reasonably specific, not merely conclusory, to show that the documents are exempt from disclosure). Accordingly, because the Peace Corps has provided no reasonable basis to determine that any particular individuals will be identified by disclosure of the AVS questions regarding discrimination/harassment or crime victimization, the agency's invocation of Exemption 6 fails.

b. Weighing the Privacy Interest in Nondisclosure Against the Public Interest in the Release of Records

Once an agency has established a substantial privacy interest is at stake, the Court must then "weigh the privacy interest in nondisclosure against the public interest in the release of records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier*, 164 F.3d at 46 (citations omitted). The phrase "clearly unwarranted" within the statute "instructs the court to tilt the balance in favor of

disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971).

In the FOIA context, the definition of "public interest" is limited. ""The only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *United States Dep't of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (citations omitted). The court must therefore weigh the privacy interest of Peace Corps staff in the non-disclosure of the survey questions rating their performance against the extent to which the disclosure of this information would shed light on the agency's "performance of its statutory duties" or otherwise let citizens know "what their government is up to." *Id.*

In this case, plaintiff claims the requested information will serve the public interest by revealing information about "the safety of and the support given to Peace Corps Volunteers," mandated by Congress in the Kate Puzey Peace Corps Volunteer Protection Act of 2011 ("Volunteer Protection Act"), which amended the Peace Corps Act, 22 U.S.C. § 2507. Opp'n at 18-19. The new provisions charge the Peace Corps with providing a variety of protections for Volunteers who are victims of sexual

assault. 22 U.S.C. §§ 2507a - 2507d. More generally, the new provisions institute robust reporting requirements about Volunteers and Peace Corps staff. Congress has directed the Peace Corps to provide it with the results of Annual Volunteer Surveys, and also with Inspector General Reports containing, *inter alia*, "reports received from volunteers relating to misconduct, mismanagement or policy violations of Peace Corps Staff." *Id.* §§ 2507e(c) and (d). Congress further directed the President to perform a *country by country* portfolio review for each country the Peace Corps serves. *Id.* § 2507e(e) (emphasis added). The portfolio review, which must be provided to Congress upon request, "shall at a minimum include," *inter alia*, (i) an analysis of the safety and security of Volunteers, and (ii) an evaluation of the effectiveness of management of each Peace Corps post. *Id.* Finally, the new provisions of the Act require the President to submit to Congress, on an annual basis, a report including "the annual rate of early termination of volunteers, including demographic data associated with such early termination." *Id.* § 2507i.

Plaintiff argues that this legislation demonstrates the public interest in "the safety and well-being of the Volunteers, [which] depend[s], in large part, on the effectiveness of and professionalism of the Peace Corps staff." Opp'n at 19. The

government, for its part, does not acknowledge the Kate Puzey Peace Corps Volunteer Protection Act of 2011. Rather, it claims that the information in the staff ratings data would not contribute to the public's understanding of the Peace Corps' operations or activities. Reply at 15. Even if there is public interest in the information, the government claims that interest is satisfied by the disclosure of the information aggregated at the global or regional level. *Id.* at 13-14.

Upon consideration, the Court concludes that there is a significant public interest in disclosure of the responses to questions regarding staff performance. The 2011 Amendments to the Peace Corps Act make clear that the Agency's mission includes protecting the safety and security of the Volunteers, as well as ensuring that Peace Corps personnel are effectively managing the agency's operations at a country by country level. These are precisely the concerns addressed in the AVS questions relating to staff performance: Volunteer access to health care, support from staff in substantive areas including safety and security, and staff awareness of and responsiveness to Volunteers' concerns. See AVS 2009 and 2010 Questions F2, F3, F4, F6, F7. Disclosure of this information would therefore serve the very public interest central to the purposes of FOIA by furthering the right of the public to know "what their

government is up to." *United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989).

The Court further concludes that there is a significant public interest disclosure of this information on a country-by-country basis. As plaintiff explains, Volunteers are invited to serve in specific countries, where they are overseen by a Peace Corps Country Director "who is the executive leader of the Peace Corps for that country." Opp'n at 11. Moreover, plaintiff contends, it was the "safety of Volunteers, and the inadequate support some victims of violence received from the Peace Corps and the host country in which they serve," which prompted the media attention that led to the Volunteer Protection Act of 2011. *Id.* at 18. Finally, as set forth above, Congress has recognized the importance of having access to this information on a country by country basis. *See* 22 U.S.C. § 2507e(e). By contrast, Plaintiff has not produced any support for his claim that there is public interest in program-by-program survey results within each country. The Court therefore cannot conclude that the program-by-program data is relevant to the public's ability to monitor whether the agency is correctly doing its job.

Through the new reporting requirements, the amendments to the Act provide that much of the information plaintiff seeks

will be publically available in future years. However, the information obtained in the 2009 and 2010 AVS predates the new requirements. Accordingly, without the data from the AVS, the public would have more difficulty determining whether the Peace Corps has been, and is, carrying out its mission to protect and support its Volunteers. *See Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1231-32 (D.C. Cir. 2008) (finding a strong public interest in disclosing data the Department of Agriculture collects to monitor its program administration).

Having found greater than a *de minimis* privacy interest and a significant public interest in disclosure of the country-by-country staff rating questions in the AVS, the Court must now "balance the two to determine whether the agency has met its burden to show that the substantial interest in personal privacy is not outweighed by the public interest in disclosure. . . [U]nless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail and the agency may not withhold the files under Exemption 6." *Id.*, 515 F.3d at 1232 (citations omitted).

In this case, the Peace Corps' employees' privacy interests are modest. As set forth above, plaintiff seeks survey responses to multiple choice questions regarding Volunteer experience with staff performance. The survey responses are not

official performance reviews or ratings, nor do they contain names or any other personal details regarding any staff members. By contrast, there is a strong public interest in monitoring the Peace Corps' protection of Volunteers' safety and security, which must necessarily include effective management within each country. Accordingly, release of this information would not "constitute a clearly unwarranted invasion of personal privacy" under Exemption 6.

D. Exemption 5

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(6). Citing Exemption 5's deliberative process privilege, the Peace Corps has withheld responses to all of the AVS questions also withheld under Exemption 6, as well as responses to all or part of three additional questions.

First, the Peace Corps withheld the response to question F1 (2009 and 2010 AVS), which are identical in both surveys.[4] It asks volunteers how prepared the host country people were for their arrival when they first arrived at their host community,

[4] Unless otherwise noted, the Court takes all facts regarding the questions and withheld responses from the Defendant's Motion, Exhibit 10 (Table of Withheld Responses); Exhibit 1 (2009 AVS), Exhibit 2 (2010 AVS), and Exhibit 14 (Vaughn index), as well as Plaintiff's Opposition, Exhibit 1 (Chart of Withheld Responses).

and permits responses of "not at all," "minimally/poorly," "adequately," "considerably/well" and "exceptionally/very well."

Responses to question J1 (2009 and 2010 AVS), also identical in both surveys, were partially withheld. The question asks how personally rewarding Volunteers found their Peace Corps service, and provides five separate categories for "Overall Peace Corps Service," "Community Involvement," "Experience with Other Volunteers," "Work with Counterparts/Community Partner," and "Experience with other Host Country Nationals/Individuals." Volunteers could respond "not at all," "minimally," "adequately," "considerably," and "exceptionally." Of the five categories, the Peace Corps withheld responses as to one: work with counterparts/community partner.

Finally, the Peace Corps withheld the responses to identical questions F6 (2009 AVS) and F5 (2010 AVS). These questions ask Volunteers whether their host country would benefit the most if the Peace Corps program was discontinued, reduced, refocused/redesigned, maintained as it, or expanded. Volunteers could choose one of these options.

The deliberative process privilege "covers documents reflecting advisory opinions, recommendations and deliberation comprising part of a process by which governmental decisions and

policies are formulated." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citations omitted). The purpose of this privilege is to "prevent injury to the quality of agency decisions," by protecting from disclosure confidential, pre-decisional advice and counsel on matters of policy. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). In order for the deliberative process privilege to apply, the material must be both "predecisional" and "deliberative." *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 876 (D.C. Cir. 2009) (citation omitted). A document is predecisional if it was generated before the agency action was finally adopted, and deliberative if it "reflects the give-and-take of the consultative process." *Id.* at 874 (citation omitted).

The Peace Corps asserts that each of the survey responses withheld is predecisional because (1) Peace Corps officials rely heavily on these responses in the continuing process of formulating agency strategies and policies; and (2) the surveys themselves state that they will "be used by the Peace Corps to identify best practices and implement program improvements" and "will contribut[e] to the improvement of the Peace Corps' operations and, ultimately, to the success of the Peace Corps." Def.'s Mot. at 38-39, *see also* Declaration of Alice-Lynn Ryssman at ¶¶ 10-13. In her declaration, Peace Corps official Esther

Benjamin states that "AVS data are used in agency strategic planning and performance activities . . . assessments of agency performance . . . [and] internal monitoring at cohort, project, post, regional, and global levels[.]" Benjamin Decl. ¶ 11. Plaintiff responds that "the generalized and aspirational agency goals and functions" set forth in the agency declarations "are not decisions within the meaning of the statute. . . . Indeed, virtually any action or information considered by the Peace Corps conceivably could fit within this definition and thus be withheld from public disclosure." Opp'n at 27.

The Court agrees with plaintiff. Although the government need not pinpoint a specific decision or policy in connection with which predecisional material is prepared, the deliberative process must be capable of some definition. *Compare Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (finding an agency's study of how to shepherd a FOIA bill through Congress to be a defined process) with *Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C. Cir. 1975) (finding an agency's efforts to evaluate and change its personnel policies, rules and standards too amorphous to qualify as a process for the purposes of the deliberative process privilege).

In *Vaughn*, the agency asserted that reports appraising the performance of agency supervisors were protected under the

deliberative process privilege because they were part of an "ongoing [] process" in which "the agency evaluates and changes its personnel policies, regulations and standards." 523 F.2d at 1143. The Circuit rejected the argument, finding that the agency could not classify its ongoing, continual task of appraising, evaluating and making recommendations for improvement as a seamless "process" for the purposes of the deliberative process privilege, since such a definition places virtually no limit on the privilege. *Id.* at 1145. To allow such an expansive definition of the term process under Exemption 5, the Court reasoned, "would swallow up a substantial part of the administrative process, and virtually foreclose all public knowledge regarding the implementation of . . . policies in any given agency." *Id.*

Defendant's arguments fail for the same reason as the government's did in *Vaughn*. The Peace Corps asserts generally that the AVS surveys are part of the agency's processes for ongoing, continuous appraisals and improvements in all manner of agency activities, from strategic planning, to program improvement, to assessment of agency performance and beyond. Ryssman Decl. ¶¶ 10-13; Benjamin Decl. ¶¶ 10-13. To permit the Defendant to assert the deliberative process privilege for every piece of information which could be used, in some way or

another, in the continuous process of improving the Agency would set virtually no limit on the privilege. Exemption 5's protections do not reach nearly this far.

Further contradicting the Peace Corps' stated rationale for withholding under Exemption 5 is the fact that the agency produced most of the responses to the surveys. The Court is particularly puzzled by this because the Agency asserts that the *entire* AVS results are used to shape agency policy and decisionmaking. *See* Ryssman Decl. ¶¶ 10-13, Benjamin Decl. ¶¶ 10-13. The Agency offers no explanation as to why the withheld information constitutes pre-decisional deliberations connected to an agency policy or action, while the other responses in the same documents are not. In order to show that material is deliberative, the agency must identify "what deliberative process is involved and the role played by the documents at issue in the course of that process." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F. 2d 854, 868 (D.C. Cir. 1980). Here, the Peace Corps has failed to do either. Accordingly, the Court finds the agency has not met its burden to demonstrate that the withheld materials are both pre-decisional and deliberative, and therefore that the documents are not properly withheld under Exemption 5.

E. Segregability

Plaintiff does not dispute that all reasonably segregable information was produced to him. Even after determination that documents are exempt from disclosure, however, FOIA analysis is not properly concluded unless a court determines whether "any reasonably segregable portion of a record" can "be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "So important is this requirement that '[b]efore approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld.'" *Elec. Frontier Found. v. Dep't of Justice*, 826 F. Supp. 2d 157, 173 (D.D.C. 2011) (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106)). The Court errs if it "simply approve[s] the withholding of an entire document without entering a finding on segregability or the lack thereof." *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242 n. 4 (D.C. Cir. 1992) (citations omitted).

"It has long been the rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). The agency should, for example, "'describe what

proportion of the information in [the] documents,' if any, 'is non-exempt and how that material is dispersed through the document[s].'" *Elec. Frontier Found.*, 826 F. Supp. 2d at 174 (citing *Mead Data Cent., Inc.*, 566 F.2d 242, 261 (D.C. Cir. 1977)); *see King v. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) (agency must sufficiently identify the withheld material to enable the district court to make a rational decision whether the withheld material must be produced without actually viewing the documents).

Upon review of the documents, the Court finds that the defendants have made very limited, specific redactions with respect to the program-by-program survey results, and have explained in detail the basis for those redactions. *See* Miller Decl. ¶¶ 14, 16, 18, 35. It appears that defendants have redacted only what was necessary to protect the exempt information, and defendants are not withholding any documents in full. Accordingly, the Court finds that all segregable information in the program-by-program results of the 2009 and 2010 AVS has been disclosed to plaintiff.

IV. CONCLUSION

For all of the foregoing reasons, defendant's motion to dismiss is **GRANTED**. The Court concludes that the Peace Corps was justified in withholding the Volunteer responses in the program-

by-program breakouts for the following questions: 2009 AVS - F2, F3, F6, F7; 2010 AVS - F2, F3, F4, F6. The Peace Corps did not justify withholding of any other document at issue. Accordingly, defendant's motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**. An appropriate Order accompanies this Memorandum Opinion.

Signed: Emmet G. Sullivan
United States District Judge
March 29, 2013

RELEASE IN FULL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 16, 2012 Decided April 2, 2013

No. 12-5004

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,
APPELLANT

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00951)

Anne L. Weismann argued the cause for appellant. With her on the briefs was *Melanie Sloan*.

Julie A. Murray and *Adina H. Rosenbaum* were on the brief for *amici curiae* Public Citizen, et al. in support of appellant.

Steve Hajjar, Attorney, Federal Election Commission, argued the cause for appellee. With him on the brief were *Anthony Herman*, General Counsel, and *David Kolker*, Associate General Counsel. *Sarang V. Damle* and *Michael S. Raab*, Attorneys, U.S. Department of Justice, entered appearances.

Before: GRIFFITH and KAVANAUGH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: This case presents an important question of procedure under the Freedom of Information Act: When must a FOIA requester exhaust administrative appeal remedies before suing in federal district court to challenge an agency's failure to produce requested documents?

As a general matter, a FOIA requester must exhaust administrative appeal remedies before seeking judicial redress. But if an agency does not adhere to certain statutory timelines in responding to a FOIA request, the requester is deemed by statute to have fulfilled the exhaustion requirement. *See* 5 U.S.C. § 552(a)(6)(C)(i).

To trigger the exhaustion requirement, an agency must make and communicate its "determination" whether to comply with a FOIA request – and communicate "the reasons therefor" – within 20 working days of receiving the request, or within 30 working days in "unusual circumstances." *Id.* § 552(a)(6)(A)(i), (a)(6)(B)(i). If the agency has made and communicated its "determination" in a timely manner, the requester is required to administratively appeal that "determination" before bringing suit. But if the agency has not issued its "determination" within the required time period, the requester may bring suit directly in federal district court without exhausting administrative appeal remedies.

The exhaustion issue in this case boils down to what kind of agency response qualifies as a "determination." In particular, when an agency responds to a request within 20 working days but merely tells the requester that the agency will produce non-exempt responsive documents and claim exemptions in the future, is that a "determination" within the meaning of the statute, as defendant FEC argues? Or must the agency, even if it need not produce the documents within 20 working days, at a minimum indicate the scope of the documents it will produce and the exemptions it will claim, as plaintiff CREW argues?

Based on the language and structure of FOIA, we agree with CREW. In order to make a "determination" within the statutory time periods and thereby trigger the administrative exhaustion requirement, the agency need not actually produce the documents within the relevant time period. But the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents.

In this case, the FEC did not make such a "determination" within the statutory time period. As a result, CREW was not required to exhaust administrative appeal remedies before filing its FOIA suit. We reverse the contrary judgment of the District Court and remand for further proceedings.

I

Citizens for Responsibility and Ethics in Washington – known as CREW – is a nonprofit organization that, among other things, advocates for the right of citizens to know about the activities of government officials. CREW pursues that

objective through the acquisition and dissemination of information about public officials and federal agencies.

On March 7, 2011, CREW submitted a FOIA request to the Federal Election Commission seeking several categories of records, including certain correspondence, calendars, agendas, and schedules of the Commissioners.

On March 8, the day after the FOIA request was received, the FEC emailed CREW to acknowledge receipt of the request. In several conversations that took place over the next few weeks, CREW agreed to exclude certain categories of documents from the FEC's initial search for records. The FEC in turn agreed to provide non-exempt responsive documents (and thus also claim exemptions over any withheld documents) on a rolling basis in the future. But by May 23, more than two months later, CREW had not received any documents, nor had it received a more specific statement about what documents the FEC would produce and what exemptions the FEC would claim. CREW therefore filed suit in District Court, alleging that the FEC had not responded to the FOIA request in a timely fashion and had wrongfully withheld records under FOIA.

As of May 23, the FEC had begun – but had not completed – gathering and reviewing potentially responsive records. Subsequently, on June 15, 21, and 23, the FEC provided CREW with a total of 835 pages of documents. The agency's June 15th production was accompanied by a letter stating in part:

> The FEC is continuing to process your request and has produced with this letter an initial round of responsive records. You will continue to receive additional responsive records on a rolling basis. Upon the agency's

> final production of records, you will receive a decision letter that will include information regarding your appeal rights. Today's letter does not constitute a final agency decision, and thus is not subject to appeal.

CREW Opposition to Motion to Dismiss at Exhibit B, *CREW v. FEC*, No. 11cv951 (D.D.C. July 7, 2011). The FEC sent a similar letter with its June 21st production to CREW.

Along with its final June 23rd production, the FEC informed CREW that the FEC had withheld some documents and had redacted others in accordance with FOIA Exemptions 4, 6, and 7(C). *See* 5 U.S.C. § 552(b)(4), (b)(6), (b)(7)(C). For the first time, the June 23rd letter also advised CREW of its right to administratively appeal any adverse FOIA determination.

On June 23 – the same day that it produced its final round of responsive documents – the FEC moved in the District Court to dismiss CREW's complaint, or, in the alternative, for summary judgment. First, the FEC contended that CREW's challenge to the agency's delay in responding to a FOIA request was moot given that the agency had now responded. Second, the FEC argued that CREW had failed to exhaust administrative appeal remedies before bringing suit.

The District Court held that the case was not moot. But the District Court granted the FEC's motion for summary judgment based on CREW's failure to exhaust administrative appeal remedies. *See CREW v. FEC*, 839 F. Supp. 2d 17, 29 (D.D.C. 2011). We review the District Court's grant of

summary judgment de novo. *See Blackwell v. FBI*, 646 F.3d 37, 39 (D.C. Cir. 2011).[1]

II

In the District Court, the FEC argued that its production of responsive documents had rendered CREW's suit moot. Although the parties do not raise the mootness issue on appeal, the Court must independently consider its own jurisdiction. *See Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1522 (D.C. Cir. 1994). We agree with the District Court that the case is not moot. CREW's complaint not only asserted that the FEC failed to respond to CREW's request in a timely fashion, but also raised a substantive challenge to the agency's withholding of responsive, non-exempt records. Even now, CREW continues to seek relief from the FEC's alleged failure to produce all records responsive to CREW's request. Therefore, the case is not moot.

III

The question presented concerns when a FOIA requester must exhaust administrative appeal remedies before filing suit.

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[1] The FEC is an independent agency and was represented in the District Court and in this Court by FEC attorneys. *See generally Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Because of the potential importance of this case to the Executive Branch as a whole, this Court invited and received supplemental briefing from the Department of Justice, which represents and provides legal advice to the President and the executive agencies. The Department of Justice generally agreed with the legal position advanced by the FEC.

A FOIA requester is generally required to exhaust administrative appeal remedies before seeking judicial redress. *See Hidalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003); *Oglesby v. Department of the Army*, 920 F.2d 57, 61-62 (D.C. Cir. 1990). But if an agency fails to make and communicate its "determination" whether to comply with a FOIA request within certain statutory timelines, the requester "shall be deemed to have exhausted his administrative remedies." 5 U.S.C. § 552(a)(6)(C)(i).

The statutory timeline relevant to this case specifies that, once an agency receives a proper FOIA request, the agency shall:

> determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.

Id. § 552(a)(6)(A)(i).

The 20-working-day timeline is not absolute. In "unusual circumstances," an agency may extend the time limit to up to 30 working days by written notice to the requester. *Id.* § 552(a)(6)(B)(i). Such unusual circumstances include:

> (I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
>
> (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

> (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

Id. § 552(a)(6)(B)(iii).

If the agency does not make a "determination" within the relevant statutory time period, the requester may file suit without exhausting administrative appeal remedies. Once in court, however, the agency may further extend its response time if it demonstrates "exceptional circumstances" to the court.[2] (Note that "exceptional circumstances" is different from "unusual circumstances.") If exceptional circumstances exist, then so long as "the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." *Id.* § 552(a)(6)(C)(i); *see also Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976).

[2] Although the statute does not define "exceptional circumstances," it provides some directional signals: "[T]he term 'exceptional circumstances' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. . . . Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) . . . after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist . . . ." 5 U.S.C. § 552(a)(6)(C)(ii)-(iii).

In short, a requester must exhaust administrative appeal remedies if the agency made and communicated its "determination" within 20 working days (or 30 working days in "unusual circumstances").[3]

But what constitutes a "determination" so as to trigger the exhaustion requirement? That is the critical question here. CREW argues that, in order to make a "determination" within the meaning of Section 552(a)(6)(A)(i), an agency need not go so far as to produce the responsive documents but it must at least inform the requester of the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents. By contrast, the FEC contends that, in order to make a "determination," an agency needs simply to express a future intention to produce non-exempt documents and claim exemptions. That question has never been resolved in this Court.[4]

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[3] Of course, the duties that FOIA imposes on agencies – including the requirement that an agency make a "determination" within 20 working days, or 30 working days in "unusual circumstances" – apply only once an agency has received a proper FOIA request. A proper request must "reasonably describe[]" the records sought and must comply with the agency's published procedures, including the agency's schedule of fees. 5 U.S.C. § 552(a)(3)(A). The agency's threshold decision that a proper request has been filed is obviously not the agency's "determination" whether to comply, and neither the FEC nor the Department of Justice argues otherwise.

[4] Despite the significant amount of FOIA litigation in this Court, we have not had occasion to previously decide this important procedural question, in part because individual FOIA requesters apparently have not thought it worth the candle to press this point, rather than to work with the agency in an effort to obtain the requested documents. In *Spannaus v. DOJ*, the Court stated that an

We agree with CREW's reading of the statute. The statute requires that, within the relevant time period, an agency must determine whether to comply with a request – that is, whether a requester will receive all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decide to later decide. Therefore, within the relevant time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.

Four aspects of the statute lead us to that interpretation, and help demonstrate that the FEC's contrary interpretation is incorrect.

First, the statute requires that an agency, upon making a "determination" whether to comply with a FOIA request, immediately "notify the person making such request of such determination *and the reasons therefor*." 5 U.S.C. § 552(a)(6)(A)(i) (emphasis added). The statutory

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agency failed to make a "determination" under Section 552(a)(6)(A)(i) when it merely acknowledged a FOIA request and indicated that the request would be forwarded to another office. 824 F.2d 52, 59 n.9 (D.C. Cir. 1987). But that case did not analyze or describe the contours of what constituted a "determination." Similarly, in *Oglesby v. Department of the Army*, the Court specifically declined to decide whether a response that the agency was processing the request was a "determination" for purposes of Section 552(a)(6)(A)(i). *See* 920 F.2d 57, 69 (D.C. Cir. 1990). The Court also declined to decide whether a response that the agency would go forward with the search absent any problems or any need for additional information was a "determination." *Id.*

requirement that the agency provide "the reasons" for its "determination" strongly suggests that the reasons are particularized to the "determination" – most obviously, the specific exemptions that may apply to certain withheld records. The statutory requirement would not make a lot of sense if, as the FEC argues, the agency were merely required to state within 20 working days its future intent to eventually produce documents and claim exemptions. After all, how could the agency articulate reasons for non-compliance when it had not yet decided whether to comply (that is, whether to produce all of the requested documents)?

Second, the statute requires that the agency immediately notify the requester of the right "to appeal to the head of the agency any adverse determination." *Id.* The requirement that the agency notify the requester about administrative appeal rights further indicates that the "determination" must be substantive, not just a statement of a future intent to produce non-exempt responsive documents. Otherwise, this right of administrative appeal would make little sense because there would be nothing to appeal at the time the agency makes its supposed "determination" in response to a properly filed FOIA request.

This critical point both highlights and unravels the maneuver that the FEC (backed by the Department of Justice) is attempting here. Under the FEC's theory, an agency could respond to a request within 20 working days in terms not susceptible to immediate administrative appeal – by simply stating, in essence, that it will produce documents and claim exemptions over withheld documents in the future. Then, the agency could process the request at its leisure, free from any timelines. All the while, the agency's actions would remain immune from suit because the requester would not yet have

been able to appeal and exhaust administrative appeal remedies. Therein lies the Catch-22 that the agency seeks to jam into FOIA: A requester cannot appeal within the agency because the agency has not provided the necessary information. Yet the requester cannot go to court because the requester has not appealed within the agency. Although the agency may desire to keep FOIA requests bottled up in limbo for months or years on end, the statute simply does not countenance such a system, as we read the statutory text.

This case illustrates how the FEC's legal position does not square with the statute. The FEC now claims that it made a "determination" in March 2011, within 20 working days of CREW's FOIA request. Yet the FEC did not inform CREW of its appeal rights until June 23, more than 75 working days after the FOIA request. The FEC was right that CREW did not have any decision to appeal until the FEC's June 23rd letter stated that the agency had withheld some documents under multiple FOIA exemptions. But that fact also necessarily shows that the FEC had not made a "determination" in March, given that the statute indicates that a "determination" must be subject to immediate appeal. By arguing that it made a "determination" in March and simultaneously saying that nothing could be administratively appealed until June, the FEC's position on CREW's request amply demonstrates the impermissible Catch-22 it seeks to enshrine in the law.[5]

[5] In order to facilitate an administrative appeal, an agency must indicate the scope of the documents it intends to produce and the exemptions it will claim. An agency is not required to produce a *Vaughn* index – which district courts typically rely on in adjudicating summary judgment motions in FOIA cases. *See, e.g.*, DEPARTMENT OF JUSTICE, GUIDE TO THE FREEDOM OF

Third, the statute creates an "unusual circumstances" safety valve that permits an agency to extend the 20-working-day period for response by up to 10 additional working days. "Unusual circumstances" are defined to encompass only "the need to search for and collect the requested records" from separate locations; "the need to search for, collect, and appropriately examine a voluminous amount" of documents; and "the need for consultation" with other agencies. *Id.* § 552(a)(6)(B)(iii). The statutory list of circumstances that permit an agency to extend the 20-working-day timeline to make a "determination," including collecting and examining numerous or distant documents, clearly contemplates that the agency must actually gather the responsive documents and determine which it will produce and which it will withhold. The agency cannot make the requisite "determination" by

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INFORMATION ACT 789 (2009 ed.) (It "is well settled that a requester is not entitled to receive [a *Vaughn* index] during the administrative process."); *NRDC, Inc. v. NRC*, 216 F.3d 1180, 1190 (D.C. Cir. 2000) (rule that agency must provide a *Vaughn* index in FOIA litigation "is a rule that governs litigation in court and not proceedings before the agency"); *Bangoura v. Department of the Army*, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009) ("Defendant was under no obligation to provide Plaintiff with a *Vaughn* Index before the filing of this action.") (internal quotation marks and alteration omitted); *Schwarz v. Department of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) ("[T]here is no requirement that an agency provide a 'search certificate' or a 'Vaughn' index on an initial request for documents. The requirement for detailed declarations and Vaughn indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court.") (footnote omitted); *cf. Mead Data Central, Inc. v Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (although "the objective of the *Vaughn* requirements . . . is equally applicable to proceedings within the agency," no error where those requirements were satisfied in district court proceedings).

simply stating its future intent to produce some non-exempt documents.

Moreover, there would be no need for the unusual circumstances safety valve if, as the FEC argues, the usual 20-working-day timeline merely required an agency to make a general promise to produce non-exempt documents and claim exemptions in the future. An agency could always provide that kind of promise within 20 working days of receiving a FOIA request. The number of documents to be examined and the difficulty of gathering those documents, for example, have no bearing on the agency's ability to provide such a formulaic response to requesters within 20 working days. Thus, the FEC's reading of FOIA would render the unusual circumstances safety valve a worthless addendum to the statute. Such a result strongly suggests that the agency's interpretation is impermissible. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).

Put simply, the unusual circumstances provision to extend the time for making a "determination" makes sense only if the statute contemplates that responsive documents must be collected and examined, and decisions made about which to produce, in order for the agency to make a "determination."

Fourth, the statute provides that, once in court, an agency may further extend its response time by means of the "exceptional circumstances" safety valve. That provision says that if exceptional circumstances exist and an agency "is exercising due diligence in responding to the request," a court

may grant the agency "additional time to *complete its review* of the records." 5 U.S.C. § 552(a)(6)(C)(i) (emphasis added). Like the unusual circumstances provision, the exceptional circumstances provision presumes that an agency operating outside the 20-working-day window needs more time to finish gathering and reviewing documents, and more time to decide what to produce and to withhold. The agency would not need more time merely to state a preliminary intention to produce whatever non-exempt records are eventually found. Again, the FEC's theory of the statute would negate any need for the exceptional circumstances provision. The fact that the FEC's interpretation renders the exceptional circumstances provision unnecessary further confirms that Congress created a different statute from the one the FEC describes.

All of those statutory provisions together reinforce the conclusion that a "determination" under Section 552(a)(6)(A)(i) must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future. Rather, in order to make a "determination" and thereby trigger the administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the "determination" is adverse.[6]

[6] Our opinion today does not affect an agency's ability to issue, where appropriate, a "Glomar" response to a FOIA request. Because of security or privacy concerns, a "Glomar" response refuses to confirm or deny that the requested records exist. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

To be clear, a "determination" does not require actual *production* of the records to the requester at the exact same time that the "determination" is communicated to the requester. Under the statutory scheme, a distinction exists between a "determination" and subsequent production. *See Spannaus v. DOJ*, 824 F.2d 52, 59 n.7 (D.C. Cir. 1987). As to actual production, FOIA requires that the agency make the records "promptly available," which depending on the circumstances typically would mean within days or a few weeks of a "determination," not months or years. 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i). So, within 20 working days (or 30 working days in "unusual circumstances"), an agency must process a FOIA request and make a "determination." At that point, the agency may still need some additional time to physically redact, duplicate, or assemble for production the documents that it has already gathered and decided to produce. The agency must do so and then produce the records "promptly." Our reading of "determination" thus neatly complements the requirement that documents be made "promptly available."

In short, unlike the FEC's theory, our reading of "determination" sensibly harmonizes the default 20-working-day timeline, the unusual circumstances safety valve, the exceptional circumstances safety valve, and the prompt production requirement. Together, those provisions create a comprehensive scheme that encourages prompt request-processing and agency accountability. To summarize: An agency usually has 20 working days to make a "determination" with adequate specificity, such that any withholding can be appealed administratively. 5 U.S.C. § 552(a)(6)(A)(i). An agency can extend that 20-working-day timeline to 30 working days if unusual circumstances delay the agency's ability to search for, collect, examine, and

consult about the responsive documents. *Id.* § 552(a)(6)(B). Beyond those 30 working days, an agency may still need more time to respond to a particularly burdensome request. If so, the administrative exhaustion requirement will not apply. But in such exceptional circumstances, the agency may continue to process the request, and the court (if suit has been filed) will supervise the agency's ongoing progress, ensuring that the agency continues to exercise due diligence in processing the request. *Id.* § 552(a)(6)(C).[7] If the agency does not adhere to FOIA's explicit timelines, the "penalty" is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court. This scheme provides an incentive for agencies to move quickly but recognizes that agencies may not always be able to adhere to the timelines that trigger the exhaustion requirement.[8]

To all of this, the FEC's overarching retort is that it would be "a practical impossibility for agencies to process all [FOIA] requests completely within twenty days." FEC Br. 34. We agree entirely with the FEC on this point. We are intimately familiar with the difficulty that FOIA requests pose for executive and independent agencies. But contrary to the FEC's suggestion, our reading of the statute recognizes and

[7] A district court may of course consider FOIA cases in the ordinary course. There is no statutory mandate for district courts to prioritize FOIA cases ahead of other civil cases on their dockets.

[8] In fact, several statutory provisions acknowledge that some requests may require significant processing time to search for, collect, examine, and consult about documents before a "determination" can be made. For example, FOIA provides that agencies may establish multitrack procedures based on the amount of work or time a request entails, and FOIA requires that agencies establish a tracking system for requests that will take longer than 10 days to process. *See* 5 U.S.C. § 552(a)(6)(D), (a)(7).

accommodates that reality.. As our opinion today emphasizes, the 20-working-day period (actually 30 working days with the unusual circumstances provision) is the relevant timeline that the agency must adhere to if it wants to trigger the exhaustion requirement before suit can be filed. The unusual circumstances and exceptional circumstances provisions allow agencies to deal with broad, time-consuming requests (or justifiable agency backlogs) and to take longer than 20 working days to do so. To reiterate, if the agency does not adhere to FOIA's explicit timelines, the "penalty" is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court.

It is true that the statute does not allow agencies to keep FOIA requests bottled up for months or years on end while avoiding any judicial oversight. But Congress made that decision. If the Executive Branch does not like it or disagrees with Congress's judgment, it may so inform Congress and seek new legislation. *See Milner v. Department of the Navy*, 131 S. Ct. 1259, 1271 (2011) ("All we hold today is that Congress has not enacted the FOIA exemption the Government desires. We leave to Congress, as is appropriate, the question whether it should do so.").

* * *

Because the FEC did not make and communicate a "determination" within the meaning of 5 U.S.C. § 552(a)(6)(A)(i) within 20 working days of receiving CREW's FOIA request, CREW is deemed to have exhausted its administrative appeal remedies under Section 552(a)(6)(C)(i), and its suit may proceed. We reverse

the District Court's grant of summary judgment to the FEC, and we remand for further proceedings.

So ordered.

RELEASE IN FULL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMMANUEL N. LAZARIDIS, Plaintiff, v. UNITED STATES DEPARTMENT OF STATE, Defendant.	Civil Action No. 10-1280 (RMC)

MEMORANDUM OPINION

In this action brought *pro se* under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, plaintiff Emmanuel N. Lazaridis seeks records maintained by the Department of State ("DOS") "concerning the plaintiffs personally."[1] Compl. [Dkt. 1] ¶ 1. Specifically, Mr. Lazaridis is challenging DOS's responses to his FOIA requests allegedly submitted in April 2006, November 2007, and March 2008.[2] *See* Compl. ¶¶ 7-32. DOS has moved for summary

[1] Although Mr. Lazaridis purports to sue also on behalf of his minor daughter, V.L., this Court has previously determined that he lacks standing to sue on her behalf, *see Lazaridis v. U.S. Dep't of Justice*, 713 F. Supp. 2d 64, 67 (D.D.C. 2010), and it finds no reason to depart from that determination here. Thus, this action is considered as brought only by Mr. Lazaridis. In addition, it bears repeating that this FOIA action concerns only Mr. Lazaridis's FOIA requests submitted to the State Department in 2006, 2007 and 2008. The Court will not address any arguments or resolve any disputed facts that do not bear directly on the agency's handling of those FOIA requests. *See* Mem. Op. and Order at 4, n.2 (Feb. 16, 2012) [Dkt. 22].

[2] Mr. Lazardis states that he resubmitted the November 2007 request on March 16, 2008, "[w]hen no response was forthcoming." Compl. ¶ 25. Since it is clear from the record that DOS

judgment under Federal Rule of Civil Procedure 56. *See* Def.'s Renewed Mot. for Summ. J. [Dkt. 25]. Mr. Lazaridis has opposed the motion and has cross moved for summary judgment. *See* Resp. in Opp'n to Def. U.S. Dep't of State's Mot. for Summ. J. and Renewed Cross-Mot. for Summ. J. [Dkt. 30]. Upon consideration of the parties' submissions and the relevant parts of the record, the Court will grant in part and deny in part DOS's motion for summary judgment and will deny Mr. Lazaridis's cross-motion for summary judgment.

I. BACKGROUND

1. The 2006 Request

By letter of April 4, 2006, Mr. Lazaridis requested from the State Department "written, audio, video or electronic records" pertaining to him and his minor child, V.L. 2nd Decl. of Margaret P. Grafeld ("Grafeld Decl.") [Dkt. 25-1], Ex. 1. In addition to DOS's "central location," plaintiff identified DOS's Office of Children's Issues, DOS's Passport Services Office of Research and Liaison, the United States Consulate in Lyon, France, and the United States Embassies in Paris, France, and Athens, Greece, as locations that may have responsive records. *Id.* By letter of July 19, 2006, the Office of Passport Services ("OPS") released to Mr. Lazaridis in their entirety three documents concerning V.L. *Id.*, Ex. 6.

In addition to OPS files, DOS searched the files of the Central Foreign Policy Records ("CFPR"), the Office of the Legal Adviser ("OLA"), the Office of Overseas Citizens Services ("OCS"), the American Embassies in Athens and Paris, the American Consulate General in Marseille, and the American Consulate in Lyon. *Id.* ¶ 13 & Ex. 7. By letter of

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has responded to the original request, any claim based on the duplicate request submitted in March 2008 is considered moot.

August 10, 2006, DOS released four documents located in the CFPR, two containing redactions. DOS withheld information "about another person" under FOIA exemption 6. *Id.*, Ex. 7 .

By letter of December 14, 2006, DOS informed Mr. Lazaridis that it had located at OPS 11 documents in his name. It released one document in its entirety and two documents with redactions. DOS withheld seven documents, and referred one document to the office from which it originated for review. It withheld information under FOIA exemptions 2; 5, and 6. *Id.*, Ex. 8. By letter of February 8, 2007, DOS released a document in full that OPS had referred to the Bureau of Diplomatic Security. *Id.*, Ex. 10.

By letter of January 12, 2007, DOS released 10 of 12 documents located at the American Embassy in Athens, nine of which contained redactions. DOS withheld two documents in full. DOS withheld information under FOIA exemptions 6 and 7(A). *Id.*, Ex. 9.

By letter of March 9, 2007, DOS released all 34 documents located at the American Embassy in Paris and the American Consulate in Lyon, nine with redactions. *Id.*, Ex. 13. By letter of October 16, 2007, DOS informed Mr. Lazaridis that an additional search of the embassies in Athens and Paris located 25 more documents. It released one document in full and six documents with redactions. DOS referred one document to another agency and held 17 for "intra-agency coordination." *Id.*, Ex. 16. DOS withheld information from both releases under FOIA exemption 6 as pertaining to "other persons."

Mr. Lazaridis lodged separate appeals of the foregoing determinations with the Appeals Review Panel. *See id.*, Ex. 11 (referencing Dec. 14, 2006, and Jan. 12, 2007 decisions); Ex. 14 (referencing Mar. 9, 2007, decision); Ex. 17 (referencing Oct. 16, 2007, decision). As a result of Mr. Lazaridis's first appeal "for the release of two documents withheld in full and nine documents withheld in part," the Appeals Panel released "additional portions of three documents

previously withheld in part," and upheld the redaction of information from six documents and the withholding of two documents. *Id.*, Ex. 19. As a result of Mr. Lazaridis's second appeal, challenging the release of nine redacted documents, the Appeals Panel released "the previously withheld portions of one document," and upheld the withholding of third-party information from "the other eight documents." *Id.*, Ex. 20.

2. The 2007 Request

By letter of November 30, 2007, Mr. Lazaridis requested the same records from DOS that he had requested on April 4, 2006. 2d Grafeld Decl. ¶ 24. Following searches of the same filing systems, DOS made the following releases.

By letter of April 25, 2008, DOS released two passport records "in the name of your daughter VL" with redactions made pursuant to FOIA exemption 6. *Id.*, Ex. 26.

By letter of May 30, 2008, DOS released all four documents pertaining to Mr. Lazaridis located in the CFPR. *Id.*, Ex. 31.

By letter of June 3, 2008, DOS released three CFPR documents pertaining to V.L., two with redactions pursuant to exemption 6. *Id.*, Ex. 27.

By letter of June 17, 2008, DOS released six passport documents pertaining to Mr. Lazaridis, five with redactions. *Id.* ¶ 32.[3]

By letter of June 29, 2011, DOS released 12 of 13 documents "regarding your daughter, V" located at the American Embassy in Paris, six with redactions, and withheld one document. *Id.*, Ex. 28. In addition, DOS released eight of 11 documents located at the U.S.

[3] Ms. Grafeld cites exhibit 32, but neither exhibit 32 nor exhibit 33 (cited in paragraph 33 of the declaration) is part of this record. Although these apparently inadvertent omissions do not materially affect the outcome of this case, the Defendant is directed to place the missing exhibits in the record.

Consulate in Lyor., one with redactions, and withheld three documents. *Id.* DOS withheld third-party information under exemption 6. *Id.*

By letter of June 29, 2011, DOS released 17 of 21 documents "regarding your daughter, V" located at the American Embassy in Athens, eight with redactions, and withheld four documents. It withheld information pursuant to exemptions 5, 6, 7(C), and 7(E). *Id.*, Ex. 29.

By letter of June 29, 2011, DOS informed plaintiff that 13 responsive documents located at the American Embassy in Paris were duplicates of previously released documents; DOS released 22 documents located at the U.S.Consulate in Lyon, two with redactions. *Id.* ¶ 33.

By letter of June 29, 2011, DOS released eight of 12 documents "maintained on [Mr. Lazaridis]" located at the American Embassy in Athens, three with redactions, and withheld four documents. DOS withheld information under exemption 6. *Id.*, Ex. 34.

By letter of July 11, 2011, DOS released 43 of 56 documents pertaining to V.L. located at the Bureau of Consular Affairs, 21 with redactions, and withheld 13 documents. DOS withheld information under exemptions 5, 6, 7(C), and 7(E). *Id.*, Ex. 30.

By letter of July 11, 2011, DOS released 102 of 156 documents "maintained on [Mr. Lazaridis]" located at the Bureau of Consular Affairs, 31 with redactions, and withheld 53 documents. It withheld information under exemptions 5, 6, 7(C) and 7(E). *Id.*, Ex. 35.

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows [through facts supported in the record] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This procedural device is not a "disfavored legal shortcut" but a reasoned and

careful way to resolve cases fairly and expeditiously. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). When, as here, both parties move for summary judgment, neither party is deemed to "concede the factual assertions of the opposing motion," *CEI Wash. Bureau, Inc. v. Dep't of Justice*, 469 F.3d 126, 129 (D.C. Cir. 2006) (citation omitted); each motion is reviewed "separately on its own merits to determine whether either of the parties deserves judgment as a matter of law," *Family Trust of Mass., Inc. v. United States*, Civ. No. 11-00680, --- F.Supp. 2d ---, 2012 WL 4336238, at *3 (D.D.C. Sept. 24, 2012) (citation and internal quotation marks omitted).

The FOIA confers jurisdiction on the district court to enjoin an agency from improperly withholding records maintained or controlled by the agency. *See* 5 U.S.C. § 552(a)(4)(B); *McGehee v. CIA*, 697 F.2d 1095, 1105 (D.C. Cir. 1983) (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980)); *Lazaridis v. Dep't of Justice*, 713 F. Supp. 2d 64, 66 (D.D.C. 2010). Summary judgment is the frequent vehicle for resolution of a FOIA action because the pleadings and declarations in such cases often provide undisputed facts on which the moving parties are entitled to judgment as a matter of law. *McLaughlin v. U.S. Dep't of Justice*, 530 F. Supp. 2d 210, 212 (D.D.C. 2008) (citations omitted). Agencies may rely on affidavits or declarations of government officials, as long as they are sufficiently clear and detailed and submitted in good faith. *See Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The Court may award summary judgment solely on the basis of information provided in such affidavits or declarations when they describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith."

Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981); *see also Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). However, the Court must "construe FOIA exemptions narrowly in favor of disclosure." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993).

An inadequate search for records also constitutes an improper withholding under the FOIA. *See Maydak v. U.S. Dep't of Justice*, 254 F. Supp. 2d 23, 44 (D.D.C. 2003) (citations omitted). Thus, when an agency's search is questioned, the Court must determine the adequacy of the agency's search, guided by principles of reasonableness. *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). The agency is required "to make a good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to produce the information requested." *Oglesby*, 920 F.2d at 68. Such methods include following through "on obvious leads." *Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citation omitted). Although an agency need not search every record system, it "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby*, 920 F.2d at 68. Because the agency is the possessor of the records and is responsible for conducting the search, the Court may rely on "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Valencia–Lucena*, 180 F.3d at 326 (quoting *Oglesby*, 920 F.2d at 68). Summary judgment is inappropriate "if a review of the record raises substantial doubt" about the adequacy of the search, *id.*, but "the [mere] fact that a particular document was not found does not demonstrate the inadequacy of a search." *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 390-91 (D.C. Cir. 2007) (citations omitted); *see Iturralde v. Comptroller of Currency*, 315 F.3d 311,

315 (D.C. Cir. 2003) ("[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.") (citation omitted).

III. ANALYSIS

Mr. Lazaridis challenges DOS's search for responsive records and its claimed exemptions. *See* Mem. of Law in Opp'n to Def. U.S. Dep't of State's Mot. for Summ. J. and in Support of Pl.'s Renewed Cross-Mot. for Summ. J. ("Pl.'s Mem.") [Dkt. 30, ECF pp. 4-34] at 2. In support of his cross-motion for summary judgment, Mr. Lazaridis has contested the facts set forth in DOS's statement of material facts and has set forth his own "Statement of Genuine Issues." *See* Response to Def. United States Dep't of State's Statement of Material Facts Not in Genuine Issue and Statement of Genuine Issues ("Pl.'s Facts") [Dkt. 30, ECF pp. 35-47]. Mr. Lazaridis does not contend "there is no genuine dispute as to any material fact" and, therefore, has not shown his entitlement to summary judgment. Fed. R. Civ. P. 56(a). Hence, Mr. Lazaridis's cross-motion for summary judgment will be denied.

The Search for Responsive Records

Mr. Lazaridis contends first that "DOS has not released any responsive records dating from September 2002 through April 2006 that are held by its OCS division . . . . Thus, it is reasonable to conclude that DOS has not searched for or released at least 500 responsive documents." Pl.'s Mem. at 9. In his counterstatement of material facts, Mr. Lazaridis refers to a "Case Summary" that he contends "clearly indicates that such records must exist . . .," Pl.'s Facts at 6, but the exhibit he cites, "Lazardis Decl., Ex. A. Doc. 01 [ECF p. 51]," is a string of e-mail messages that do not support the foregoing assertion. *See* Fed. R. Civ. P 56(c)(1)(A) (requiring party to support asserted fact by "citing to particular parts of the materials in the record . . . .").

In contrast, Ms. Grafeld describes searches that were conducted of OCS' electronic and paper files, utilizing Mr. Lazaridis's and V.L.'s names and relevant terms, which located 212 responsive documents. 2d Grafeld Decl. ¶¶ 50-53. Ms. Grafeld's description of the filing systems searched and the search methods employed demonstrates that DOS conducted a reasonable search of the OCS files for responsive records. Mr. Lazaridis's speculative argument about missing documents does not suffice to raise a material factual dispute about the search.

Mr. Lazaridis contends next that "the DOS search unreasonably excluded from its ambit government records that are held by NCMEC." Pl.'s Mem. at 10. This argument has no reasonable basis in fact since, as Mr. Lazaridis admits, *id.*, and this Court has found, the National Center for Missing and Exploited Children (NCMEC) is a private entity that is not subject to the FOIA's disclosure requirements, *see Lazaridis v. U.S. Dep't of Justice*, 713 F. Supp. 2d 64, 67-69 (D.D.C. 2010), and DOS's disclosure obligations extend only to those records in its custody and control at the time of the FOIA request.

Mr. Lazaridis has not made any other specific challenges to DOS's searches. The Court has carefully reviewed Ms. Grafeld's comprehensive description of the searches that were conducted of files maintained by various DOS offices, including the Central Foreign Policy Records, the Office of Passport Services, the Office of Overseas Citizens Services, the American Embassies in Athens and Paris, and the American Consulates in Marseille and Lyon, 2d Grafeld Decl. ¶¶ 13, 36-64, and finds that DOS's searches were reasonably calculated to (and did) locate responsive records. In the absence of any contradicting evidence, the Court concludes that DOS is entitled to judgment as a matter of law on the adequacy of the search for responsive records.

The Claimed Exemptions

DOS invokes FOIA exemptions 5, 6, 7(A), 7(C), and 7(E) and Privacy Act exemptions (d)(5), (j)(2), and (k)(2) for its withholdings, in full or in part. 2d Grafeld Decl. ¶¶ 67-87; *Vaughn* Index [Dkt. 25-2]. Since an agency cannot withhold records under the Privacy Act that must be disclosed under the FOIA, 5 U.S.C. § 552a(b)(2); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982), and DOS properly reviewed and released responsive records under the FOIA, the Court will only address DOS's justifications for withholding information under the FOIA.

As an initial matter, Mr. Lazaridis contends that DOS's *Vaughn* index is not "sufficiently detailed," Pl.'s Mem at 11, but his argument goes more to the merits of DOS's exemption 6 claim than to the adequacy of the index. *See id.* Regardless, DOS's *Vaughn* index is more than adequate inasmuch as it correlates the particular exemptions relied upon with the withheld information and, thus, "convey[s] enough information for [Mr. Lazaridis] and the court to identify the records referenced and understand the basic reasoning behind the claimed exemptions." *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007). Indeed, Mr. Lazaridis has himself relied on the index in challenging certain withholdings and conceding others. *See* Pl.'s Mem at 12-14.

Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "[T]he parameters of Exemption 5 are determined by reference to the protections available to litigants in civil discovery; if material is not 'available' in discovery, it may be withheld from FOIA requesters." *Burka v. U.S. Dep't of Health &*

Human Servs., 87 F.3d 508, 516 (D.C. Cir. 1996); *accord Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1112 (D.C. Cir. 2007) (citing cases). Exemption 5 encompasses materials that would be protected under the attorney-client privilege, the attorney work-product privilege, and the executive deliberative process privilege. *Formaldehyde Inst. v. Dep't Health & Human Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989), *overruled on other grounds by Nat'l Inst. of Military Justice v. Dep't of Def.*, 512 F.3d 677 (D.C. Cir. 2008). To qualify for protection under exemption 5 as deliberative process material, a document must be "predecisional," *i.e.*, "generated before the adoption of an agency policy," and "deliberative," *i.e.*, reflecting "the give-and-take of the consultative process." *Public Citizen, Inc., v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2010) (citations and internal quotation marks omitted).

In response to the 2006 request, DOS withheld in their entirety seven inter-agency e-mails containing "candid exchanges between Department officials and Embassy personnel about the enforcement of passport rules and regulations." *Vaughn* Index, ECF p. 8. In response to the 2007 request, DOS redacted information reflecting "internal deliberations" concerning both Mr. Lazaridis and V.L.'s mother relating to the overarching issues surrounding their daughter's custody. *See, e.g., Vaughn* index, ECF pp. 9, 11, 13, 19, 21; *see also Lazaridis v. U.S. Dep't of Justice*, 766 F. Supp. 2d 134, 147 (D.D.C. 2011) (describing FBI records compiled "as a result of a criminal investigation into an alleged illegal relocation of Lazaridis's minor child outside the United States, based on authority provided in the International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204") (internal quotation marks omitted); *id.* at 144 (noting "the fact that the [U.S. Attorney's] office declined prosecution does not change the law enforcement purpose for which the records were compiled," namely, "for the law enforcement

purpose of prosecuting Lazaridis for alleged parental kidnapping/interference with parental rights offense") (citations and internal quotation marks omitted).

Ms. Grafeld states that the withheld information is "pre-decisional" and that its disclosure "would inhibit candid internal discussion and the expression of recommendations and judgments." *Id.*; 2d Grafeld Decl. ¶ 68. Such information falls squarely within the deliberative process privilege, which exempts from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), and "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see Public Emps. for Envtl. Responsibility v. EPA*, Civ. No. 12-748, --- F. Supp. 2d ---, 2013 WL 677672, at *5 (D.D.C. Feb. 26, 2013) (discussing exemption 5).

Ms. Grafeld states that the responsive documents "contain[] selected factual material intertwined with opinion . . . regarding current problems and preferred course of action," and that "[t]he withheld material . . . has been carefully reviewed and there are no reasonably segregable facts that may be released." 2d Grafeld Decl. ¶ 68. Indeed, most of the documents are described in the *Vaughn* index as one or two-page e-mail messages and memoranda of brief telephone conversations, lending credence to the reasonableness of DOS's segregability assessment. *See, e.g., Mays v. DEA*, 234 F.3d 1324, 1327 (D.C. Cir. 2000) (approving the withholding of entire documents when the "exempt and nonexempt information are 'inextricably intertwined,' such that the excision of exempt information would . . . produce an edited document with little informational value") (citation and other internal quotation marks omitted).

Mr. Lazaridis counters that DOS improperly applied exemption 5 "to records that did not consist of deliberations within DOS, or between DOS and its legal counsel." Pl.'s Facts at 8. This argument mistakenly conflates the attorney-client and attorney work-product privileges with the deliberative process privilege. While the two former privileges obviously depend on the existence of an attorney-client relationship, the deliberative process privilege applies broadly to any material "reflecting advisory opinions, recommendations and deliberations comprising part of a process which governmental decisions and polices are formulated." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002). Exemption 5 protects "the give-and-take of the decisional process." *FBI v. Abramson*, 456 US. 615, 630 (D.C. Cir. 1982). Mr. Lazaridis also argues that "[w]hile some of the . . . records might be characterized as pre-decisional with respect to . . . Interpol or the FBI, they are not deliberative with respect to DOS," since "DOS is not a law enforcement authority." Pl.'s Mem. 13. This argument simply ignores exemption 5's language that protects records reflecting both "intra-agency" and "inter-agency" deliberations.

Mr. Lazaridis questions DOS's application of exemption 5 to several documents, *see* Pl.'s Mem. at 12-13, only one of which merits discussion. Doc. 044 is described as a memorandum of "a [telephone] conversation [between DOS and a Michigan Detective] discussing the prospects of action by Michigan law enforcement authorities against Mr. Lazaridis." *Vaughn* Index, ECF p. 33. Since that document reflects neither inter-agency nor intra-agency discussions, the Court does not find exemption 5 applicable. DOS has applied exemptions 7(C) and 7(E) to the same document, thereby raising the possibility that the information may nonetheless be protected. At this juncture, the Court finds that DOS is entitled to judgment as a matter of law on its application of exemption 5 to all of the documents

containing deliberative process material identified in the *Vaughn* index, except Doc. 044 since it does not reflect agency deliberations.

Exemption 6

Exemption 6 permits an agency to withhold from disclosure "personnel and medical files and similar files" if their disclosure would "constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). All information that "applies to a particular individual" would qualify for consideration under this exemption. *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *accord New York Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc); *see Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. U.S. Dep't of Justice*, 503 F. Supp. 2d 373, 381 (D.D.C. 2007) ("Congress' primary purpose in drafting Exemption 6 was to provide for confidentiality of personal matters.") (citation and internal quotation marks omitted). However, "not every incidental invasion of privacy is protected by Exemption 6; only those invasions that implicate private personal details may be precluded." *Akin, Gump*, 503 F. Supp. 2d at 382 (citation omitted).

The proper application of "privacy exemptions [6 and 7(C)] turns on a balance of 'the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny.'" *CEI Wash. Bureau, Inc.*, 469 F.3d at 128 (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175 (1991)). Hence, when a requester seeks such information, an agency must conduct a balancing test to determine if releasing the information would constitute a "clearly unwarranted invasion of personal privacy" by weighing the privacy interest in non-disclosure against any qualifying public interest in disclosure. *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 596 n.1, 601-02 (1982). It is this balancing test "not the nature of the files in which the information was contained [that] limit[s] the scope of the exemption." *Norton*, 309 F.3d at 33;

see id. at 33 ("assuming without deciding that the requested . . . records are 'similar files' under Exemption 6"). As the D.C. Circuit instructs:

> To establish that the release of information contained in government files would result in a clearly unwarranted invasion of privacy, the court first asks whether disclosure would compromise a substantial, as opposed to a de minimis, privacy interest. If a significant privacy interest is at stake, the court then must weigh that interest against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy. The public interest to be weighed against the privacy interest in this balancing test is the extent to which disclosure would serve the core purposes of the FOIA by contribut[ing] significantly to public understanding of the operations or activities of the government. Thus, unless a FOIA request advances the citizens' right to be informed about what their government is up to, no relevant public interest is at issue.

Id. at 33-34 (citations and internal quotation marks omitted) (alteration in original).

DOS has applied exemption 6 to most of the withheld material, which, with regard to the 2006 request, is described as information pertaining to health and private contact information of the child's mother, her attorney's private contact information, and information about other third-party individuals. *See generally Vaughn* Index, ECF pp. 1-7. With regard to the 2007 request, DOS applied exemption 6 to the foregoing information as well as to information of broader categories of third-party individuals, including law enforcement personnel and embassy personnel. *See generally id.*, ECF pp. 9-38; 2d Grafeld Decl. ¶¶ 70-71.

DOS has shown that the withheld information falls within the personnel, medical and similar files exemption 6 protects. *See U.S. Dep't of Defense v. Fed. Labor Relations Auth'y*, 510 U.S. 487, 502 (1994) ("Because the privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure, we conclude that disclosure would constitute a 'clearly unwarranted invasion of personal privacy.'"); *Norton*, 309 F.3d at 33 ("Congress intended the phrase 'similar

files' to have 'a broad, rather than a narrow, meaning'. . . . Exemption 6 is designed to protect personal information in public records, even if it is not embarrassing or of an intimate nature[.]") (citation omitted); *see also Akin, Gump*, 503 F. Supp. 2d at 382 ("When the material in the government's control is a compilation of information about private citizens, rather than a record of government actions, there is little legitimate public interest that would outweigh the invasion of privacy because the information reveals little or nothing about an agency's own conduct.").

Mr. Lazaridis argues first that "many of the redacted records concern information that was widely and very publicly disseminated by the very persons whose 'personal privacy' the DOS now seeks to protect." Pl.'s Mem. at 14. Under the public domain theory, FOIA-exempt information loses its protection if it was previously "disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 553–54 (D.C. Cir. 1999) (citations omitted). This doctrine applies only to information that has been "officially acknowledg[ed]," *i.e.*, made public through an official and documented disclosure. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Mr. Lazaridis has "the initial burden of pointing to specific information in the public domain [by official disclosure] that appears to duplicate that being withheld." *Id.* (quoting *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (internal quotation marks omitted)); *accord Valfells v. CIA*, 717 F. Supp. 2d 110 (D.D.C. 2010).

Mr. Lazaridis's public domain argument fails because it is not predicated on an "official and documented disclosure," *Wolf*, 473 F. 3d at 378 (citation and internal quotation marks omitted), which is required to overcome the exemption, but rather on the disclosure of information by the child's mother, whom Mr. Lazaridis has not shown to have any authority to speak or act on behalf of the government. *See ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 621 (D.C. Cir. 2011) ("[W]e are hard pressed to understand the . . . contention that the release of

a nongovernment document by a nonofficial source can constitute a disclosure affecting the applicability of the FOIA exemptions."). In addition, the fact that Mr. Lazaridis may have obtained withheld information from an unofficial source or by some other means does not prevent DOS from invoking FOIA exemptions because unlike, for example, a "constitutionally compelled disclosure to a single party," *Cottone*, 193 F.3d at 556, a FOIA disclosure is "to the public as a whole." *Stonehill v. IRS*, 558 F.3d 534, 539 (D.C. Cir. 2009). Thus, "the fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause harm cognizable under a FOIA exemption." *Wolf*, 473 F.3d at 378 (citation omitted). To the extent that Mr. Lazaridis is seeking release of exempt material on a waiver theory, the publicity surrounding the child's mother, even if she approved it, cannot be said to constitute a waiver by the agency of its right to invoke FOIA exemptions. This is because "[i]n most waiver cases, the inquiry turns on the match between the information requested and the content of the prior [official] disclosure." *Id.*

Mr. Lazaridis also argues that the release of third-party information redacted from Doc. O49 (the mother's Authorization for Release of Information to Certain Parties 1/26/07) and Doc. O50 (same but undated) "would[] shed light on how government works[,]" by "ascertain[ing] the degree to which DOS has improperly invoked Exemption (b)(6) in the present FOIA case, as well as help clarify the relationship between DOS and the NCMEC, which is presumed to have been invited by [the child's mother] . . . to have access to DOS records about the plaintiff and his daughter." Pl.'s Mem. at 19-20. The argument triggers the question of whether an overriding public interest warrants release of the withheld material.

Disclosure of otherwise exempt information is required when a requester shows that the information is necessary to "shed any light on the [unlawful] conduct of any Government

agency or official." *Reporters Comm.*, 489 U.S. at 772-73; *accord Nation Magazine*, 71 F.3d at 887-88; *SafeCard Services, Inc., v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). "The relevant question . . . is whether [Mr. Lazaridis] has shown government misconduct sufficient to overcome Exemption [6's] protection for personal privacy under the test outlined in *National Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004)." *Blackwell v. FBI*, 646 F.3d 37, 41 (D.C. Cir. 2011). In *Favish*, the Court explained that a plaintiff "must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake" and that "the information is likely to advance that interest." *Favish*, 541 U.S. at 172. Such a showing requires "more than a bare suspicion" of official misconduct; "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 174. For it is "[o]nly when [such evidence is] produced [that] there [will] exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records." *Id.* at 174-75. Otherwise, the balancing requirement does not come into play. *Id.* at 175.

Mr. Lazaridis's claim of impropriety based on DOS's invocation of this exemption begs the question, and he has not otherwise identified "government misconduct" that would be revealed from the release of the third-party information contained in the authorizations. Hence, the Court concludes that DOS is entitled to judgment as a matter of law on its application of exemption 6 to the third-party information withheld from most of the responsive records.

Exemption 7

FOIA Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . ." would cause certain enumerated harms. 5 U.S.C. § 552(b)(7). The

scope of exemption 7 encompasses "both civil and criminal matters," and, for purposes of invoking this exemption, "the FOIA makes no distinction between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions." *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002). Rather, the threshold requirement turns on an assessment of "how and under what circumstances the requested files were compiled . . . and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Id.* at 78 (quoting *Jefferson v. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002)).

Since DOS is not a law enforcement agency, its claim that records were compiled for law enforcement purposes is entitled to less deference than that of a law enforcement agency. *See id.* at 77. Nevertheless, it cannot be seriously disputed that at least some of the requested records pertain to alleged international kidnapping charges against Mr. Lazaridis, who has contested such charges in these proceedings and in each of his cases over which the undersigned judge has presided. DOS has invoked exemption 7 sparingly.

Exemption 7(A)

Exemption 7(A) authorizes an agency to withhold law enforcement records "only to the extent that [their] production . . . could reasonably be expected to interfere with enforcement proceedings." § 552(b)(7)(A). The agency must show that release of the records reasonably could be expected to cause some distinct harm to pending or imminent enforcement proceeding or investigation. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *Butler v. Dep't of Air Force*, 888 F. Supp. 174, 183 (D.D.C. 1995), *aff'd*, 116 F.3d 941 (D.C. Cir. 1997); *Kay v. FCC*, 976 F. Supp. 23, 39 (D.D.C. 1997), *aff'd*, 172 F.3d 919 (D.C. Cir. 1998). "Under exemption 7(A) the government is not required to make a specific factual

showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." *Barney v. IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980) (citation omitted). "Rather, federal courts may make generic determinations that, 'with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *Id*. (quoting *Robbins Tire*, 437 U.S. at 236).

DOS applied exemption 7(A) to two documents responsive to the 2006 request, consisting of two pages each, described as "requests for INTERPOL action" relative to "an ongoing enforcement action." *Vaughn* Index, ECF p. 8. Ms. Grafeld states that the information "is contained in Interpol law enforcement documents," and that "the withheld material has been carefully reviewed and no additional non-exempt information may be released." 2d Grafeld Decl. ¶ 74.

Mr. Lazaridis disputes the existence of a law enforcement proceeding, asserting that "Interpol is not today seeking the plaintiff or his child, since its yellow and blue notices were withdrawn by the originating law enforcement agency, the FBI." Pl.'s Facts at 9. (To support his assertion, Mr. Lazaridis refers to documents that he has not made a part of this record and, therefore, will not be considered.) On the other hand, Mr. Lazaridis contends that the "other law enforcement activities to which Interpol documents are alleged to relate" are inapplicable because he "justifiably rejects French child custody decisions . . ." on jurisdictional grounds, *id.* at 9-10, and "has already been held innocent of the kidnapping or illegal retention of his daughter by the competent Greek court." Pl.'s Mem. at 34. Neither Mr. Lazaridis's unsubstantiated claims nor his subjective views about the courts' decisions present a materially factual dispute with regard to DOS's evidence of ongoing enforcement actions. Furthermore, in his response to

DOS's invocation of exemption 7(C), discussed next, Mr. Lazaridis contradicts his own denials of enforcement proceedings. In that context, he first alleges that "there are penal proceedings ongoing against [certain] conspirators, in which law enforcement personnel may be implicated." Pl.'s Facts at 10. Second, he contends that the prosecutor in Ottawa County, Michigan, where the custody proceedings arose, *see Lazaridis v. Wehmer*, 288 F. App'x 800, 801 (3d Cir. 2008), "refuses to dismiss [a] charge . . . ." *Id.* at 11. Hence, the Court finds that DOS is entitled to judgment as a matter of law on its withholding of two INTERPOL documents under exemption 7(A).

Exemption 7(C)

Exemption 7(C) exempts law enforcement material "to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). As a general rule, third-party identifying information contained in such records is "categorically exempt" from disclosure. *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 896 D.C. Cir. 1995). In addition, "[a]s a result of Exemption 7(C), FOIA ordinarily does not require disclosure of law enforcement documents (or portions thereof) that contain private information." *Blackwell*, 646 F.3d at 41 (citing cases); *see Lazaridis*, 766 F. Supp. 3d at 144 (exemption 7(C) shields identities of suspects, witnesses, investigators, and law enforcement officers). DOS applied this exemption, in conjunction with exemption 6, to "[n]ames and identifying data . . . to protect the personal privacy of personnel of a law-enforcement agency." 2d Grafeld Decl. ¶ 76; *Vaughn* Index, ECF pp. 6, 9, 12, 12, 14, 19, 22.

Mr. Lazaridis argues that a public interest outweighs the substantial privacy interests at stake because "[t]he law enforcement officers whose names are being redacted . . .

are among those who are aware that there is no probable cause for the plaintiff's arrest, yet they are complicit in permitting the [alleged illegal] proceeding [in Michigan] to continue." Pl.'s Mem. at 25-26. These subjective assertions fail to trigger the balancing requirement not only because they are unsubstantiated but also because they present interests that are clearly personal to Mr. Lazaridis. *See Favish*, 541 U.S. at 172 ("[T]he public interest sought to be advanced [must be] more specific than having the information for its own sake."); *Blackwell*, 646 F.3d at 41 ("Privacy interests are particularly difficult to overcome when law enforcement information regarding third parties is implicated . . . . This is particularly true when the requester asserts a public interest—however it might be styled—in obtaining information that relates to a criminal prosecution."); *see also U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496 (1994) (explaining that "whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made . . ., except in certain cases involving claims of privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request" (citations and internal quotation marks omitted)).

Mr. Lazaridis disputes DOS's withholding of law enforcement officers' telephone and fax numbers where "there is no suggestion that these [numbers] are private, personal numbers," as opposed to "public work numbers for which no expectation of personal privacy exists." Pl.'s Facts at 10. However, the commonly asserted harm associated with disclosing the telephone numbers of law enforcement officers, *e.g.*, possible harassment, does not and cannot turn on whether they are work numbers or private numbers, both categories of which can lead to identifying the respective officer. Furthermore, Mr. Lazaridis has not advanced *any* public interest in the disclosure of such numbers. *See Brown v. FBI*, 873 F. Supp. 2d 388, 403 (D.D.C. 2012) (finding that "any public interest in [Special Agents'] internal [work phone] numbers . . .

would in no way illuminate 'what the government is up to,' [and is] de minimis"). The Court concludes that DOS is entitled to judgment as a matter of law on its withholding of the identifying information of law enforcement personnel under exemption 7(C).

Exemption 7(E)

Exemption 7(E) protects from disclosure law enforcement records that "would disclose techniques and procedures for law enforcement investigation . . . or would disclose guidelines for law enforcement investigations . . . if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). DOS redacted information "that would reveal details of the procedures used to coordinate actions among U.S. and foreign law enforcement agencies," and information "that relates to [DOS's] techniques and procedures to record and communicate information used to protect the integrity of the passport process, over which [DOS] has law enforcement responsibility." 2d Grafeld Decl. ¶ 78.

The District of Columbia Circuit has explained that "[e]xemption 7(E) sets a relatively low bar for the agency to justify withholding: Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell*, 646 F.3d at 42 (alteration in original) (citations and internal quotation marks omitted). Ms. Grafeld concludes only that "[r]elease of [the withheld] information could hamper the use of these procedures in the future." 2d Grafeld Decl. ¶ 78. This vague conclusion coupled with the opaque descriptions in the *Vaughn* index does not show "how the release of the requested information might create a risk of circumvention of the law." *Blackwell*, 646 F.3d at 42. The Court cannot discern what disclosure could risk circumvention of

the law. Hence, DOS's motion for summary judgment on this claimed exemption will be denied without prejudice.

Record Segregability

The Court is required to consider, *sua sponte*, whether all reasonably segregable portions of the responsive records were released, particularly where documents were withheld in their entireties. *See Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1027-28 (D.C. Cir. 1999); *Valfells*, 717 F. Supp. 2d at 120. DOS has invoked multiple FOIA exemptions to justify withholding some documents in their entirety. The Court cannot tell from the current *Vaughn* index which exemption applies to which portion of the document. Therefore, the Court cannot assess, for example, whether any justification remains for withholding Doc. 044 after having found exemption 5 inapplicable and exemption 7(E) unsubstantiated, and when exemption 7(C) generally shields third-party identifying information but not a whole document. Hence, the Court will hold in abeyance its segregability assessment and will direct DOS to submit a more detailed *Vaughn* index with regard to documents withheld in their entirety. If DOS determines that it cannot complete this task without disclosing exempt information, it may submit the documents for *in camera* review.

IV. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part DOS's motion for summary judgment and will deny Mr. Lazaridis's cross-motion for summary judgment. DOS's motion will be granted on the adequacy of the search for records and all claimed FOIA

exemptions except exemption 7(E) and the application of exemption 5 to Doc. 044. A memorializing Order accompanies this Memorandum Opinion.

Date: March 27, 2013

/s/
ROSEMARY M. COLLYER
United States District Judge

RELEASE IN FULL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE CANNING,	:	
Plaintiff,	:	
v.	:	Civil Action No. 11-1295 (GK)
U.S. DEPARTMENT OF JUSTICE,	:	
Defendant.	:	

MEMORANDUM OPINION

On January 14, 2013, Plaintiff filed a Second Motion for Discovery and for a Stay of the Case While Discovery is Conducted, accompanied by a Second Declaration of George Canning [Dkt. No. 31]. Plaintiff has also filed a Renewed Motion for Discovery Regarding His Mailing of the July and December 2009 FOIA Requests, and for a Stay of the Case While Discovery is Conducted [Dkt. No. 35]. Finally, he has also filed a document titled "Plaintiff's Second Interrogatories and Request for Production of Documents and Recordings." The Government has filed a Motion for Protective Order and Memorandum in Support Thereof [Dkt. Nos. 38 and 38-1].

There is no question that the Government is correct that discovery in general is unavailable in Freedom of Information Act ("FOIA") actions, 5 U.S.C. § 522, et seq. Wheeler v. CIA, 271 F. Supp. 2d 132, 129 (D.D.C. 2003). Moreover, if the Court deems the declarations of an agency deficient, then it may request that the agency supplement those disclosures rather than order discovery. Hall v. CIA, 881 F. Supp. 2d 38, 73 (D.D.C. 2012). In short, discovery in FOIA cases is rarely allowed.

Mr. Canning, a non-lawyer (but a knowledgeable FOIA plaintiff), makes frequent use of his rights as a citizen under the Freedom of Information Act ("FOIA"). It is clear from his many filings,

at least before this Court, that he is a highly intelligent gentleman, who, over the years, has learned a vast amount about the procedures and inner workings of the Federal Bureau of Investigation, as well as other national security agencies of the United States Government. Having said all that, the Court must note some major deficiencies in Mr. Canning's attempt to obtain very extensive discovery in this case.

First, many of his requests for production of documents and his interrogatories seek information which can only be evaluated after the Government's Motion for Summary Judgment is fully briefed. He claims that much of the information he seeks goes to the issue of whether material facts are in dispute and that he needs that information in order to directly challenge the accuracy of the Government's factual representations. His allegations that the Government's facts are inaccurate must be contested by filing an Opposition to the Government's pending Motion for Summary Judgment. Second, it is abundantly clear that at least some of the information he seeks is irrelevant or protected by various exemptions contained in the Act itself.

Given all of the above, and the extremely detailed nature of the discovery that Mr. Canning seeks, the Court concludes that his two Motions must be denied. The most efficient way to proceed in this case, which is now more than two years old, is for Plaintiff to submit his Opposition to the Government's Motion for Summary Judgment and for the Government to file its Reply, if any. Some of the discovery sought by Mr. Canning may well be mooted by rulings on the Motion for Summary Judgment.

WHEREFORE, it is this 2nd day of April, 2013, hereby

ORDERED, that the Government's Motion for a Protective Order is granted; and it is further

ORDERED, that the Plaintiff's Second Motion for Discovery and Renewed Motion for Discovery shall be denied; and it is further

ORDERED, that Plaintiff shall file his Opposition to the pending Motion for Summary Judgment no later than May 1, 2013; and it is further

ORDERED, that the Government shall file its Reply, if any, no later than June 1, 2013.

Gladys Kessler
United States District Judge

Copies via ECF to all counsel of record

and to

George Canning
60 Sycolin Road
Leesburg, VA 20175

RELEASE IN PART
B5, B6

Smilansky, Gene M

From: Smilansky, Gene M
Sent: Thursday, August 08, 2013 9:42 PM
To: Finnegan, Karen M; Walter, Sheryl L
Subject: RE: [redacted] B5

Categories: 2

Sorry, Karen – I just saw this email. Will follow up on the low side to see if we can set up a time for tomorrow.

Best,
Gene

This email is UNCLASSIFIED.

From: Finnegan, Karen M
Sent: Thursday, August 08, 2013 1:53 PM
To: Smilansky, Gene M; Walter, Sheryl L
Subject: RE: [redacted]

Thanks Gene! I'm available today after 4 pm for a discussion. However, I'm not certain that I need to be involved in this discussion.

Karen

From: Smilansky, Gene M
Sent: Wednesday, August 07, 2013 7:06 PM
To: Walter, Sheryl L; Finnegan, Karen M
Subject: [redacted]

Sheryl, Karen – [redacted] We can discuss by phone or in person tomorrow if you are available.

Best,
Gene

Gene Smilansky
Office of the Legal Adviser (L/M)
U.S. Department of State
Office: (202) 647-8093
Mobile [redacted] B6

Sensitive
This email is UNCLASSIFIED.

RELEASE IN PART B5

Smilansky, Gene M

From:	Smilansky, Gene M
Sent:	Thursday, May 09, 2013 2:52 PM
To:	Jaramillo, Edgar E
Cc:	Finnegan, Karen M
Subject:	RE: FOIA Request F-2012-40981 - Secretary's e-mails
Attachments:	F-2012-40981 Oglesby.docx
Categories:	2
AttachmentsClassification:	UNCLASSIFIED
Classification:	UNCLASSIFIED
SensitivityCode:	Sensitive
SMARTCategory:	Working

Edgar – Thanks for the opportunity to review. [redacted] B5

Best,
Gene

Sensitive
This email is UNCLASSIFIED.

From: Jaramillo, Edgar E
Sent: Wednesday, May 08, 2013 2:48 PM
To: Smilansky, Gene M
Subject: FOIA Request F-2012-40981 - Secretary's e-mails

RELEASE IN PART B5

Good afternoon Gene,

I'm the FOIA case manager for the FOIA request below. We drafted the attached Oglesby draft and I've forwarded it for your clearance, per Karen Finnegan & Pat Scholl from FOIA. Do you approve?

V/r,
Edgar

Edgar E. Jaramillo
Freedom of Information Act Office
A/GIS/IPS/CR/EAN
Europe, South Central Asia, Africa & Near Eastern Affairs
202-261-8472

RELEASE IN PART B5

Smilansky, Gene

From: Smilansky, Gene
Sent: Friday, August 08, 2014 5:46 PM
To: Bair, James P; Keller, Andrew N
Subject: [redacted] B5
Attachments:

Categories: 2, 1

[redacted] B5

We should discuss next week.

SBU
This email is UNCLASSIFIED.

From: Bair, James P
Sent: Friday, August 08, 2014 4:21 PM
To: Keller, Andrew N; Smilansky, Gene
Subject: Fw: [redacted]

From: Finney, Clarence N
Sent: Friday, August 08, 2014 04:19 PM
To: Bair, James P
Cc: Wasser, Jonathon D; Finney, Clarence N
Subject: Former Secretary E-Mail Account.

Jamie,

[redacted] B5

Clarence

Clarence N. Finney Jr.
Deputy Director, Executive Secretariat Staff (S/ES-S)
(202) 647-3574 (office)

Smilansky, Gene

From: Walter, Sheryl L
Sent: Tuesday, April 02, 2013 2:33 PM
To: Davis, Jonathan E; Smilansky, Gene; Finnegan, Karen M; Reid, Rosemary D; Scholl, Patrick D
Subject: FW: Recent FOIA and Privacy Act Decisions of U.S. Courts for D.C.
Attachments: CREW v FEC DC Cir 4-2-2013.pdf; Canning v FBI DDC 4-2-2013.pdf; Ludlam v Peace Corps DDC 3-29-2013.pdf; Lazaridis v State DDC 3-27-2013.pdf

Categories: 2
AttachmentsClassification: UNCLASSIFIED
RELEASE IN PART B5
Classification: UNCLASSIFIED
SMARTCategory: Working

B5

This email is UNCLASSIFIED.

From: Bizic, Eli W
Sent: Tuesday, April 02, 2013 2:02 PM
To: Walter, Sheryl L; Davis, Jonathan E; Smilansky, Gene; IPS-FOIA Litigation-DL; Patton, Dorothy P; McLean, Christine L; Washington, Vanessa D
Cc: MPD-Users; Manheim, Marianne J; Hartmann, Lorraine; Scholl, Margaret B; Houser-Jackson, Celeste
Subject: Recent FOIA and Privacy Act Decisions of U.S. Courts for D.C.

In *CREW*, the U.S. Court of Appeals for the D.C. Circuit held that because the FEC did not make and communicate a "determination" within the meaning of 5 U.S.C. § 552(a)(6)(A)(i) within 20 working days of receiving CREW's FOIA request, CREW is deemed to have exhausted its administrative appeal remedies under Section 552(a)(6)(C)(i), and its suit may proceed. The appeals court thus reversed and remanded the District Court's earlier decision that CREW had not exhausted its administrative remedies after the FEC had produced records.

In *Canning*, the Court denied the plaintiff's two motions for discovery, ruling that his requests for production of documents and his interrogatories can only be evaluated after the Government's Motion for Summary Judgment is fully briefed. His allegations that the Government's facts are inaccurate must be contested by filing an Opposition to the Government's pending Motion for Summary Judgment. Second, it is abundantly clear that at least some of the information he seeks is irrelevant
or protected by various exemptions contained in the Act itself.

In *Ludlum*, the plaintiffs' FOIA request sought production, in electronic format, of a country-by-country breakout of the Peace Corps' 2008 survey of its Volunteers which was eventually produced. Subsequently one plaintiff submitted a FOIA request of a copy the annual volunteers survey (AVS) for 2009 and 2010. The Peace Corps redacted responses to some of the responses under FOIA exemptions (b)(5) and (b)(6). The Court concurred in withholding of responses to the first set of questions concerning staff performance under (b)(6),

but rejected the redactions of responses to questions regarding host sensitivity and crime, and withholdings under (b)(5) as deliberative process.

In *Lazaridis*, regarding multiple FOIA requests for records about himself and his daughter by a U.S. citizen father who had abducted his minor daughter to Europe, the court ruled that the Department of State had conducted adequate searches for records responsive to plaintiff's requests and properly redacted material in all but one document in which State had asserted FOIA exemptions (b)(7)(E) and(b)(5).

This email is UNCLASSIFIED.

RELEASE IN FULL

F-2012-40981

CREW | citizens for responsibility and ethics in washington

1400 Eye Street N.W., Suite 450
Washington, D.C. 20005
Phone: 202-408-5565
Fax: 202-588-5020

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
FOIA Officer, Office of Information Programs and Services	Anne L. Weismann
COMPANY:	DATE:
U.S. Department of State	DECEMBER 6, 2012
RECIPIENT'S FAX NUMBER:	PAGE 1 OF 8
202-261-8579	
RECIPIENT'S PHONE NUMBER:	RE:
	Please see enclosed FOIA request

NOTES/COMMENTS:

Fee Waiver

Pages transmitted are privileged and confidential.

CREW | citizens for responsibility and ethics in washington

December 6, 2012

By facsimile: 202-261-8579

RELEASE IN FULL

Office of Information Programs and Services
A/ISS/IPS/RL
U.S. Department of State, SA-2
Washington, D.C. 20522-8100

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and U.S. Department of State (State) regulations, 2 C.F.R. § 171, Citizens for Responsibility and Ethics in Washington (CREW) requests records sufficient to show the number of email accounts of or associated with Secretary Hilary Rodham Clinton, and the extent to which those email accounts are identifiable as those of or associated with Secretary Clinton. By "identifiable" we mean the extent to which the email account is in a name that would permit the public to identify it as an account of the secretary. Please note CREW does not seek the full email address(es) to the extent that would include any exempt information.

Please search for responsive records regardless of format, medium, or physical characteristics. Where possible, please produce records electronically, in PDF or TIF format on a CD-ROM. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs.

If it is your position that any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1972). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). Moreover, the *Vaughn* index must "describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis added). Further, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *Id.* at 224 (citing *Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

1400 Eye Street, N.W., Suite 450, Washington, D.C. 20005 | 202.408.5565 phone | 202.588.5020 fax | www.citizensforethics.org

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. *Mead Data Central*, 566 F.2d at 261. Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Finally, CREW welcomes the opportunity to discuss with you whether and the extent to which this request can be narrowed or modified to better enable DOJ to process it within the FOIA's deadlines. Toward that end, please feel free to contact me at 202-408-5565 or aweismann@citizensforethics.org.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 22 C.F.R. § 171.17, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government and expenditures, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. Moreover, the request primarily and fundamentally is for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii). *See, e.g.*, *McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

Specifically, these records are likely to contribute to greater public awareness of the extent to which Secretary Clinton, like the administrator of the Environmental Protection Agency (EPA), use email accounts not readily identifiable as her accounts. Recently it was reported that Administrator Jackson established alias email accounts to conduct official government business, including an account under the name "Richard Windson," which is not publicly attributable to her. *See* Brendan Sasso, House Republicans Question EPA Over Secret Email Accounts, *The Hill*, November 17, 2012 (attached as Exhibit A). Apparently this practice of alias accounts dates back to former EPA Administrator Carol Browner. Through this FOIA, CREW seeks to learn how widespread this practice is, and to evaluate the extent to which it has led to under-inclusive responses to FOIA, discovery, and congressional requests, and a failure to preserve records in a way that complies with the Federal. Records Act.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials and to ensuring the integrity of those officials. CREW is dedicated to empowering citizens to have an influential voice in government decisions and in the government

decision-making process. CREW uses a combination of research, litigation, and advocacy to advance its mission. The release of information garnered through this request is not in CREW's financial interest. In addition, CREW will disseminate any documents it acquires from this request to the public through www.scribd.com and CREW's website, which also contains links to thousands of pages of documents CREW acquired from multiple FOIA requests. *See* www.citizensforethics.org. CREW's website includes documents relating to CREW's FOIA litigation, Internal Revenue complaints, and Federal Election Commission complaints.

Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

News Media Fee Waiver Request

CREW also asks that it not be charged search or review fees for this request because CREW qualifies as a "representative of the news media" pursuant to the FOIA. In *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia Circuit found the National Security Archive was a representative of the news media under the FOIA, relying on the FOIA's legislative history, which indicates the phrase "representative of the news media" is to be interpreted broadly; "[i]t is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis added), cited in *id.*

CREW routinely and systematically disseminates information to the public in several ways. First, CREW maintains a frequently visited website, www.citizensforethics.org, that received 33,571 page views in October 2012. The website reports the latest developments and contains in-depth information about a variety of activities of government agencies and officials. In addition, CREW posts all of the documents it receives under the FOIA on www.scribd.com, and that site has received 2,287,124 visits to CREW's documents since April 14, 2010.

Second, since May 2007, CREW has published an online newsletter, *CREWCuts*, that currently has 15,564 subscribers. *CREWCuts* provides subscribers with regular updates regarding CREW's activities and information the organization has received from government entities. A complete archive of past *CREWCuts* is available at http://www.citizensforethics.org/newsletter.

Third, CREW publishes a blog, *Citizens blogging for responsibility and ethics in Washington*, that reports on and analyzes newsworthy developments regarding government ethics and corruption. The blog, located at http://www.citizensforethics.org/blog, also provides links that direct readers to other news articles and commentary on these issues. CREW's blog had 5,664 page views in October 2012.

Finally, CREW has published numerous reports to educate the public about government ethics and corruption, including agencies' failure to comply with their record keeping responsibilities. See *Record Chaos*, which examines agency compliance with electronic record keeping responsibilities; *The Revolving Door*, a comprehensive look into the post-government activities of 24 former members of President Bush's cabinet; and *Those Who Dared: 30 Officials Who Stood Up For Our Country*. These and all other CREW's reports are available at http://www.citizensforethics.org/reports.

Based on these extensive publication activities, CREW qualifies for a fee waiver as a "representative of the news media" under the FOIA.

If you have any questions about this request or foresee any problems in releasing fully and the requested records, please contact me at (202) 408-5565. Also, if CREW's request for a fee waiver is not granted in full, please contact me immediately upon making such determination. Please send the requested records to Anne L. Weismann, Citizens for Responsibility and Ethics in Washington, 1400 Eye Street, N.W., Suite 450, Washington, D.C. 20005.

Sincerely,

Anne L. Weismann
Chief Counsel

Enclosure

RELEASE IN FULL

Smilansky, Gene

From: Smilansky, Gene
Sent: Wednesday, July 02, 2014 12:53 PM
To: Hackett, John; Finnegan, Karen M
Cc: Bair, James P
Subject: CREW op-ed regarding email retention
Attachments: RE: F-2012-40981, Weismann, Anne - FOIA REQUEST/SEARCH DUE: 05/29/2013; CREW request.pdf

Categories: 2

FYI: http://www.washingtonpost.com/opinions/the-irs-isnt-the-only-agency-with-an-e-mail-problem/2014/06/27/35b2767e-fe1c-11e3-b1f4-8e77c632c07b_story.html

CREW also filed the attached FOIA request in December 2012.

Gene

SBU
This email is UNCLASSIFIED.

RELEASE IN PART B5

Smilansky, Gene

From: Finnegan, Karen M
Sent: Wednesday, May 08, 2013 11:34 AM
To: Scholl, Patrick D
Cc: Smilansky, Gene
Subject: [redacted] B5

Follow Up Flag: Follow up
Flag Status: Flagged

Categories: 2
Classification: UNCLASSIFIED
SMARTCategory: Working

Pat: [redacted]

Thanks,
Karen

Karen M. Finnegan
Chief, Programs and Policies Division
A/GIS/IPS/PP, Room 5045, SA-2
U.S. Department of State
Washington, D.C. 20520
Direct: 202-663-2946

This email is UNCLASSIFIED.

RELEASE IN PART B5

Smilansky, Gene

From: Smilansky, Gene
Sent: Wednesday, August 07, 2013 5:05 PM
To: Finnegan, Karen M
Subject: RE: CREW FOIA request
Attachments: CREW request.pdf

Categories: 2, 1

Sure, running to a meeting now but will include Sheryl on the high-side email when I get back. Request is attached.

Gene

SBU
This email is UNCLASSIFIED.

From: Finnegan, Karen M
Sent: Wednesday, August 07, 2013 5:03 PM
To: Smilansky, Gene
Subject: RE: CREW FOIA request

Thanks Gene! Do you have a copy of the request too? I thought that I had a copy of the request, but I cannot locate it and Sheryl would like to see it.

Should we include Sheryl in the discussion?

Karen

SBU
This email is UNCLASSIFIED.

From: Smilansky, Gene
Sent: Wednesday, August 07, 2013 5:02 PM
To: Finnegan, Karen M
Subject: RE: CREW FOIA request

Karen – Yes, I will send on the high side. [redacted] B5

Best,
Gene

SBU

This email is UNCLASSIFIED.

From: Finnegan, Karen M
Sent: Wednesday, August 07, 2013 4:59 PM
To: Smilansky, Gene
Subject: CREW FOIA request

Gene: Sheryl asked if we've responded to CREW's request pertaining to e-mail accounts related to Secretary Clinton. I seem to remember that we had responded, but am not certain. If so do you have a copy of the R/D letter that you can share with Sheryl? If not I'll reach out to CR.

Thanks,
Karen

Karen M. Finnegan
Chief, Programs and Policies Division
A/GIS/IPS/PP, Room 5045, SA-2
U.S. Department of State
Washington, D.C. 20520
Direct: 202-663-2946

This email is UNCLASSIFIED.

RELEASE IN PART B5

Smilansky, Gene

From: Smilansky, Gene
Sent: Thursday, August 08, 2013 10:21 PM
To: Finnegan, Karen M; Walter, Sheryl L
Subject: RE: IPS Significant FOIA Report

Categories: 2

Sheryl, Karen – Is there a good time tomorrow for me to give you a call about this? I'm generally open 10am-2pm and 4-6pm.

Thanks,
Gene

From: Finnegan, Karen M
Sent: Wednesday, August 07, 2013 5:12 PM
To: Walter, Sheryl L
Cc: Smilansky, Gene
Subject: RE: IPS Significant FOIA Report

Sheryl: I've attached the CREW request to this message. [redacted] B5

Karen

SBU
This email is UNCLASSIFIED.

From: Walter, Sheryl L
Sent: Wednesday, August 07, 2013 4:34 PM
To: Finnegan, Karen M
Subject: RE: IPS Significant FOIA Report

If so, can you send me the response as well as the request letter? Thanks!

This email is UNCLASSIFIED.

From: Finnegan, Karen M
Sent: Wednesday, August 07, 2013 4:17 PM
To: Walter, Sheryl L
Subject: RE: IPS Significant FOIA Report

I believe that we responded to this request, but I'll confirm with Gene.

Karen

This email is UNCLASSIFIED.

From: Walter, Sheryl L
Sent: Wednesday, August 07, 2013 4:11 PM
To: Finnegan, Karen M
Subject: RE: IPS Significant FOIA Report

What about the CREW request? Is that still outstanding?

This email is UNCLASSIFIED.

From: Finnegan, Karen M
Sent: Wednesday, August 07, 2013 4:10 PM
To: Walter, Sheryl L; Hermesman, Geoffrey F; Scholl, Patrick D; Hackett, John; Manheim, Marianne J
Subject: RE: IPS Significant FOIA Report

Sheryl: To follow-up on my early response, Cristina is handling the Judicial Watch case, CA No. 2013-772 (DDC) (J. Kollar-Kotelly), that seeks access to all communications (including e-mail) between the Department and President Clinton and/or his foundation regarding clearing his speeches [redacted] B5

Karen

This email is UNCLASSIFIED.

From: Walter, Sheryl L
Sent: Wednesday, August 07, 2013 2:52 PM
To: Hermesman, Geoffrey F; Finnegan, Karen M; Scholl, Patrick D; Hackett, John; Manheim, Marianne J
Subject: RE: IPS Significant FOIA Report

Is the Gawker request from 2010 re Rahm Emmanuel emails still open? I thought that one was done.

This email is UNCLASSIFIED.

From: Hermesman, Geoffrey F
Sent: Wednesday, August 07, 2013 12:54 PM
To: Walter, Sheryl L; Finnegan, Karen M; Scholl, Patrick D; Hackett, John; Manheim, Marianne J
Subject: RE: IPS Significant FOIA Report

Sheryl,

A search of the F 2 database identified 17 FOIA cases that contain Clinton in the subject line and can be further construed as requests for correspondence between the Secretary and other individuals and/or organizations. Of these, four specifically mention Emails or Email accounts.

CLOSED CASES

Of the 17 cases, 10 are closed. Closed requests F-2010-05294 and F-2012-40981 specifically mention Emails.

OPEN CASES

Of the remaining 7 open cases, requests F-2010-07625 and F-2013-12881 specifically mention Emails. The latter was received on 7/31/13 and is still being processed in RC. Both request letters are attached.

Geoffrey Hermesman
Branch Chief
IPS/CR/WEP
U.S. Department of State
Washington, DC 20522
Tel. 202 663 2634
hermesmangf@state.gov

This e-mail is unclassified based on the definitions provided in E.O. 13526

From: Walter, Sheryl L
Sent: Wednesday, August 07, 2013 10:51 AM
To: Finnegan, Karen M; Scholl, Patrick D; Hackett, John; Manheim, Marianne J; Hermesman, Geoffrey F
Subject: FW: IPS Significant FOIA Report

All, please see Peggy's comments below, we should discuss theses.
Geoff, can you get a copy of all requests related to Secretary Clinton's emails?
Karen, I don't think we have any litigation on this topic, do we? Did we respond to the CREW request yet?
Thanks, all! Sheryl

SBU
This email is UNCLASSIFIED.

From: Grafeld, Margaret P
Sent: Wednesday, August 07, 2013 10:47 AM
To: Walter, Sheryl L; Hackett, John
Cc: Stein, Eric F; Houser-Jackson, Celeste
Subject: Fw: IPS Significant FOIA Report

I'll be interested in the response to Musgrove's request.

Also, I'm curious about how you plan to address the CRS request, as well as for the employee meds request.

Finally, John, you mentioned yesterday requests for Secretary Clinton's emails; may I get copies, pls and thx.

From: IPS-STAFF-Assistants
Sent: Wednesday, August 07, 2013 09:50 AM
To: Chang, Cindy
Cc: Summers, Matt; Finnegan, Karen M; A Staff Collective; Wasser, Jonathon D; Stein, Eric F; Davis, Jonathan E; Smilansky, Gene; Houser-Jackson, Celeste; Finney, Clarence N; Walter, Sheryl L; Reid, Rosemary D; Mehlenbacher, Kelly J; Hackett, John; Grafeld, Margaret P; Bemish, Renee C
Subject: IPS Significant FOIA Report

All:

Attached is the Significant FOIA Report for this week; it is also reproduced below for easy reference. Please contact me if you have any questions.

Thank you,

Olivia Woods
Staff Assistant to the Director
U.S. Department of State
Office of Information Programs and Services
A/GIS/IPS
(202) 663-1012
SA-2, Room 5081

Our Mission is to meet the needs of our customers and the United States Government

(U) IPS FOIA Requests of Interest: Among the requests received by IPS FOIA are the following:

- Barbara Elias of the National Security Archive for all reports related to the July 30, 2013 prison break in Dera Ismail Khan, Pakistan;
- Cora Currier of *ProPublica* for documents regarding the deaths and burials of Taliban prisoners of war at Dasht-i-Leili, Afghanistan, in November 2001;
- Sarah Fitzpatrick of *CBS News* for the number of State Department employees prescribed Mefloquine or Lariam annually, as well as the number of those employees who received a diagnosis and/or treatment for a psychiatric issue or traumatic brain injury in the six months prior to receiving their prescription, from 2001 to the present;
- Brooke Williams of Harvard University's Edmond J. Safra Center for Ethics for all communications between the State Department and the Center for Strategic and International Studies that refer to the Keystone XL pipeline;
- Rebecca Markert of the Freedom From Religion Foundation for records regarding the Department's addition of religious quotes to U.S. passports;

- John Greenewald, Jr., freelance journalist and television producer, for the following:
  1. all Congressional Research Service reports that are not currently listed on the State Department's website, at http://fpc.state.gov/c55696.htm; and
  2. all records regarding the August 2013 *Rolling Stone* issue featuring Dzhokhar Tsarnaev.
- Shawn Musgrave of *MuckRock News* for the document that outlines the State Department's methodology for estimating FOIA completion dates; and
- Michael Evans of the National Security Archive for the following:
  1. the 50 cables referred to in the notes of the June 29, 2009 Department assessment titled, "Colombia: Institutional Standoff Continues";
  2. all documents pertaining to the U.S.-Mexico Repatriation Technical Working Group, from 2004 to the present;
  3. the 24 cables referred to in the notes of the May 26, 2009 Department assessment titled, "Colombia: Uribe's Third-Term Prospects"; and
  4. the 16 cables referred to in the notes of the June 4, 2010 Department assessment titled, "Colombia: More of the Same with Santos?"

This email is UNCLASSIFIED.

RELEASE IN PART B5

Smilansky, Gene

From: Smilansky, Gene
Sent: Tuesday, August 20, 2013 11:05 AM
To: Davis, Jonathan E; Walter, Sheryl L
Cc: Finnegan, Karen M
Subject: RE: request about "secret/alias" email accounts
Attachments:

B5

Categories: 2, 1

Thanks, Sheryl.

SBU
This email is UNCLASSIFIED.

From: Davis, Jonathan E
Sent: Tuesday, August 20, 2013 9:54 AM
To: Walter, Sheryl L; Smilansky, Gene
Cc: Finnegan, Karen M
Subject: RE: request about 'secret/alias" email accounts

Thanks much for letting us know.

From: Walter, Sheryl L
Sent: Tuesday, August 20, 2013 9:47 AM
To: Davis, Jonathan E; Smilansky, Gene
Cc: Finnegan, Karen M
Subject: FW: request about "secret/alias" email accounts

Just fyi, as this seems to be floating around the agencies, though not here at State.

From: Manheim, Marianne J
Sent: Tuesday, August 20, 2013 8:22 AM
To: Reid, Rosemary D; Walter, Sheryl L; Finnegan, Karen M

Cc: Casto, Mary T; Brothers, Karen G; DiGiovine, Amy L; Jennings, Patrice; Yousef, Rundik M; Tribble, Shamella L; Gentile, Emily R; Evans, Wayne D
Subject: RE: request about "secret/alias" email accounts

Thanks, Rosemary, and everyone else on this email!

Marianne

This email is UNCLASSIFIED.

From: Reid, Rosemary D
Sent: Monday, August 19, 2013 3:10 PM
To: Walter, Sheryl L; Finnegan, Karen M; Manheim, Marianne J
Cc: Casto, Mary T; Brothers, Karen G; DiGiovine, Amy L; Jennings, Patrice; Yousef, Rundik M; Tribble, Shamella L; Gentile, Emily R; Evans, Wayne D
Subject: request about "secret/alias" email accounts

No request so far – we'll watch for it, though

From: Brothers, Karen G
Sent: Monday, August 19, 2013 3:03 PM
To: DiGiovine, Amy L; Reid, Rosemary D
Subject: RE:

I remember something more recent but didn't find anything under the subject. Sorry

This email is UNCLASSIFIED.

From: DiGiovine, Amy L
Sent: Monday, August 19, 2013 2:56 PM
To: Reid, Rosemary D
Cc: Brothers, Karen G
Subject: RE:

Dear Rosemary,

I checked the weekly reports and did a search in F2. I also couldn't find any cases fitting the below description from Mr. Gillum, Mr. O'Neil or any other requester.

I believe the case I was thinking of is F-2012-40981 (submitted by CREW), which pertains to the e-mail accounts of Secretary Clinton. It doesn't appear that we've received any other cases about secret alias e-mail accounts.

Best,
Amy

From: Reid, Rosemary D
Sent: Monday, August 19, 2013 2:37 PM
To: DiGiovine, Amy L
Cc: Brothers, Karen G
Subject: RE:

Thank you both! Let me know what you find...

From: DiGiovine, Amy L
Sent: Monday, August 19, 2013 2:36 PM
To: Reid, Rosemary D
Cc: Brothers, Karen G
Subject: RE:

Dear Rosemary,

Yes, I believe that I remember a request similar to that. I'll look to see if I can find it now. We may have reported it in the weekly.

Best, Amy

From: Reid, Rosemary D
Sent: Monday, August 19, 2013 2:32 PM
To: Brothers, Karen G; DiGiovine, Amy L
Cc: Casto, Mary T
Subject: FW:

I didn't see anything under G Ilum or O'Neil. Do you remember seeing anything come in?

From: Manheim, Marianne J
Sent: Monday, August 19, 2013 12:05 PM
To: Casto, Mary T; Reid, Rosemary D
Cc: Finnegan, Karen M
Subject: FW:

Did we get this one?

This email is UNCLASSIFIED.

From: Duckett, Charlotte W
Sent: Monday, August 19, 2013 12:04 PM
To: Manheim, Marianne J
Subject:

Marianne,

I retrieved a call from the audix system last week. The call was from Nikki Gramian with OGIS. She asked for you. She stated that she is taking a survey of Federal Agencies to see if they received a FOIA request that asked for "Secret and Alias E-mail Accounts for High Level Officials". She stated that DHS received a FOIA request. Ms. Gramian stated that

the requests would have been from Jack Gillum with the Associated Press or from Michael J. O'Neil with the Landmark Legal Foundation. I didn't see either one of these in the system. Ms. Gramian can be reached on 202-741-5772.

Charlotte W. Duckett
RL/AO

RELEASE IN PART B5

Smilansky, Gene

From: Smilansky, Gene
Sent: Tuesday, August 19, 2014 3:41 PM
To: Hartmann, Lorraine
Subject: [redacted] B5

Categories: 2

Lori – [redacted]

Thanks,
Gene

This email is UNCLASSIFIED.

RELEASE IN PART B5

Smilansky, Gene

From: Smilansky, Gene
Sent: Tuesday, August 19, 2014 3:41 PM
To: Evers, Austin R
Cc: Keller, Andrew N; Bair, James P
Subject: [redacted] B5
Attachments:

Categories: 2, 1

Austin – [redacted]

Gene

This email is UNCLASSIFIED.