UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONISIBILITY	)	
Plaintiff,	)	
v.	)	**Civil Action No. 11-1583-RJL**
OFFICE OF SCIENCE AND TECHNOLOGY POLICY	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Public Employees for Environmental Responsibility (PEER) hereby moves for the Court to enter summary judgment in Plaintiff's favor pursuant to Rule 56(b) of the Federal Rules of Civil procedure and Local Rule 7(h). Attached in support of this motion are a statement of material facts not in dispute, a statement of material facts as to which there are genuine issues, and a memorandum of points and authorities, with exhibits.

Dated: February 17, 2012

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Public Employees for Environmental Responsibility ("PEER" or "Plaintiff"), hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure ("Rule") 56(b) and Local Rule 7(h) and opposes Defendant's Motion for Summary Judgment. Plaintiff brings this action under the Freedom of Information Act ("FOIA") seeking the production of certain documents requested by Plaintiff in April 18, 2011 and June 13, 2011 FOIA requests.

BACKGROUND

I. PLAINTIFF'S FOIA REQEUSTS

On April 18, 2011, Plaintiff filed a FOIA request with the Office of Science and Technology Policy's ("OSTP" or "Defendant") FOIA Officer (Request No. 11-18), seeking the agency's records regarding communications concerning cultivating genetically engineered or genetically modified ("GE") crops on national wildlife refuges. Specifically, Plaintiff sought "(1) all communications to and from outside (non-federal) entities, including corporations, or

individuals concerning cultivation of GE crops on national wildlife refuges; and (2) all communications to and from other federal agencies, including the U.S. Fish and Wildlife Service and the Department of Interior, concerning cultivation of GE crops on national wildlife refuges." Leonard Decl. at P5.

OSTP acknowledged and responded to Plaintiff's request on May 13, 2011. OSTP produced records responsive to Plaintiff's request, but withheld portions of the records under 5 U.S.C. § 552(b)(4), (b)(5), and (b)(6) ("Exemptions 4, 5, and 6"). On June 10, 2011, Plaintiff appealed OSTP's constructive and partial denial of its FOIA request (Request No. 11-18A). Specifically, Plaintiff appealed the redactions under Exemptions 4, 5, and 6; that OSTP had made no effort to segregate exempt and non-exempt material as required by FOIA; and that the referral of documents to other agencies improperly impeded the production of records within the statutory time frame. On June 27, 2011, OSTP acknowledged and responded to Plaintiff's appeal. In this letter, OSTP denied Plaintiff's appeal in total. Leonard Decl. at PP 6, 7, 10.

Based on information regarding the Agricultural Biotech Working Group ("ABWG") learned from documents produced in response to its April 18 FOIA request, Plaintiff submitted a follow-up FOIA request to OSTP on June 13, 2011 (Request No. 11-32) seeking information relating to ABWG's function, purpose, and communications. Specifically PEER sought: "1) all documents, including communications, which reflect the mission, nature and/or scope of activities of the Ag. Biotech Working Group or any similarly named organization in which OSTP is a member or otherwise involved; 2) all communications that OSTP has had with industry or industry representative organizations, such as the Biotechnology Industry Organization (BIO), from January 1, 2010 to present concerning the Ag. Biotech Working Group

or any similarly named organization; and 3) records reflecting any other industry-promotion or partnership arrangements in which OSTP is currently participating." Leonard Decl. at P12.

OSTP acknowledged receipt of Plaintiff's Request No. 11-32 on July 11, 2011 and stated that it had located documents responsive to Plaintiff's request, that some of the records contained "equities of other federal agencies," and that OSTP would release records on a "rolling basis." Plaintiff did not receive any documents within the twenty day timeframe for responding to a request. On July 18, 2011, Plaintiff appealed OSTP's constructive denial of this FOIA request. *See* 5 U.S.C. § 552(a)(6)(A)(ii). Leonard Decl. at P15. On October 3, 2011, after Plaintiff filed the complaint in this instant litigation, Plaintiff received documents responsive to its June 13, 2011 request.[1]

II. PLAINTIFF'S COMPLAINT AND PROCEDURAL BACKGROUND

On September 1, 2011, Plaintiff filed suit against Defendant for failure to respond to FOIA Request Nos. 11-32 and 11-18, and for unlawfully withholding portions of records responsive to FOIA Request No. 11-18. (Dkt. 1). Defendant filed its answer to Plaintiff's complaint on October 3, 2011. (Dkt. 2). Since this time, Defendant has completed production under both requests and the parties have narrowed the areas of dispute to the Exemption 4 redactions in one of the documents produced in response to Request No. 11-18, document 11-18.12,[2] and the Exemption 5 redactions in multiple documents OSTP produced in response to Request No. 11-32.[3]

[1] OSTP claims to have produced these documents on August 15, 2011 and that the October 3, 2011 production was a duplicate. However, Plaintiff did not receive any responsive documents until October 3 when the Assistant United States Attorney assigned to this case provided the material with his answer to the complaint. Moreover, OSTP did not acknowledge or respond to Plaintiff's July 18 appeal.

[2] Plaintiff refers to the documents by the number given them in the Vaughn Index.

[3] Plaintiff had also expressed concern regarding the adequacy of the search regarding items 1 and 2 in FOIA request 11-32. Information contained in the Rachael Leonard Declaration filed with OSTP's Motion for Summary Judgment in this case addresses Plaintiff's concerns regarding the adequacy of the search.

OSTP filed a Motion for Summary Judgment and Memorandum in Support of Its Motion for Summary Judgment ("OSTP Mem."), and exhibits, on January 20, 2012. OSTP argues that it is entitled to summary judgment because it conducted an adequate search for records and produced all responsive documents that are not exempt under FOIA. OSTP Mem. 1. As discussed below, Plaintiff now moves for summary judgment and opposes OSTP's motion because OSTP has unlawfully withheld documents responsive to Plaintiff's requests.

III. DOCUMENTS WITHHELD AND REDACTED

OSTP produced 135 documents responsive to Request No. 11-18 and 35 documents responsive to Request No. 11-32. OSTP withheld portions of documents responsive to both requests under FOIA Exemptions 4, 5, and 6. Plaintiff challenges certain redactions made pursuant to Exemptions 4 and 5 only. The challenged Exemption 4 withholding is a paragraph in document 11-18.12, which is a forwarded email from Biotechnology Industry Organization ("BIO") employee Adrianne Massey to an OSTP employee. The challenged Exemption 5 redactions are in documents produced in response to No. 11-32 and fall into three general categories—1) redacted agenda items from upcoming ABWG meetings and general ABWG information, 2) summaries of ABWG meetings and activities, and 3) email discussions with recent USDA ruling as the subject line. Plaintiff challenges these excessive redactions because OSTP has not met its burden to demonstrate that the claimed exemptions apply, and thus the withholdings are unlawful under FOIA. Plaintiff also contends that OSTP failed to properly segregate and produce properly disclosable information.

ARGUMENT

I. APPLICABLE LEGAL STANDARD FOR SUMMARY JUDGMENT

"Summary judgment is appropriate when the pleadings and the evidence demonstrate that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Kilby-Robb v. Spellings*, 522 F. Supp. 2d 148, 154 (D.D.C. 2007) (quoting Fed. R. Civ. P. 56(c)). This standard applies in FOIA cases. *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982). The party moving for summary judgment bears the initial responsibility of showing an absence of a genuine issue of material facts. *Kilby-Robb,* 522 F. Supp. 2d at 155. In deciding whether a genuine issue of material facts exists, the court must "accept all evidence and make all inferences in the non-movant's favor." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). "A non-moving party, however, must establish more than the mere existence of a scintilla of evidence in support of its position." *Id.* at 154-55 (quoting Anderson, 477 U.S. at 252). That is, "'[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'" *Id.* at 155 (quoting *Anderson,* 477 U.S. at 249-50).

Under FOIA, "[t]he burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989), citing S. Rep. No. 89-813, at 8 (1965); *Senate of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). For a defending agency in a FOIA case to meet this burden, it "'must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the [FOIA's] inspection requirements.'" *Perry*, 684 F.2d at 126 (quoting *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979).

"Furthermore, the FOIA requires that 'any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection.'" *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 237 F. Supp. 2d 17, 22-23 (D.D.C. 2002) (quoting 5 U.S.C. § 552(b)).

The agency may satisfy its burden by providing "a relatively detailed justification through the submission of an index of documents, known as a Vaughn Index, sufficiently detailed affidavits or declarations, or both." *Id.* at 22 (quoting *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)). However, reliance on agency affidavits to demonstrate compliance with FOIA does not "require courts to accept glib government assertions of complete disclosure or retrieval." *Perry,* 684 F.2d at 126. Instead, for supporting affidavits to support a grant of summary judgment, the affidavits "must be relatively detailed and nonconclusory and must be submitted in good faith." *Id.* (internal quotations and citations omitted). Here, Defendant has failed to meet its burden to prove that its withholdings are legally justified.

Courts review an agency's justification for non-disclosure *de novo*. 5 U.S.C. § 552(a)(4)(B). "The central purpose of FOIA is to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). The Supreme Court has stated that the FOIA exemptions should be "narrowly construed," reasoning that disclosure, not secrecy, is the basic objective behind FOIA. *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

Applying this standard here it is clear that the Court should enter summary judgment in Plaintiff's favor.

II. DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE WITHHELD RECORDS ARE PROPERLY EXEMPT FROM DISCLOSURE UNDER FOIA

As an initial matter, the Vaughn index provided by OSTP to explain its withholdings is inadequate, and thus the agency has failed to justify its withholdings. An agency's Vaughn Index or declarations must describe the documents or portions of documents withheld in sufficient detail for the requestor and/or court to determine that the elements of the exemption are met and that the document was properly withheld. *Ctr. for Int'l Envtl. Law*, 237 F. Supp. 2d at 22; *see also Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1180-81 (D.C. Cir. 1996) (finding explanation that the "remaining 9 pages contain information pertaining to intelligence activities, sources, and methods and also contain classified foreign government information" inadequate nonsegregability description); *Judicial Watch Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004) (stating that agency declaration must correlate facts with elements of privilege). Moreover, only providing the "briefest of references to its subject matter… will not do" even where the agency also provides the document's date, author, and recipient. *Senate of P.R.*, 823 F.2d at 585 (footnote omitted); *see also Ctr. for Biological Diversity v. Gutierrez*, 451 F. Supp. 2d 57, 68 (D.D.C. 2006) (finding "repeated refrain" that withheld documents are "predecisional and deliberative" and "preliminary recommendations" and "would discourage open, frank discussions" inadequate justification for withholding documents because statements were "perfunctory legalese").

Here, OSTP's Vaughn index and Leonard Declaration contain the type of brief and conclusory language courts have found inadequate to meet the agency's burden of showing that the withheld information is properly withheld under FOIA. For example, as discussed below in Section V on segregability, OSTP repeats the same general, conclusory, and undetailed language to justify its assertion that no non-exempt, reasonably segrebable portions can be disclosed. *See*

Vaughn Index ("A careful, line-by-line review was done to determine that there is no reasonably segregable, non-exempt information responsive to Plaintiff's request within the redacted portions."). In this same vein, to justify its Exemption 5 claim, OSTP repeatedly states the same general language that disclosing the material "could deter officials" from proposing projects for discussion or otherwise pursuing improvement activities. *See generally* Vaughn Index. Such general language is not specific enough to determine whether the material was justifiably withheld under Exemption 5 because it does not reveal how the document is predecisional or deliberate and thus does not justify each element of the claimed exemption. *See Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 861 (D.C. Cir. 1980) (finding inadequate a Vaughn index entry that provided date and addressee of withheld document and briefly describing them as "Advice on audit of reseller whether product costs can include imported freight charges . . . ."); *Judicial Watch,* 297 F. Supp. 2d at 260 (stating that facts must correlate with privilege); *Ctr. for Biological Diversity*, 451 F. Supp. 2d at 68 (finding general language inadequate).

In many instances OSTP fails to explain how individual documents meet the essential elements of the exemptions claimed. For example, similar statements in the Vaughn index assert that the information is deliberative because it "discusses consistency with U.S. government positions and approaches, timing and predictability of specific systems, draft options for discussion, and other proposals for priority issues and options." Vaughn Index 11-32.10; *see also, e.g.*, 11-32.15 and 16 ("other policy issues under consideration" and "certain executive branch processes and policies"); 11-32.17 and 18 (same); 11-32.31 ("efforts to improve efficiency and predictability of certain processes"). Such statements are only the "briefest references" to subject matter and do not provide the court enough information to determine that the exemptions were properly invoked, including what decision the document was created to

inform and where the document fits within the decision making process. *See, e.g.*, *Senate of P.R.*, 823 F.2d at 585 (finding failure to specify relevant final decision grounds for remand).[4] Thus, as further demonstrated below, OSTP failed to demonstrate how the withheld material falls within the claimed FOIA exemptions.

III. DEFENDANT HAS FAILED TO SUPPORT ITS CLAIM OF PRIVILEGE UNDER EXEMPTION 5

Defendant has failed to show that much of the withheld material is privileged under Exemption 5. The deliberative process privilege protects advice, recommendations, and opinions which are part of the decision-making process of the government. *EPA v. Mink*, 410 U.S. 73, 89 (1973); *Coastal States*, 617 F.2d at 866. Properly invoking Exemption 5 requires the agency to show that the information is both "predecisional" and "deliberative." *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). "Predecisional" means prior to the agency's adoption of a policy, *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 151-52 (1975). Hence, communications after decisions are made that explain a decision are not privileged. *Id*. Material is "deliberative" when it "reflects the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866 (finding information not deliberative in part because did not discuss wisdom or merits of particular policy or recommend new policy).

Here, OSTP has erroneously withheld information in multiple documents claiming that Exemption 5 applies. These documents fall into three general categories—1) ABWG meeting agenda items, general role, and related topics (Plaintiff Ex. 1), 2) weekly summaries regarding

[4] The Leonard Declaration, OSTP Ex. 1, provides little more detail or justification for the claimed withholdings than the Vaughn index. In fact, it restates general language for supporting the claimed exemptions without the level of detail or factual information needed to determine whether the exemptions were properly invoked. *See e.g.*, P41 ("draft interagency comments, opinions and impressions," "perceived priorities and issue," "proposed policies and processes"); P44 ("All of the documents withheld were predecisional"); P45 ("Disclosure would also frustrate the policy behind the deliberative process privilege.").

the ABWG,[5] and 3) communications regarding recent USDA rulings (Plaintiff Ex. 2). OSTP failed to meet its burden to show that the withheld documents are predecisional and deliberative, including identifying what decision the documents informed demonstrating how the withheld information fits within a deliberative process. Furthermore, there is no showing that releasing the information would harm the decision making process. Lastly, OSTP withheld numerous documents containing purely factual information, which is not exempt from disclosure under FOIA. OSTP thus did not meet the requirements necessary to invoke Exemption 5.

a. OSTP has failed to show how the withheld information is predecisional.

A document is considered predecisional if the agency can point to the specific agency decision to which the document correlates, establish that the document was prepared for the purpose of assisting an agency official charged with making the decision, and verify that the document precedes the decision to which it relates. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *Coastal States*, 617 F.2d at 867; *see also, e.g., Senate of P.R.*, 823 F.2d at 585 (finding failure to specify relevant final decision grounds for remand); *Paisley v. CIA*, 712 F.2d 686, 698 (D. C. Cir. 1983), *vacated on other grounds*, 724 F.2d 201 (D. C. Cir. 1984) (stating that to meet Exemption 5 requirements, the court must be able to "pinpoint" decision or policy to which the document contributed); *Elec. Frontier Found. v. U.S. Dep't of Justice*, 2011 U.S. Dist. Lexis 137129, *20 (D.D.C. 2011) (failure to identify specific deliberative process to which the email related).

i. <u>OSTP did not identify the decisions to which the withheld documents correlate or demonstrate that the documents were prepared to assist the decision-maker.</u>

In many, if not all, of the redactions at issue here, OSTP failed to identify what decision the document related to or what role the redacted material played in the decision-making process.

[5] The emails containing the weekly summaries were withheld in full.

Moreover, OSTP is not a regulatory agency and OSTP has not explained what role the ABWG or OSTP play in any formal decision-making process. *See* Leonard Decl. at P2-P4 (describing ABWG as an "informal" collaboration that meets to "share information related to science, technology, and regulation of agricultural technologies"). OSTP itself was created to "assess and advise on policies for cooperation in science and technology." Leonard Decl, at P2; 42 U.S.C. §6614(a). OSTP does not have regulatory authority or the authority to veto proposed regulations. This makes it unlikely that the withheld documents played any part in an agency decision making process that would make them properly exempt.

OSTP withheld numerous portions of documents without identifying what decision the document was prepared to inform, or who the decision-maker was. OSTP instead relied on vague and conclusory statements regarding how the document fits within the administrative process. For example, many documents contain wholesale redactions with the claim that they relate to "proposed agency action," "certain processes," and a "particular issue." *See* Vaughn Index 11-32.30—34; *and see* 11-35.25-29, 35. Moreover, the Vaughn Index justification for redacting the agenda items alludes to "positions," "other proposals," and "coordination of …processes and policies," without providing detail on who the decision maker is, what the specific decisions at issue are, or even more generally what the decision making process was. Vaughn Index 11-32.10, 16, 17, 18. Such general statements do not suffice to meet OSTP's burden of showing that the documents are predecisional because OSTP did not describe the role the documents played in any specific decision making process. *See Senate of P.R.*, 823 F.2d at 585; *Coastal States*, 617 F.2d at 861, 868 ("Characterizing ... documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.").

OSTP has also not shown how document 11-32.15 corresponds with an agency decision. In fact, the document appears to be a general description of how the ABWG works and there is no indication from either the document itself or the Vaughn index as to what upcoming decision by whom the document relates. Vaughn Index 11-32.15.

ii. OSTP withheld information that explained a decision already made.

A document is predecisional when it is "prepared in order to assist an agency decision maker in arriving at his decision," not to explain or support a decision that has already been made. *Renegotiation Bd.*, 421 U.S. at 184. A document loses its claim to exemption when "even if predecisional at the time it was prepared," it has been "adopted, formally or informally, as agency position on an issue or is used by the agency in its dealings with the public." *Coastal States*, 617 F.2d at 866. Here, document 11-32.13 contains redacted information directly following a statement that USDA's "final Environmental Impact Statement" will be presented at an upcoming ABWG meeting. The Vaughn Index states that the information is redacted because, among other things, it addresses differences between the draft and final decision. Vaughn Index 11-32.13. Such information is by its very nature not predecisional, but rather explains a decision already made—the final USDA/APHIS EIS. In addition, it was USDA, not OSTP which made the decision, and there is no indication that OSTP played a role in reaching the decision. *See Sears, Roebuck & Co.*, 421 U.S. at 152-53 (explaining the reasoning behind the predecisional requirement for the exemption as the public's interest in knowing the basis for actually adopted agency policy).

b. OSTP has failed to show how the withheld information is deliberative.

i. OSTP has failed to show how the withheld information is part of the consultative process.

In addition to the fact that the withheld materials have not been shown to be pre-

decisional, and thus cannot qualify for the exemption for that reason alone, they have also not been shown to be deliberative. Factors to consider in determining whether a document is deliberative include whether the document 1) is "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency"; 2) "is recommendatory in nature or is a draft"; and 3) "weigh[s] the pros and cons of agency adoption of one viewpoint or another. *Coastal States*, 617 F.2d at 866. Moreover, application of the deliberative process privilege is document specific and the agency must show the role each individual withholding and redaction plays in the administrative process. *Coastal States*, 617 F.2d at 867. *And see Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977) (government must show "by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA"). Based on those criteria, Defendant has withheld documents that are not deliberative.

For example, OSTP redacted material that appears to be agenda topics under Exemption 5. *E.g.*, Vaughn Index 11-32.10, 16, 17, 18, 20, 21; Plaintiff Ex. 1. It is unclear how agenda items for ABWG meetings could be so candid or personal in nature as to hinder agency communications, or how they are recommendatory, or express a viewpoint, or weigh the pros and cons of a particular policy. Indeed, OSTP has not demonstrated how merely identifying topics discussed by the working group could stifle honest communication and thus justify keeping such information from the public or how disclosure would harm the decision making process.[6]

[6] Moreover, some of the agenda items were produced in full, invalidating the agency's justifications for redacting others. OSTP's justification for non-disclosure of certain agenda items is that they are "issues to consider" and updates on finalizing "specific documents and decisions," and updates on other relevant issues" not yet finalized. Vaughn Index at p 7. However, OSTP disclosed agenda items, which surely fit within OSTP's reasons for nondisclosure. *See, e.g.*, OSTP 11-32.16 ("Update on EPA's PIP Data Requirements Rule"); OSTP 11-32.10 ("Readout from the MOP-5 meeting of the Cartagena Protocol on Biosafety and review of the issues").

Other withheld documents also do not appear to meet the criteria for nondisclosure. For instance, document 11-32.15 is an email from the ABWG leader, Peter Schmeissner, to senior OSTP officials, apparently explaining the ABWG's history and role in the government process. How an agency works is precisely the type of information that FOIA was designed to reveal. *Dep't of the Air Force*, 425 U.S. at 361 (describing FOIA's purpose to "pierce the veil" of government secrecy). Mr. Schmeissner's description of the general role of the working group is not so personal in nature that public disclosure would stifle honest and frank communication, is not recommendatory in nature, and did not weigh the pros and cons of one policy versus another. There would be no chilling effect by releasing the description of how the ABWG operates. This information simply does not reflect the "consultative process" that the deliberative process privilege serves to protect, *see Coastal States*, 617 F.2d at 866, and thus should be disclosed to Plaintiff.

Applying the Exemption 5 standard, OSTP also wrongfully withheld the name of an attachment in document 11-32.16. *See* Plaintiff Exhibit 1. Even assuming that there is some legitimate basis to withhold the attachment, there is no justification for withholding even the name of the attachment. There is no basis on which the short name of an attached document could meet the criteria for nondisclosure as there is no showing of chilling effect on policy discussions or that it is recommendatory in nature. *See Coastal States*, 617 F.2d at 866. Moreover, by withholding the name of the attachment, Plaintiff and the Court are left with absolutely no basis for determining the applicability of the exemption to the attachment itself.

Furthermore, OSTP completely withheld a series of emails from the ABWG lead official, Mr. Schmeissner, to the OSTP Chief of Staff, in which Mr. Schmeissner provides updates to senior OSTP officials regarding the ABWG meetings. Vaughn Index 11-32.25—29, 35.

Although the Vaughn index justifies withholding these "weeklies" as draft submissions, that does not suffice to show the applicability of Exemption 5. *See Arthur Anderson & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) (designating document as draft does not end inquiry). Moreover, OSTP's claim that these are "drafts" would not be supportable unless there were subsequent "final" versions, and OSTP has not identified or produced any such documents. In any event, OSTP is required to go beyond a mere claim that the documents are drafts, and identify the "function and significance…in the agency's decision making process" of the withheld documents to qualify for the privilege.[7] *Arthur Anderson*, 679 F.2d at 258. OSTP has simply failed to show the weeklies fit within the deliberative process.[8]

ii. OSTP wrongfully withheld factual information from disclosure.

In defining the meaning of "deliberative," courts have distinguished between "materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." *Mink*, 410 U.S. at 89, 93 (stating privilege applies only to "opinion" and recommendatory" portions of advisory documents, not factual information); *Coastal States*, 617 F.2d at 867. Purely factual material in documents that is severable from otherwise privileged information is not protected under Exemption 5. *Id.* at 91, 93; *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1432 (D.C. Cir. 1992). The fact/opinion distinction is not categorically applied. Rather, the D.C. Circuit has found that the deliberative privilege applies when the material bears "on the formulation or exercise of agency policy-oriented judgment," and the key question is whether "disclosure [of the information] would tend

[7] Merely asserting that the material reflects impressions of particular processes is not sufficient to demonstrate the exemption is met as discussed above.

[8] Additionally, when an agency identifies a document as draft, it must indicate whether the draft was "(1) 'adopted formally or informally, as the agency position on an issue;' or (2) 'used by the agency in its dealings with the public.'" *Judicial Watch v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 261 (D.D.C. 2004) (quoting *Arthur Anderson*, 679 F.2d at 258).

to diminish candor within an agency." *Id*. at 1435; *see also, e.g., Playboy Enters., Inc. v. Dep't of Justice*, 677 F.2d 931, 935 (D. C. Cir. 1982) (finding factual information in report not deliberative merely because the facts were selected by the author); *c.f. Montrose Chem. Corp. v. Train*, 491 F.2d 63, 67-8 (D.C. Cir. 1974) (summary of evidence exempt because compiled by staff for purpose of assisting the Administrator in making what later became a final public decision). Here, OSTP withheld portions of documents that were factual in nature including, agenda items, ABWG's role, weekly summaries regarding ABWG activities, and email discussions regarding GE crops and USDA rulings. Plaintiff Ex. 1; Vaughn Index 11-32.26- 29, 35; Plaintiff Ex. 2. Plaintiff concedes that it is possible that some of the information within the documents could be recommendatory in nature.[9] However, the subject matter and topics for discussion are facts for which disclosure is required because there is no evidence that disclosing the subject matters being discussed at ABWG meetings or by ABWG members would discourage candor within the agency. Rather, they are factual statements regarding topics discussed unaccompanied by opinions, recommendations or other indicia of "deliberation." Beyond conclusory statements that it would harm decision making, OSTP has done nothing to demonstrate how such disclosure would harm the process, or how it reflects the give and take of the consultative process, and thus has not justified its withholding of factual information. *See Petroleum Inform.*, 976 F.2d at 1436-37 (finding that among other reasons material was not exempt because disclosing computer data file would not harm agency decision making process, confuse the public, or harm agency's reputation); *Playboy Enters.*, 677 F.2d at 935 (holding fact report not privileged because compiler's mission was to investigate facts and not part of policy making process).

[9] As noted above, this material would still not be exempt unless it could be shown to be pre-decisional, *i.e.*, created to assist a decision-maker in reaching a particular decision.

c. The cases relied on by OSTP are distinguishable.

Based on the foregoing, OSTP has not met its burden to demonstrate that the documents are predecisional, because the agency failed to identify the decision to which the withheld documents correlate, the decision-maker, and what specific role the documents played in the decision-making process. Moreover, OSTP failed to demonstrate how the withheld material is deliberative or how disclosing the information would harm the deliberative process or otherwise diminish candor within the agency.

Nonetheless, OSTP argues that Exemption 5 was properly applied here because the material reflects proposals for consideration, the status of these deliberations, and individuals' impressions of these matters. OSTP Mem. at 17.

OSTP cites *Wolfe v. Dep't of Health and Human Services* for the premise that Plaintiff is not entitled to the proposals under consideration by the ABWG. OSTP Mem. at 15. The court in *Wolfe* held that FDA regulatory proposals and the timing of regulations were exempt from disclosure because disclosing such factual information would itself disclose recommendations made by FDA officials prior to formally adopting the policy. *Wolfe v. HHS*, 839 F.2d 768, 774-75 (D. C. Cir. 1988). The court reasoned that because FDA rulemaking procedures required two levels of review prior to rule finalization (FDA referral of draft rule to Secretary and then to OMB), that knowledge of whether the proposed rule had been forwarded to one of these entities, or where it was in that process, would itself divulge opinions and judgments before a final decision had been made. *Id*. (stating that disclosing which policies were being discussed prior to final rule making would show sensitive and important policy judgments).

The issues and topics discussed by the ABWG in this case are wholly distinguishable from the regulatory proposals in *Wolfe*. Unlike the FDA, HHS, and OMB in *Wolfe*, the ABWG

has no regulatory authority and no formal role in any rule-making process. Nor does it appear that the ABWG formally adopts policies or makes decisions at all. *See* Leonard Decl. at P2-P4 (describing the working group as an "informal" collaboration that meets to "share information related to science, technology, and regulation of agricultural technologies"). Disclosing what issues the working group considers would not reveal any policy judgments made prior to decision-making. Agencies need not seek approval from the ABWG before moving forward in promulgating regulations, nor does it appear that the ABWG can veto a proposed policy, unlike the Secretary and OMB in *Wolfe*. Rather, the ABWG merely meets informally to share information regarding agricultural biotechnologies. There is no evidence that revealing the issues discussed by the ABWG would hinder agency decision making, discourage officials from bringing up issues to consider, or otherwise impair the agency deliberative process in any way.

OSTP also cites *McKinley v. FDIC*, for the proposition that Plaintiff is not entitled to proposals under consideration. OSTP Mem. at 15-16. In *McKinley*, the court held that emails containing significant issues regarding fragile market conditions, financial institutions' exposure to Bear Stearns, proposed FDIC regulatory responses to Bear Stearns' potential bankruptcy, and arguments for and against a temporary loan were properly withheld because disclosure would reveal predecisional judgments by the decision-making agency. *McKinley v. FDIC*, 744 F. Supp. 2d 128, 140 (D.D.C. 2010). Conversely, here, Plaintiff is not seeking proposed regulatory responses prior to their final adoption.

Moreover, the proposed regulatory responses in *McKinley* were part of an identified decision-making process leading to a known decision by the regulating entity—the FDIC Board responding to Bear Stearns' potential bankruptcy. *Id.* Here, the Vaughn Index and Leonard Declaration refer generally to decision-making processes without identifying what process is at

issue, what the ABWG role it in is, or what eventual decisions will be made.[10]

In addition, much of the material that Plaintiff seeks is factual material that would need to be segregated and produced even if it were determined that any of the withheld material is part of a deliberative process leading to an agency decision. The general topics and issues the working group discussed are factual information that would not reveal judgments prior to a final decision and would not hinder officials from raising matters, or stifle or otherwise hinder agency decision making. As noted above, it is unclear what, if any, role the ABWG plays in other agencies' decision-making process. Indeed, if anything, it appears that the ABWG merely discusses a wide array of matters that other agencies are tasked with actually regulating. Given that the ABWG has no authority over these other agencies, it is hard to imagine how disclosing the topics would stifle either the ABWG's or any other agency's decision making process. In sum, since OSTP did not demonstrate how the redacted information is deliberative or predecisional, the Agency has not met its burden to claim that Exemption 5 is proper here and thus summary judgment should be granted to Plaintiff on the Exemption 5 withholdings.

IV. DEFENDANT HAS FAILED TO SHOW THAT THE DOCUMENT IS COMMERCIAL OR CONFIDENTIAL UNDER EXEMPTION 4

OSTP withheld a short paragraph from an email sent from BIO employee Adrianne Massey to OSTP employee Peter Schmeissner, (Plaintiff's Exhibit 3), claiming that it is confidential commercial information withheld under Exemption 4. OSTP claims that the withheld information concerns BIO's "internal strategy for accomplishing our advocacy mission." OSTP Exhibit 2, Declaration of Thomas DiLenge at P6 ("DiLenge Decl."); OSTP

[10] OSTP also cites *Mayer, Brown, Rowe & Maw LLP v. IRS*, 537 F. Supp.2d 128, 138 (D.D.C. 2008). OSTP Mem. at 16. There, the court held that the status of ongoing determinations regarding SILO transactions were exempt from disclosure presumably because a final decision had not been made and an agency is entitled to continually consider improvements. *Id*. This case is inapplicable here where there has been no final decision or agency process leading to such a decision identified.

Mem. at 8. The withheld paragraph was contained in an email concerning a U.S. Fish and Wildlife Service environmental assessment on biotech crops in wildlife refuge areas. *See* Plaintiff Exhibit 3.

Under Exemption 4, the government may exclude from production "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This privilege applies when the agency shows that the information is 1) commercial or financial, 2) obtained from a person, and 3) privileged or confidential. *Pub. Citizen Health Research Grp. v. Food and Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Plaintiff does not dispute that the information was obtained from a person. The first question here is whether the withheld material is "commercial," since OSTP does not allege that it contains financial information or a trade secret. Plaintiff contends that it is not, and therefore Exemption 4 does not apply. The second question is whether the information is confidential. OSTP has not met is burden to demonstrate this element.

a. The withheld information is not "commercial" within the meaning of Exemption 4.

The courts have held that the term "commercial" in Exemption 4 should be given its "ordinary" meaning. *See e.g., Pub. Citizen*, 704 F.2d at 1290. In further defining commercial, courts have held that information is commercial if it pertains to or deals with commerce, *Am. Airlines Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978); or if it "serves a commercial function or is of a commercial nature," *Nat'l Assoc. of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (internal quotation marks omitted); or if the submitter has a commercial interest in the information. *Baker & Hostetler LLP v. United States Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006).

Whether the submitter of the information is a for-profit or non-profit entity is not dispositive as to whether the information qualifies as commercial. *See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 281 (D.C. Cir. 1987) *rev'd on other grounds*, 975 F.2d 871 (D.C. Cir. 1992) (non-profit status "not determinative"); *Pub. Citizen*, 704 F.2d at 1290 (stating that not every piece of information submitted by commercial entity qualifies); *New York Pub. Interest Research Grp. v. EPA*, 249 F. Supp. 2d 327, 333-34 (S.D.N.Y. 2003) (for-profit corporation's advocacy of a particular position not commercial).

However, courts have found information submitted by non-profit organizations to be commercial only under circumstances not present here demonstrating that the information itself was in fact "commercial." One such situation is where the information is generated by the organization's for profit members, and clearly implicated those members' commercial interests. In *Critical Mass*, 830 F.2d at 281, a non-profit trade association submitted safety data from its members, power plant operators, to the Nuclear Regulatory Commission. The D.C. Circuit held that the information was commercial because it was gathered directly from the power plant operators and implicated those operators' "commercial fortunes," which could be "materially affected" by disclosure. *Id.* There is no claim here that the withheld paragraph would reveal commercial information generated by BIO's for profit members. *Id.*

In *American Airlines*, 588 F.2d at 870, a non-profit labor union submitted to the National Mediation Board cards filled out by individual passenger service employees of American Airlines authorizing the union to negotiate with the airline on their behalf. In determining that information pertaining to the number of authorization cards submitted was covered by Exemption 4, the court "accorded great weight" to the legislative history of Exemption 4, which explicitly stated that the exemption would include "negotiation positions or requirements in the

case of labor-management mediations." *Id.* at 869-70. The court noted that this language was added to the legislative history "in direct response to a request by a spokesperson for the National Mediation Board for express protection of labor-management mediation proceedings and information." *Id.* at 869. Under these circumstances, the court held that the information was "commercial." *Id.* at 870. The *American Airlines* court was clear that Exemption 4 does not extend to situations where the information itself is not commercial in nature, and distinguished cases such as *Washington Research Project, Inc. v. Dep't of Health, Education and Welfare*, 504 F.2d 238, 244-45 (D.C. Cir. 1974). *Id*. The D.C. Circuit held in *Washington Research* that research designs submitted by scientists in grant applications were not subject to Exemption 4 because the scientists were not engaged in trade or commerce, and that finding the information "commercial" would stray from the plain meaning of the language of Exemption 4. *Id*. at 245.

This case does not involve labor-management relations, and BIO has not demonstrated that the withheld information concerning an organizational advocacy strategy related to environmental assessments of GE crops on National Wildlife Refuges is commercial within the ordinary meaning of that word.

This Court found information concerning a non-profit was commercial for purposes of Exemption 4 when it concerned the organization's consideration of establishing a presence in a new geographic area and information concerning its staffing, remuneration, recruiting, and prospective grant projects. *Gov't Accountability Project v. United States Dep't of State*, 699 F. Supp. 2d 97, 102-03 (D.D.C. 2010). OSTP has not claimed that the withheld information here pertains to similar actual business-like activities of BIO, but to its strategy for advocacy on a particular subject. This case is more like *New York Pub. Interest Research Group,* 249 F. Supp. 2d at 333-34, where even though the information came from a for profit business, General

Electric (GE), the court found that Exemption 4 did not apply to analyses submitted to support GE's policy position, because such information did not concern the commercial business of GE. This was the case even though GE's advocacy was intended to save the company money. *Id.*

Whether a submitter of information is a for profit business or a non-profit organization, the information must pertain to or deal with commerce to be protected from disclosure by Exemption 4. *Am. Airlines*, 588 F.2d at 870; *see, e.g., Baker & Hostetler*, 473 F.3d at 319-20 (information describing "favorable market conditions" whose disclosure would help certain companies identify and exploit rival companies' competitive weaknesses is commercial); *Critical Mass*, 830 F.2d 281 (information compiled by a trade organization, the disclosure of which could materially affect the commercial fortunes of its members, is commercial); *Pub. Citizen*, 704 F.2d at 1290 (information that would be "instrumental in gaining marketing approval" for a company's products is commercial); *see also Landfair v. United States Dep't of Army*, 645 F. Supp. 325, 327 (D.D.C. 1986) ("Examples of items generally regarded as commercial or financial information include: business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition."). In contrast, Exemption 4 does not apply to information not normally considered commercial, even when provided with the sole intent of advancing a commercial entity's interests. *Nat'l Assoc. of Home Builders*, 309 F.3d at 38-39 (owl sighting information not commercial because created by government not business and no commercial interest at stake); *Physicians Comm. for Responsible Medicine v. NIH*, 326 F. Supp. 2d 19, 25 (D.D.C. 2004) (research on drug not commercial because never marketed or used to develop drugs). If non-commercial information provided by a commercial entity is not protected by Exemption 4, then non-commercial information provided by a non-profit organization is likewise not protected.

A finding that the redacted paragraph is commercial information protected by Exemption 4 would be contrary to the ordinary meaning of "commercial" and the case law interpreting it.

i. Interpreting BIO's advocacy information as "commercial" would subvert the purpose of Exemption 4.

A holding that protects the advocacy strategy of a non-profit organization from disclosure under FOIA as commercial would stretch the definition of commercial to include virtually any information disclosed to the government by a non-profit organization, including actual advocacy on behalf of for-profit members. This broad definition would contradict the very purpose of FOIA, which was intended to ensure that administrative decisions were subject to public scrutiny, *see Dep't of Air Force v. Rose*, 425 U.S. at 361, and the generally accepted rule that the FOIA exemptions should be interpreted as narrowly as possible. *See FBI v. Abramson*, 456 U.S. at 630. The danger of such a holding is evident: it would allow non-profit organizations to serve as conduits through which commercial entities could funnel their advocacy without fear that their tactics and the extent of their influence will be disclosed to the public. If a for-profit, commercial entity cannot shield its advocacy activities from public view by invoking Exemption 4's protection of commercial information, *see New York Public Interest Research Group*, 249 F. Supp.2d at 333-34, then it also should not be able to use the guise of a non-profit, non-commercial organization to obscure its advocacy activities. Thus, this court should limit Exemption 4 to the protection of information that truly falls within the ordinary definition of commercial.

ii. OSTP has not justified redaction of the information.

Even if this Court determines that information pertaining to advocacy by a non-profit trade association can be found to be within the ordinary meaning of commercial, OSTP has failed to sufficiently describe how the redacted information pertains to BIO's commercial

interests. The redacted portions contain BIO's advocacy strategy apparently regarding a U.S. Fish and Wildlife Service environmental assessment for allowing GE crops on wildlife refuges. DiLenge Decl. P6; Plaintiff Ex. 3. OSTP has not advanced any valid reasons why BIO's strategy as it relates to a government environmental assessment is commercial. The Vaughn Index and DiLenge Declaration merely contend that the redacted paragraph contains an "internal strategy for accomplishing" BIO's advocacy mission. DiLengeDecl, P6. OSTP fails to explain what BIO's commercial interest is and how the withheld information relates to it.

OSTP's Memorandum in Support of Summary judgment sheds little more light on the nature of BIO's purported commercial interest in its advocacy strategy. OSTP merely reiterates that BIO has a commercial interest in the information because it will further its and its members' goals. OSTP Mem. at 9. However, OSTP does not elaborate on how the information accomplishes this aim or even what the goals are. This vague, general claim cannot support a finding that the information is commercial, especially given that FOIA exemptions are to be interpreted narrowly. Presumably most if not all of what BIO does is directed at furthering its and its members' goals, but that does not render any information that it provides to the government "commercial."

The cases cited by OSTP where courts have found strategies commercial are distinguishable. In *Judicial Watch*, the court stated that AIG's corporate strategy was commercial, but did not elaborate why. *Judicial Watch, Inc. v. U. S. Dep't of Treasury*, 2011 U.S. Dist. Lexis 90790 at *53 (D.D.C. 2011) (primarily focusing on why the information was "confidential" for Exemption 4 purposes). Presumably, the court found the information commercial because it concerned company employee retention programs, an overview of business recovery and stability, and issues regarding compensation structures, *id*. at 7-8, *i.e.*,

information about commercial business operations. Here, there is no indication what commercial aspects of BIO's business the redacted information relates to.

The other case cited by OSTP is similarly unsupportive. In *ICM Registry*, the court found that a consultant's professional insights were commercial with very little reasoning. *ICM Registry v. U.S. Dep't of Commerce*, 2007 U.S. Dist. Lexis 22853, *21 (D.D.C. 2007) (stating that a telecommunications consultant's opinions regarding internet domain names is commercial). Conversely, here, the redacted information relates to a FWS environmental assessment regarding growing GE crops on national wildlife refuges and it is not clear how it is commercial. *See* Plaintiff Ex. 3 (email regarding Southeast Region environmental assessment).

b. OSTP failed to show how the redacted information is confidential.

OSTP must also demonstrate that the information is confidential for Exemption 4 to apply. Plaintiff does not dispute that the information was voluntarily sent to OSTP. As such, the standard that applies to determine whether the information is confidential is "if it of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass*, 975 F.2d at 879.

OSTP does not provide enough information to determine whether this standard is met. Rather, the DiLenge Declaration reiterates the standard by stating that the information "is of a kind that BIO would not normally release to the public, OSTP, or any other outside party," DiLenge Decl. at P5, and that "BIO does not normally provide information about our internal strategic discussions with any third parties and views them as confidential." DiLenge Decl. at P8; and see Vaughn Index, document 11-18.12 (information is "regarded by BIO as confidential."). Meeting the requirements of FOIA requires the agency to demonstrate with detail why the information is properly exempt. *Perry*, 684 F.2d at 126 (affidavit must be

relatively detailed and nonconclusory); *Judicial Watch*, 297 F. Supp.2d at 260 (affidavits must correlate facts with each element of privilege). Merely restating the standard does not suffice. Moreover, since the information was fully redacted, Plaintiff is unable to determine that the information is not of the sort that would typically be released to the public without further information from the agency.

In sum, OSTP has failed to show how the redacted information regarding BIO's advocacy strategy related to an environmental assessment is commercial or confidential. As such, Exemption 4 does not apply to withhold the information. Summary judgment is thus properly granted in Plaintiff's favor on the Exemption 4 claim.[11]

V. DEFENDANT HAS WITHHELD RECORDS WITHOUT SEGREGATING NON-EXEMPT FACTUAL MATERIAL

Even assuming that Plaintiff is not entitled to the entirety of the withheld documents based on the arguments above, OSTP has failed to adequately disclose segregable material in the vast majority of documents that it turned over to Plaintiff. While OSTP only withheld a few documents in full, many of the "partially" redacted documents are redacted so heavily as to be essentially withheld in full. *See* Plaintiff Ex. 2 (emails with bodies fully or near-fully redacted). FOIA requires that "[a]ny reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt," 5 U.S.C. § 552(b), unless the non-exempt portions are so inextricably intertwined with exempt material to make disclosure of the remainder meaningless. *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1026-27 (D.C. Cir. 1999). The segregability requirement applies to all documents and all claimed exemptions, *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984), and the court has an affirmative duty to consider the issue of segregability sua sponte.

[11] The Court also has the option of reviewing the redacted material *in camera* to determine whether it is "commercial" or "commercial." 5 U.S.C. § 552(a)(4)(B).

Morley v. CIA, 508 F. 3d 1108, 1123 (D.C. Cir. 2007) (stating that failure to make findings on segregability constitutes reversible error).

Where an agency claims that non-exempt material is non-segregable, it must do so with the same degree of detail as is required for claims of exemptions. *See Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Mead Data*, 566 F.2d at 260, ("The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material."). A "blanket declaration" that the documents do not contain segregable information is insufficient. *Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (finding general statements of non-segregability in Vaughn Index insufficient explanation). Rather, an agency is required to "specify in detail which portions of the document are [disclosable] and which are allegedly exempt." *Animal Legal Def. Fund v. Dep't of the Air Force*, 44 F. Supp. 2d 295, 302 (D.D.C. 1999) (quoting *Schiller v. NLRB*, 964 F.2d 1205, 1210 (D.C. Cir. 1992); *see also McGehee v. U.S. Dep't of Justice*, 800 F. Supp. 2d 220, 238 (D.D.C. 2011) (finding that defendant's statement that "every effort was made to provide plaintiff with all…reasonably segregable portions of releasable material" does not meet the specificity required to demonstrate non-segregability).

Under these standards, OSTP failed to show that the non-exempt information was not reasonably segregable. OSTP only issued blanket statements to justify its non-segregation by stating that it "conducted a careful, line-by-line review of each document…to determine that there was no reasonably segregable" information. *See generally* Vaughn Index, Leonard Decl. P48. This falls short of the detail needed to demonstrate that non-exempt information could not

be reasonably segregated. *See McGehee*, 800 F. Supp. 2d at 238; *Wilderness Soc.*, 344 F. Supp. 2d at 19.

Moreover, it is extremely unlikely that facts within the documents that were redacted were all "inextricably intertwined" with policy recommendations, opinions or confidential commercial information. *See Trans-Pac. Policing*, 177 F.3d at 1026-27; *Mead Data*, 566 F.2d at 254 n. 28 (remanding for district court to require defendant to describe factual content of documents and disclose it, or provide adequate justification for why it is it non-segregable). OSTP has failed to identify or even demonstrate how any of the withheld factual information could possibly be so inextricably intertwined with policy recommendations as to be non-segregable.

OSTP maintains, however, that a declaration and Vaughn index parroting the same general language is sufficient to show that its segregability review is adequate. OSTP Mem. at 17-18; Leonard Decl. at P48. OSTP also relies on *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (stating that "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material."); and *Juarez v. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (stating that "government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated" may be relied upon by courts to determine whether the segregability duty was met). OSTP Mem. at 17-18.

Sussman merely states the standard and affirms the District Court without further discussion, and *Juarez* is distinguishable. In *Juarez*, the affidavits stated that the agency had conducted a page-by-page review of all requested documents, found that each page of each document contained information subject to the claimed law enforcement exemptions, and then

justified its inability to redact non-exempt information from the documents by explaining that the remaining information could still reveal exempt information.

> [The agency] justified its inability to simply redact sensitive portions (i.e., informant names) from these documents by pointing out that the balance of information remaining in the documents could still reveal the extent of the government's investigation, the acts on which it is focused, what evidence of wrongdoing it is aware of, the identity of cooperating sources, and the agency's investigative techniques in this investigation. The affidavits further attested that release of any of this information could jeopardize the investigation.

518 F.3d at 61. In contrast, here, the Leonard Declaration only states that the agency conducted a "careful, line-by-line review of each document" and determined "that there was no reasonably segregable factual or non-deliberative information." Leonard Decl. at P48. Unlike the agency in *Juarez*, OSTP did not explain what non-exempt information was included in the documents and how disclosing it would nonetheless reveal otherwise exempt information. Therefore, the Leonard Declaration does not contain enough information to show that the agency met its segregability duty.

The cases that OSTP cites where general language was found sufficient to support non-segragability are distinguishable as well. In *Adionser v. Dep't of Justice*, 2011 U.S. Dist. Lexis 105035, at *4 (D.D.C. 2011), the court held that affidavits submitted were sufficient to demonstrate that no information was segregable. There, the affidavits contained a lot of justification, including stating that documents withheld could not be released further "without destroying the integrity of the document," that non-exempt information was inextricably intertwined with exempt information, that the information withheld could not be segregated, and that releasing unsegregated portions would result in an "unwarranted invasion of personal privacy." *Id.* In contrast, the Leonard Declaration does not provide near the level of detail as those in *Adionser*. As explained above, there is no claim that release of the non-exempt

information would destroy the integrity of the document or is inextricably intertwined with claimed exempt information, or any explanation of what purported harm releasing the non-exempt information would do.

Similarly, the Leonard Declaration contains less information to justify its non-segregability claim than the declaration in *Judicial Watch, Inc., v. Dep't of State*, 650 F. Supp.2d 28, 33, 35 (D.D.C. 2009). In *Judicial Watch*, the court held that a declaration sufficiently demonstrated that material could not be segregated where the declaration stated that all records "pertain in their entirety to visa issuance and refusal," and explicitly described the "number and size" of withheld portions. *Id*. Here, there is merely a general statement applied to every withheld document that no information was reasonably segregable. Leonard Decl. at P48. The Leonard Declaration does not justify why the information is non-segregable nor does it contain the level of detail describing the withheld portions as was found adequate in *Judicial Watch*.

In *Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 776-77 (D. C. Cir. 2002), the court found that the combination of a comprehensive Vaughn index describing the documents withheld and an affidavit stating that "no documents contained releasable information that could be reasonably segregated from nonreleasable portions" met the segregability requirements. Conversely, here, although the Leonard Declaration is similarly short and general in nature to the affidavit in *Johnson*, the Vaughn index here, as discussed extensively above, is not comprehensive and does not adequately justify the redactions.

Lastly, in *Hodge v. FBI*, 764 F. Supp.2d 134, 143-44 (D.D.C. 2011), the court found that an affidavit stating that "the FBI carefully examined the 1,762 pages of responsive records" and that "[e]very effort was made to provide plaintiff with all material in the public domain and with all reasonably segregable portions of released material" was sufficient where the agency had also

demonstrated that the claimed exemptions were proper and where the plaintiff had not pointed to specific documents claimed to be subject to segregation to rebut the presumption of good faith of the agency's claim of non-segregability. Here, and, unlike the agency in *Hodge*, OSTP has not demonstrated that the claimed exemptions were proper. Additionally, as further discussed below, Plaintiff points to documents that, even if the claimed exemptions did apply, should be subject to further segregation.

OSTP is not entitled to the presumption of good faith with respect to its non-segregability claim here because a review of the documents and Vaughn Index evidences that the documents are likely not properly segregated. For example, document 11-32.15 contains redacted material following a sentence that states, "The ABWG is NOT an NSTC working group." It is likely that the redacted information following this statement describes what the ABWG does and how it is distinguishable from an NSTC working group. Such non-deliberative factual information is not exempt from disclosure. Documents 11-32.30-35 are emails with the full bodies redacted. The Vaughn index justifies these redactions as communications regarding proposed agency action, coordination of processes, responses to an issue, and the status of executive processes. Even assuming some of the information is properly exempt, given the nature of the communications, factual information regarding the process and issues would be present, but was not segregated out. Likewise, in the redacted agenda items in documents 11-32.10, 13, 16, 17, 20, and 21, factual information regarding the topics or issues should have been segregated and disclosed. Finally, the "weeklies" emails were redacted in full. *See* Vaughn Index 11-32.25-29, 35. The weeklies are described as containing information regarding agency processes, issues considered by the ABWG, updates on the ABWG's role, and discussions of policy improvements, among other things. Given these descriptions, there is likely factual information that could have been

segregated out and the documents should not have been withheld in full. In sum, OSTP has not met its burden to justify its withholdings and its failure to release segregable material, and therefore summary judgment must be denied to OSTP and granted to Plaintiff.

CONCLUSION

For the foregoing reasons, summary judgment is appropriate in Plaintiff's favor.

Dated: February 17, 2012

Respectfully submitted,

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