

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AMERICAN CIVIL LIBERTIES UNION;)	
ELECTRONIC PRIVACY INFORMATION)	
CENTER; AMERICAN BOOKSELLERS)	Civil Action No.
FOUNDATION FOR FREE EXPRESSION;)) 1:02CV2077 (ESH)
FREEDOM TO READ FOUNDATION,)	
)	(Judge Ellen Segal Huvelle)
Plaintiffs)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

ORDER

Upon consideration of Defendant's Motion for Partial Summary Judgment, and any response thereto, and the record of this motion and this case, it is

HEREBY ORDERED THAT Defendant's Motion is hereby GRANTED and partial summary judgment on behalf of the Department of Justice's Office of Information and Privacy and Office of Intelligence Policy and Review is hereby ENTERED.

SO ORDERED:

DATE: _____

Judge Ellen Segal Huvelle
United States District Judge

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Defendant.)	

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant United States Department of Justice respectfully moves the Court to enter summary judgment on behalf of the Department of Justice's Office of Information and Privacy and Office of Intelligence Policy and Review on plaintiff's claims pursuant to the Freedom of Information Act, 5 U.S.C. § 552, et seq. ("FOIA"), as there are no genuine issues of material fact regarding these offices' compliance with the FOIA in responding to plaintiffs' FOIA request. The accompanying Memorandum of Law more fully sets forth the reasons that support Defendant's Motion for Partial Summary Judgment.

This motion is filed pursuant to the Court's Order issued on November 26, 2002.

Respectfully Submitted,

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January 24, 2003

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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

In this FOIA action, plaintiffs seek records from the Department of Justice concerning the Department's implementation of the USA PATRIOT Act. The Department has responded to plaintiffs' FOIA request by searching through the relevant offices, files and automated systems of the Department, including senior leadership offices, and has produced responsive materials to plaintiffs. The instant motion for partial summary judgment is filed on behalf of OIP and OIPR.¹ In making its FOIA production, the Department (which, for purposes of the instant motion, refers to OIP and OIPR) withheld a limited, minimal amount of information pursuant to well-recognized exemptions for protecting classified national security information and deliberative

¹Contemporaneous with this motion, the Department is filing an uncontested motion for a brief, one-week extension of time in which to file a summary judgment motion on behalf of the FBI.

process information. The Department's invocation of these exemptions was necessary and proper, as the detailed declarations submitted with this motion make clear. The Department is therefore entitled to summary judgment on plaintiffs' FOIA claim, with respect to the Offices of Information and Privacy and Intelligence Policy and Review.

FACTUAL AND PROCEDURAL BACKGROUND

In a letter dated August 21, 2002, plaintiffs, American Civil Liberties Union (ACLU), the Electronic Privacy Information Center (EPIC), and the American Booksellers Foundation for Free Expression (ABFFE), submitted a FOIA request to the Department of Justice's Office of Information and Privacy (OIP) and to the Federal Bureau of Investigation (FBI).² (Aug. 21, 2002 letter from ACLU, attached hereto as Ex. 1). The request contained 14 individual requests for agency records, which broke down into three categories.

The first category (request no. 1) sought all records prepared or collected by DOJ or the FBI in connection with the Department's response to certain questions posed in a letter to the Attorney General dated June 13, 2002, from Representatives Sensenbrenner and Conyers, Chairman and Ranking Member of the House Committee on the Judiciary, regarding the Department's implementation of the USA PATRIOT Act (the "Act"). (*Id.*) In their June 13, 2002 letter to the Attorney General, Representatives Sensenbrenner and Conyers posed fifty separate questions concerning the Department's use of the new investigative tools to combat terrorism that the Act gave the government. (June 13, 2002 letter from Reps. Sensenbrenner and Conyers, attached hereto as Ex. 2). The Department responded to the individual questions in two

²In their Complaint, plaintiffs state that the Freedom to Read Foundation joined the FOIA request by letter dated October 21, 2002. OIP has never received such a letter.

submissions. The first submission, dated July 26, 2002, noted that classified answers to a handful of questions would be provided to the Committee through appropriate channels, in addition to the unclassified answers that the Department was providing. (July 26, 2002 letter from Assistant Attorney General Daniel J. Bryant, attached hereto as Ex. 3). Plaintiffs here seek records relating to those classified answers provided by the Department in response to the Sensenbrenner and Conyers letter. (Id.; Ex. 1).

The second category of records requested by plaintiffs (request nos. 2-6) sought policy directives or guidance issued by the Department regarding the use of authority granted by certain provisions of the Act. (Ex. 1). The third category (request nos. 7-14) sought records showing the frequency with which the Department had sought to apply or rely upon various provisions of the Act. (Id.).

Plaintiffs requested and received expedited processing of their request. Plaintiffs' FOIA request was processed by three separate components of the Department, in consultation with numerous other offices within DOJ. Those three components are the Office of Information and Privacy (OIP), the Office of Intelligence Policy and Review (OIPR), and the Federal Bureau of Investigation (FBI). Plaintiffs sent their FOIA request directly to OIP and the FBI, but failed to send it to OIPR as required by DOJ regulations. See 28 C.F.R. § 16.3(a). OIP referred plaintiffs' request to OIPR, and all three components searched for responsive records.

Dissatisfied with the speed with which the Department was processing its request, on October 24, 2002, plaintiffs filed this action against the Department seeking an injunction compelling the Department to immediately respond to their FOIA request. In an order entered on November 26, 2002, the Court denied plaintiffs' request for a preliminary injunction and issued a

schedule for the Department to complete its processing of plaintiffs' FOIA request, for plaintiffs to object to the results, and for the parties to file summary judgment motions. On January 15, 2003, per the Court's scheduling order, OIP, OIPR and the FBI submitted their responses to plaintiffs' FOIA request, identifying responsive documents and informing plaintiffs which documents were being withheld and on what basis.

Office of Information and Privacy Search and Records

In response to plaintiffs' FOIA request, OIP searched for and reviewed records within the senior leadership offices of the Department. (Second Declaration of Melanie Ann Pustay, Department of Justice, Office of Information and Privacy, at ¶ 1) ("Sec. Pustay Decl."). OIP searched the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legislative Affairs, and Legal Policy. (*Id.* at ¶ 4). OIP also searched the Department Executive Secretariat, which is the official records repository for the Offices of the Attorney General, Deputy Attorney General and Associate Attorney General. (*Id.* at ¶¶ 4, 5).

No responsive records were located in the Offices of the Attorney General, the Office of the Associate Attorney General, or the Department Executive Secretariat. (*Id.* at ¶¶ 5, 6). Seventy pages of responsive records were located in the Office of the Deputy Attorney General; 96 pages were located in the Office of Legislative Affairs; one responsive record was located in the Office of Legal Policy, but this document had been made available to the public and plaintiffs had advised OIP that it was not interested in receiving publically available information. (*Id.* at ¶¶ 6, 7, 8).

Of these 166 pages of responsive, nonpublic records, 161 pages were responsive to the first category of documents requested by plaintiffs pertaining to the Department's response to the

Sensenbrenner and Conyers letter, and five pages were responsive to the second category concerning directives issued since the implementation of the USA PATRIOT Act (request nos. 2-6). No responsive records were located for the third category regarding the number of times DOJ has applied certain provisions of the Act (request nos. 7-14). (*Id.* at ¶ 9).

After consulting with other DOJ components with an interest in the release of the located documents, *see* 28 C.F.R. § 16.4(c)(1), and in accordance with the schedule set by the Court for processing plaintiffs' FOIA request, on January 15, 2003, OIP identified to plaintiffs the responsive documents it had located, informed plaintiffs of information it was withholding and on what basis, and provided copies of documents to plaintiffs. (*Id.* at ¶¶ 10, 11). OIP released 108 pages in their entirety. OIP released an additional 52 pages with excisions made pursuant to FOIA's Exemptions 5, 6 and 7(C). 5 U.S.C. § 552(b)(5), (6), (7)(C). Some of this information was withheld at the request of the FBI or OIPR. No documents were withheld in full. Nine of the pages partially withheld contained information that was outside the scope of plaintiffs' request. OIP referred six pages to OIPR for processing and direct response to plaintiffs. Lastly, one document had been referred by OIPR to OIP for processing and direct response; that document was duplicative of one already handled by OIP and thus was not included separately in OIP's page count. (*Id.* at ¶ 11).

Office of Intelligence Policy and Review Search and Records

DOJ's Office of Intelligence Policy and Review provides legal advice to the Attorney General and United States intelligence agencies regarding questions of law and procedure related to United States intelligence activities. OIPR reviews certain intelligence activities and prepares and presents applications for electronic surveillance and physical search to the United States

Foreign Intelligence Surveillance Court. (Declaration of James A. Baker, Department of Justice, Office of Intelligence Policy and Review, at ¶ 5) ("Baker Decl.").

Upon receiving plaintiffs' FOIA request from OIP, OIPR initiated its search for responsive records. OIPR searched its policy and operational records, which include congressional inquiries and reports to Congress. (Id. at ¶ 6). In addition, searches were conducted of the files within the office of the Counsel for Intelligence Policy and within the offices of all OIPR staff tasked with USA PATRIOT Act-related projects, including OIPR's response to the Sensenbrenner and Conyers letter. (Id.). In conducting its search, OIPR hand-searched through large paper files and searched through electronic mail (e-mail) files containing hundreds of e-mails and other automated databases. (Id. at ¶ 7).

OIPR's search revealed 34 documents (totaling 68 pages) responsive to plaintiffs' request nos. 1, 5, 7, 8, 9 and 10. (Id. at ¶ 8). These documents primarily consist of e-mail messages between numerous officials in the Department discussing the Department's responses to the congressional questions. (Id.). No responsive documents were located for request nos. 2-4, 6, and 11-14. (Id.). Two documents originated with other DOJ offices (the Office of the Attorney General and the FBI) and were referred to OIP and the FBI for review and direct response to plaintiffs. (Id. at ¶ 11).

OIPR released two of the 34 documents in their entirety to plaintiffs. (Id.). OIPR also released 22 documents with excisions. (Id.). One document, responsive to request nos. 1 and 9, was released with excisions made pursuant to FOIA's Exemption 5. Four documents, responsive to request no. 1, were released with excisions made pursuant to Exemption 6. Sixteen documents, responsive to request no. 1, were released with excisions made pursuant to

Exemptions 5 and 6. One document, responsive to request nos. 1, 7 and 8, was released with excisions made pursuant to Exemptions 5 and 6. OIPR provided plaintiffs with copies of all of these documents with its January 15, 2003 submission. (Ex. 1 to Baker Decl.).

OIPR withheld the remaining eight documents in full, on the following bases: one document, responsive to request nos. 7, 8, 9 and 10, was withheld pursuant to FOIA's Exemption 1;³ five documents, responsive to request no. 1, were withheld pursuant to Exemptions 5 and 6; one document, responsive to request no. 1, was withheld pursuant to Exemption 5; and one document, responsive to request nos. 1, 8, 9 and 10, was withheld pursuant to Exemption 1. An additional document referred to OIPR by OIP was withheld in full pursuant to Exemptions 5 and 6. (Id.; Baker Decl. at ¶¶ 11, 12).

OIPR has prepared a Vaughn Index describing the documents located, the number of pages of each document, the information withheld or excised, and the bases for any such withholding or excision. (Ex. 2 to Baker Decl.).

Plaintiffs' Objections to Defendants' FOIA Response

On January 17, 2003, plaintiffs advised defendants of their objections to defendant's search for responsive documents and to defendant's determination to withhold certain responsive records. Plaintiffs stated that they would not challenge any invocation of Exemptions 6 or 7(C), but that they would challenge each invocation of Exemptions 1 and 5. They also asserted a challenge to the adequacy of the searches conducted. (Jan. 17, 2003 letter from Jameel Jaffer,

³This document duplicates two documents referred to OIPR by OIP, which OIPR notified plaintiffs on Nov. 20, 2002 were being withheld as classified pursuant to Exemption 1. See Exhibit D to Declaration of Robert O. Davis, submitted with Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction.

ACLU, attached hereto as Ex. 4).

ARGUMENT

The Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess. 6 (1966)). Thus, while the FOIA requires agency disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest." Baldrige v. Shapiro, 455 U.S. 345, 352 (1982). Consequently, the FOIA "provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." Id. "These exemptions reflect Congress' recognition that the Executive Branch must have the ability to keep certain types of information confidential." Hale v. DOJ, 973 F.2d 894, 898 (10th Cir. 1992), vacated on other grounds, 509 U.S. 918 (1993). As the Supreme Court has stressed, the statutory exemptions must be construed "to have a meaningful reach and application." John Doe, 493 U.S. at 152.

In determining whether an agency has met its burden of justifying nondisclosure of information in a FOIA action, the district court must accord substantial weight to affidavits submitted by the agency in support of claimed exemptions. 5 U.S.C. § 552(a)(4)(B). Indeed, as courts have recognized, in enacting the FOIA, Congress intended that courts give agency affidavits substantial weight in recognition of the agency's expertise, particularly in cases concerning questions of national security. Gardels v. CIA, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982); Assassination Archives and Research Center v. CIA, 177 F. Supp. 2d 1, 5-6 (D.D.C. 2001).

Accordingly, summary judgment is regularly granted in FOIA cases on the basis of agency affidavits. Summary judgment is appropriate in a FOIA case unless the information provided by the agency is contradicted in the record or there is some evidence in the record of agency bad faith. Gardels, 689 F.2d at 1104-05; Assassination Archives, 177 F. Supp. 2d at 5-6; Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 409-11 (D.D.C. 1983).

The attached declarations and Vaughn index submitted on behalf of OIP and OIPR show that these offices conducted adequate searches in response to plaintiffs' FOIA request and appropriately withheld information pursuant to FOIA's Exemptions 1, 5, 6 and 7(C). Because plaintiffs only challenge the assertion of Exemptions 1 and 5, this motion will address only those exemptions. The attached declarations and Vaughn index are reasonably detailed and submitted in good faith, thus the OIP and OIPR are entitled to summary judgment.

I. THE DEPARTMENT'S SEARCH FOR RESPONSIVE RECORDS WAS ADEQUATE.

With respect to the adequacy of an agency's search for records, an agency can show that it has discharged its obligations under the FOIA and is entitled to summary judgment by "demonstrat[ing] that it has conducted a search reasonably calculated to uncover all relevant documents." Weisberg v. DOJ, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (internal quotations and citations omitted). The issue is not whether any other documents possibly responsive to the request might exist, but whether the agency's search for documents was adequate. Weisberg, 745 F.2d at 1485. Importantly, the agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. Western Ctr. for Journalism v. IRS, 116 F. Supp.2d 1, 9 (D.D.C. 2000), aff'd, 2001 WL 1699416

(D.C. Cir. Dec. 18, 2001) (per curiam) (unpublished); Roberts v. DOJ, No. 92-1707, 1995 WL 356320, at * 1 (D.D.C. Jan. 29, 1993).

Because the focus of the review is on the method of search rather than its results, where an agency locates and releases additional responsive records mistakenly omitted from its initial response, courts find this effort to be further evidence that the agency conducted its search in good faith rather than evidence of an inadequate search. See Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986); Western Ctr. for Journalism, 116 F. Supp. 2d at 10. "It is unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed." Western Ctr. for Journalism, 116 F. Supp. 2d at 10.

Agency affidavits are the appropriate vehicle to show that an agency's search was reasonably calculated to uncover relevant documents. They should in reasonable detail explain the scope and method of the search, but they need not "set forth with meticulous documentation the details of an epic search." Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982). Indeed, "[a]gency affidavits enjoy a presumption of good faith, which will withstand purely speculative claims about the existence and discoverability of other documents." Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981) (per curiam).

OIP and OIPR conducted adequate searches in response to plaintiffs' FOIA request. The declarations of James A. Baker on behalf of OIPR and Melanie Ann Pustay on behalf of OIP establish that both components conducted searches that were reasonably calculated to uncover all responsive documents, searching those systems in which responsive records were likely to be located. OIPR searched through its policy and operational records, which includes congressional

inquiries and reports; through the files within the office of the Counsel for Intelligence Policy; and through the files of all staff tasked with USA PATRIOT Act-related projects. (Baker Decl. at ¶ 6). Given the nature of plaintiffs' request, which sought records related to the Department's implementation of the USA PATRIOT Act and to the Department's answers to the congressional inquiry from Representatives Sensenbrenner and Conyers, OIPR's search was appropriately targeted at uncovering responsive documents in OIPR. It was not likely that responsive documents would be found in OIPR's litigation records or FISA records (which includes applications for authority to conduct electronic surveillance or physical searches), and so those files were appropriately not searched. (*Id.*).

Ms. Pustay's declaration states that OIP searched the senior leadership offices of the Department for records responsive to plaintiffs' request. (Sec. Pustay Decl. at ¶¶ 1, 4). OIP searched the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legislative Affairs, and Legal Policy. (*Id.* at ¶ 4). OIP also searched the Department Executive Secretariat, which is the official records repository for the Offices of the Attorney General, Deputy Attorney General and Associate Attorney General. (*Id.* at ¶¶ 4, 5). These were the offices of the Department where documents responsive to plaintiffs' request seeking information of a policy nature were likely to be found. (*Id.* at ¶¶ 1, 4). Ms. Pustay's declaration further details the type of searches conducted, the topics searched, the search terms used, the type of files and systems searched, and who performed the searches. (*Id.* at ¶¶ 5-8). Ms. Pustay's declaration demonstrates the adequacy of OIP's search.

II. THE DEPARTMENT PROPERLY WITHHELD CLASSIFIED INFORMATION PURSUANT TO FOIA'S EXEMPTION 1.

OIPR withheld two documents in full pursuant to Exemption 1. These are the only Exemption 1 documents at issue in this motion, since OIP did not withhold any information pursuant to Exemption 1. OIPR was fully justified in withholding this small amount of properly classified national security information.

Exemption 1 protects records that are: (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and (2) are in fact properly classified pursuant to Executive Order. See 5 U.S.C. § 552 (b)(1). Substantial weight is accorded to an agency's determination that potential harm merits classification of particular information. See, e.g., Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999); Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982); Military Audit Project v. Casey, 656 F.2d 724, 745 (D.C. Cir. 1981); Washington Post v. DOD, 766 F. Supp. 1, 6-7 (D.D.C. 1991). As such, summary judgment for the government in an Exemption 1 FOIA action should be granted on the basis of agency affidavits if they simply contain "reasonable specificity" rather than conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith. Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980).

The Executive Order currently in effect is Executive Order ("E.O.") 12958, "Classified National Security Information." An agency can demonstrate that it has properly withheld information under Exemption 1 if it establishes that it has met the substantive and procedural requirements of E.O. 12958. Substantively, the agency must show that the records at issue

logically fall within the exemption, i.e., that E.O. 12958 authorizes that the particular information sought be kept secret in the interest of national defense or foreign policy, and procedurally, that the agency followed the proper procedures in classifying the information. See Salisbury v. United States, 690 F.2d 966, 970-73 (D.C. Cir. 1982); Military Audit Project, 656 F.2d at 737-38.

The declaration submitted on behalf of OIPR is specific and shows that the substantive and procedural requirements of E.O. 12958 have been satisfied. Nor is there any evidence that the withheld records are not properly classified or any evidence of bad faith. Accordingly, these two documents are protected from disclosure by Exemption 1.

OIPR withheld two classified documents in full based on Exemption 1: document no. 12 and document no. 34. (Baker Decl. at ¶ 13; Ex. 2 to Baker Decl.). As OIPR's declaration and Vaughn index explain, document no. 12 is a three-page undated document that contains classified answers to the House Permanent Select Committee on Intelligence. Document no. 34 is a seven-page document dated April 29, 2002, and it consists of certain pages from the Attorney General's Reports to Congress on FISA relied upon in connection with the Department's classified response to the Sensenbrenner and Conyers letter. These documents consist of the classified answers provided by the Department to the June 13, 2002 letter from Representatives Sensenbrenner and Conyers, and reports on FISA relied upon by the Department in formulating its response to the Sensenbrenner and Conyers letter. (Id.). They both contain intelligence information and therefore fall logically within section 1.5(c) of E.O. 12958, which classifies information related to "intelligence activities (including special activities)" or "intelligence sources or methods." (Id.).

Mr. Baker's declaration explains that the information in these documents concerns the frequency or manner of use of specific techniques authorized under FISA for use against clandestine intelligence and international terrorist activities. (Id. at ¶¶ 15, 16). He further explains, at length, how this information is related to intelligence activities, how its disclosure would harm our national security, and how this information is treated as especially sensitive classified material. (Id. at ¶¶ 16-23). In fact, Congress has specifically rejected proposals to require public disclosure of this type of information. (Id. at ¶¶ 18-23).

The Baker declaration also establishes that OIPR followed the proper procedures in classifying the two withheld documents. The documents were classified by Mr. Baker, the Counsel for Intelligence Policy, who holds original classification authority and is therefore authorized to make determinations regarding classification of national security information. (Id. at ¶¶ 13-14). Indeed, plaintiffs specifically requested information that they knew was classified when they sought only those records related to DOJ's answers to the Sensenbrenner and Conyers letter that were submitted to Congress as classified. In response to plaintiffs' FOIA request, Mr. Baker conducted a classification review and determined that the two documents continued to warrant classification. (Id. at ¶ 14).

III. PURSUANT TO FOIA'S EXEMPTION 5, THE DEPARTMENT PROPERLY WITHHELD MATERIAL PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE.

Not surprisingly, plaintiffs' request for records relating to the Department's implementation of the USA PATRIOT Act and development of policy concerning the Act required the Department to redact from certain responsive documents information protected by the deliberative process privilege. Records generated as part of the process of developing

answers to questions from Members of Congress and developing policy guidance on a newly enacted statute naturally contain the type of deliberative and predecisional information that is exempt from public disclosure under FOIA's Exemption 5.

Exemption 5 exempts from mandatory disclosure "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)(5). Exemption 5 incorporates the privileges available to an agency in civil litigation; the three principal privileges are the deliberative process privilege, the attorney-client privilege, and the attorney work-product doctrine. See United States v. Weber Aircraft Corp. , 465 U.S. 792, 799-800 (1984); National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Florida House of Representatives v. Dep't of Commerce, 961 F.2d 941, 944-45 (11th Cir.), cert. dismissed, 506 U.S. 969 (1992). Here, OIPR and OIP withheld information pursuant to Exemption 5 based on the deliberative process privilege.

The deliberative process privilege exempts from mandatory disclosure documents that reflect predecisional agency deliberations. See NLRB, 421 U.S. at 150-52; Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). The privilege is based on the recognition that public disclosure of predecisional, deliberative documents would harm the quality of agency decision-making. Florida House of Representatives, 961 F.2d at 944. "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." Dep't of Interior v. Klamath

Water Users Protective Assoc., 532 U.S. 1, 8-9 (2001) (internal quotations and citation omitted). The purpose of the deliberative process privilege is to "encourage the frank discussion of legal and policy issues" and "protect[] the decisionmaking processes of government agencies." Wolfe, 839 F.2d at 773 (internal quotations and citation omitted). It also serves "to ensure that a decisionmaker will receive the unimpeded advice of his associates." Florida House of Representatives, 961 F.2d at 947 (emphasis in original) (citing Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979)).

Documents falling within the deliberative process privilege include those "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB, 421 U.S. at 150 (internal quotations and citations omitted). These documents must be both predecisional and deliberative. See Florida House of Representatives, 961 F.2d at 945. "In deciding whether a document should be protected by the privilege we look to whether the document is 'predecisional' [-] whether it was generated before the adoption of an agency policy [-] and whether the document is 'deliberative' [-] whether it reflects the give-and-take of the consultative process." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). "There should be considerable deference to the [agency's] judgment as to what constitutes. . . 'part of the agency give-and-take – of the deliberative process – by which the decision itself is made.'" Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). The agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions . . . while the decisionmaking process is in progress.'" Id. at 118 (quoting NLRB, 421 U.S. at 151).

OIPR

Pursuant to Exemption 5, OIPR properly withheld deliberative portions of e-mail messages and drafts. OIPR withheld six documents in full and portions of 18 documents, which are all detailed in OIPR's Vaughn index. (Baker Decl. at ¶ 24; Ex. 2 to Baker Decl.). Mr. Baker's declaration explains that these e-mails were authored by individuals in OIPR and the Offices of the Deputy Attorney General and Legislative Affairs, as the Department was preparing its response to the June 13, 2002 Sensenbrenner and Conyers letter. (Baker Decl. at ¶ 24). The e-mails contain discussions among Department officials about which Department components should be assigned to work on particular questions, what approach should be taken in responding to the questions, and what language should be used in the response letter. The e-mails reflect the back-and-forth conversations between Department staff as they worked on the Department's response to Congress. They are both deliberative and predecisional, as they were generated before the Department submitted its final answers to Representatives Sensenbrenner and Conyers, and constitute deliberations. (*Id.* at ¶¶ 24-25). See NLRB, 421 U.S. at 150-52; Florida House of Representatives, 961 F.2d at 945. As Mr. Baker notes, in a world without computers, the discussions contained in these e-mails would probably have only occurred orally and would not have been documented. (Baker Decl. at ¶ 25).

Similarly, the drafts withheld by OIPR are protected by the deliberative process privilege. Mr. Baker's declaration explains that the withheld drafts concern the issue of OIPR's efforts to disseminate classified FISA information to Congress in response to the Sensenbrenner and Conyers letter. (*Id.* at ¶ 26). The drafts contain staff members' assessments and opinions about how to provide classified information to Congress through secure channels. They do not reflect

formally adopted positions of the agency, but rather are quintessentially predecisional and deliberative. (Id.). Drafts have been held to be predecisional and protected by the deliberative process privilege. See Town of Norfolk v. U.S. Corps of Engineers, 968 F.2d 1438, 1458 (1st Cir. 1992); Dudman Communications Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987). "Draft documents, by their very nature, are typically predecisional and deliberative. They reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors." Exxon Corp. v. Dep't of Energy, 585 F. Supp. 690, 698 (D.D.C. 1983) (internal quotations and citations omitted). Drafts are at the core of that information that the deliberative process is designed to protect. Disclosure of these drafts, as well as the e-mails, would chill the free exchange of ideas within the agency and thus adversely effect the quality of the agency decision-making process.

OIP

OIP only withheld limited portions of 26 pages of responsive records pursuant to Exemption 5.⁴ (Sec. Pustay Decl. at ¶ 12). With one exception, the redacted information consists of deliberative portions of e-mail messages; the exception is a handwritten note. (Id.) Ms. Pustay's declaration fully sets forth the deliberative, predecisional nature of the information redacted from these e-mails, and establishes the application of the deliberative process privilege to this information. (Id. at ¶¶ 12-14). These e-mails reflect the same give-and-take exchange as the withheld OIPR e-mails, as they were also generated by individuals in the Department as they worked on responding to the Sensenbrenner and Conyers letter, and they also preceded the final

⁴The only assertion of FOIA withholding by OIP at issue in this case is Exemption 5, since OIP did not withhold any materials pursuant to Exemption 1.

answers that were provided to Representatives Sensenbrenner and Conyers. The discussions concern who should work on answering which questions, what the answers might consist of, and how the answers should be phrased. These conversations about the handling and the content of the Department's response to Congress were informal and would also have been conducted orally, without any record, before the advent of computers. (Id.).

The redacted information in the e-mails also includes proposed draft language for the Department's response letter, or comments on proposed language, and was properly redacted pursuant to the deliberative process privilege. (Id.). This information is inherently deliberative and predecisional, and its disclosure would chill the candor of officials as well as cause public confusion about the Department's official positions and policies. (Id.).

OIP also redacted a small portion of a handwritten note pursuant to the deliberative process privilege. These notes reflect an OLA official's distillation of issues that he believed to be important at the time of their discussion and which he wished memorialized for later reference. (Id. at ¶ 15). Virtually all of these notes were disclosed; the withheld portion consists of a brief five-word commentary regarding the Department's response to the questions at issue. Ms. Pustay accurately states that "[d]isclosure of this comment would inhibit Department officials from freely writing down the information that they think is necessary for their work, for fear that it will be publicly disclosed. Such a chilling effect ultimately impairs the quality of the Department's decisionmaking process." (Id.).

CONCLUSION

For all of the foregoing reasons, the Department of Justice respectfully requests that the Court enter partial summary judgment in its favor as a matter of law on the grounds that the Office of Information and Privacy and the Office of Intelligence Policy and Review complied with the FOIA in responding to plaintiffs' FOIA request, and that the assertions by these offices of FOIA's Exemptions 1 and 5 are valid.

Respectfully Submitted,

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January 24, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on this January 24, 2003, I caused the foregoing Defendant's Motion for Partial Summary Judgment and accompanying Memorandum of Law, Exhibits and Declarations to be served upon plaintiffs' counsel of record at the addresses listed below:

Via first class mail, postage prepaid:

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