

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

DEPARTMENT OF HOMELAND SECURITY,

Defendant.

C.A. No. 08-1046 (JDB)

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF’S
CROSS-MOTION FOR SUMMARY JUDGMENT IN PART**

In this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, plaintiff Citizens for Ethics and Responsibility in Washington (“CREW”) seeks the disclosure of records concerning allegations that defendant Department of Homeland Security (“DHS”) and its component, U.S. Customs and Border Protection (“CBP”), engaged in improper political favoritism when CBP made decisions concerning the location of the U.S.-Mexico border fence and the property owners who would be adversely impacted by the construction project. As we demonstrated in our opening brief, the agency has failed to carry its burden of justifying its decision to withhold responsive material from disclosure under FOIA Exemption 5 and is thus not entitled to the partial summary judgment it seeks with respect to the disputed information. The agency’s opposition to plaintiff’s cross-motion for partial summary judgment – a response which fails to cure the defects we identified – warrants a brief reply.

I. CBP's Declaration and *Vaughn* Index are Inadequate to Carry Its Burden

It is a basic tenet of FOIA litigation that, when moving for summary judgment, an agency must “sustain[] its burden of demonstrating the documents requested are . . . exempt from disclosure” and that supporting affidavits must “contain reasonable specificity of detail rather than merely conclusory statements.” *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citations and internal quotation marks omitted). In this case, CBP seeks to rely upon a declaration that, to a large extent, merely reiterates the general requirements of Exemption 5 and offers very little information concerning the specific documents at issue. Likewise, as we have noted, the agency’s *Vaughn* Index merely states – repeatedly – that responsive information has been withheld under Exemption 5 because it “contains deliberations on how to respond to allegations raised in the media.” *See, e.g., Vaughn* Index entries for Documents 1, 10-24, 28.

Defendant’s latest submission does nothing to bolster the agency’s position. If anything, it confirms that CBP does, indeed, seek to rely exclusively upon the assertion that the disputed material is being withheld because it concerns “deliberations on how to respond to allegations raised in the media.” Mirroring the repetitive recitation contained in its declaration and *Vaughn* Index, the agency’s brief refers to those “allegations” more than 45 times, while providing none of the additional enlightenment that one would expect from a party that carries the burden of persuasion. 5 U.S.C. § 552(a)(4)(B); *Al-Fayed v. CIA*, 254 F.3d 300, 305 (D.C. Cir. 2001); *Summers v. Dep’t of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998).

The agency argues that CREW’s “claim that CBP’s submissions are inadequate . . . fails to consider that the redacted documents themselves demonstrate FOIA Exemption 5 was

properly asserted in this case.” Defendant’s Reply and Opposition to Plaintiff’s Cross-Motion for Summary Judgment In Part (“Def. Opp.”) at 10. CBP notes, for instance, that “the unredacted portions” show the dates when several of the e-mail strings at issue began, and the subject lines of those messages. *Id.* at 11-13. It is unclear, however, why defendant believes this information adds anything of substance to its attempted justification of its exemption claims. The agency’s bottom-line remains the same: the documents “reflect[] internal discussion on how to respond to allegations raised in the media.” *Id.* at 11, 12 (citing *Vaughn Index*). Plaintiff submits that nothing contained in CBP’s opposition alters the conclusion that the agency’s submissions are “inadequate.” *Defenders of Wildlife v. U.S. Dep’t of Agric.*, 311 F. Supp. 2d 44 (D.D.C. 2004).¹

I. CBP’s Improperly Invoked Exemption 5

As we have noted, the shortcomings of CBP’s *Vaughn* submission are “all the more apparent when the agency’s vague representations are measured against the specific requirements of Exemption 5.” Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment In Part, and in Support of Plaintiff’s Cross-Motion for Summary Judgment In Part (“Pl. Mem.”) at 8. Most importantly, the agency has failed to identify “the role, if any, that the [disputed] document[s] play[ed] in the process of agency deliberations.” *Formaldehyde Inst. v. Dep’t of Health & Human Serv.*, 889 F.2d 1118, 1123 (D.C. Cir. 1989); *see also Senate of Puerto Rico ex rel. Judiciary Comm. v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987).

¹ Defendant has submitted an “amended *Vaughn* index” accompanying its opposition. “The amended *Vaughn* index has been revised to accurately describe the basis for redacting Document 27, and contains no other revisions to the original index.” Def. Opp. at 8 n.10. The agency has thus chosen to rely upon its initial submission, even after making a minor revision and filing an amended index.

In its opposition, the agency attempts, for the first time, to identify the role that the withheld material played in the process:

[T]he only potentially responsive documents comprised internal agency discussions about how to respond to inquiries relating to the allegations in the [*Texas Observer*] article and agency responses to the allegations. Because the allegations related to Hunt were unfounded, *the agency officials involved in the internal discussions necessarily offered opinions about where responsive information about placement of the border fence in relation to property owned by Mr. Hunt might be found in agency records.*

Def. Opp. at 15 (emphasis added).² Assuming this is an accurate characterization, it is difficult to understand how disclosure of the withheld information would, as defendant suggests, damage the “quality of agency decisions” or discourage “open, frank discussions of policy matters.” *Id.* at 14. It is, indeed, impossible to fathom why CBP would invoke the deliberative process privilege to withhold anything as mundane as “opinions about where responsive information . . . might be found in agency records.” Similarly, the agency’s opposition (but not its *Vaughn* submission) describes another mundane activity CBP seeks to protect:

The unredacted portions of each e-mail string show an intra-agency discussion consisting of the back-and-forth between various CBP offices as to who will take the lead in responding to the various taskers sent out to gather information about the allegations in the *Texas Observer* article, including those relating to Mr. Hunt.

Id. at 16. Plaintiff submits that the routine administrative chores defendant cites do not come close to resembling “the give-and-take of the consultative process” that the deliberative process privilege is intended to protect. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

² This assertion, like many others contained in defendant’s opposition, is not accompanied by a citation to the record. Indeed, neither the agency’s declaration nor its *Vaughn* Index contains any similar assertion. As we have noted, those submissions are devoid of any detail concerning the role the withheld material played in the agency’s deliberative process.

Defendant next takes issue with CREW's assertion that material the agency itself describes as "talking points" may not properly be withheld. Def. Opp. at 17-19. Employing a tactic that runs through its brief, the agency goes beyond the record to assert, without any support, that it "used the term 'talking points' here to refer to material prepared in the context of the 'taskers' sent out to develop a response within the agency to the allegations in the media," and that

[t]he "talking points" are therefore properly considered "briefing materials" – reports or other documents that summarize issues and advise superiors, either generally or in preparation for an event such as congressional testimony – that are protected from disclosure under FOIA under the deliberative process privilege.

Id. at 17-18 (citation omitted). Attempting to move even further away from the descriptive phrase contained in its *Vaughn* Index – "talking points" – the agency makes a final linguistic leap and concludes that "[b]riefing materials' . . . are . . . similar to advisory opinions, recommendations, and deliberations, and are likewise generally exempt from disclosure under the deliberative process privilege." *Id.* at 19 (citations omitted).

It is not difficult to see why the agency needs to engage in these semantic gymnastics. As we noted in our opening brief, Pl. Mem. at 10, this Court has held that "draft talking points" may not be withheld where, as here, an agency "identifies nothing more specific about the content of th[e] document, does not specify its place in a particular decisionmaking context, and does not indicate whether, as a draft, these talking points were actually used in a communication with the public." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d

252, 265-266 (D.D.C. 2004).³ Likewise, the CBP “talking points” at issue here are improperly withheld, notwithstanding the agency’s attempt to backtrack and re-define them.

Finally, the agency attempts to brush aside CREW’s observation that “it is difficult to imagine how the information marshaled by the agency in order to respond to the [media] allegations could be anything but ‘purely factual’” and thus, not properly withheld under Exemption 5. Pl. Mem. at 12. As we have noted, unredacted portions of the disputed e-mail instruct recipients to “fact check” and “review . . . for correctness” material that has been withheld, *id.*, citing Documents 10, 11, 15 & 24, thus suggesting that the withheld information is of a factual nature. In response, the agency offers that “the request to ‘fact check’ was not redacted from the e-mail string.” Def. Opp. at 20. That assertion is irrelevant and misses the point; the unredacted portions of the e-mail strongly suggest that agency employees were exchanging factual material in the course of fashioning an agency response to the “media allegations” concerning political favoritism. As defendant suggests, the “unredacted portions” of the disputed documents should be considered in assessing “the soundness of the withholding[s].” *Id.* at 11. Working with the little information the agency has provided to plaintiff and the Court, it is rational to conclude that a request to “fact check” information suggests that the material is factual.

III. CBP Has Failed to Comply With The FOIA’s Segregability Requirement

We noted in our opening brief that Mr. Hanson – the agency’s declarant – does not address the question of segregability anywhere in his declaration. Pl. Mem. at 14.

³ Attempting to escape its burden, the agency says, “There is no factual basis in the record that the talking points were adopted, formally or informally, as CBP’s position, or that the talking points constituted anything other than ‘briefing material.’” Def. Opp. at 17-18 n. 14. In fact, as we have noted, the record is devoid of *any* details concerning the withheld material, a shortcoming that cuts against the agency as the party that bears the burden of proof, and not against CREW.

Notwithstanding that omission, the agency asserts in its opposition that all “the redacted information was exempt from disclosure pursuant to a FOIA exemption or was not reasonably segregable because its release would have revealed the underlying protected material.” Def. Opp. at 22, *citing* Defendant’s Statement of Material Facts as to Which There Is No Genuine Dispute (“SFNGD”), No. 9; and Declaration of Mark Hanson (“Hanson Decl.”), ¶ 10. That assertion tracks the language of the referenced section of the agency’s statement of facts, which states:

No reasonably segregable non-exempt portions of the documents were withheld from Plaintiff. *See* Hanson Decl., ¶ 10. Accordingly, the redacted information was exempt from disclosure pursuant to a FOIA exemption or was not reasonably segregable because its release would have revealed the underlying protected material. *Id.*

SFNGD, No. 9. The cited paragraph of Mr. Hanson’s declaration, however, says nothing of the kind. Rather, it states, in its entirety:

Redactions made on those documents are detailed in a Vaughn index identifying information responsive to Plaintiff’s FOIA request, but exempt from disclosure, in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). *See* Exhibit A. This Declaration, along with the Vaughn index, provide the Court and Plaintiff with an identification of information that is withheld, the statutory exemption(s) claimed, and the justification for asserting the exemptions used to withhold information contained in the records at issue.

Hanson Decl., ¶ 10.

As with other aspects of the agency’s argument, its discussion of segregability does not square with the evidence of record. Plaintiff thus reiterates that CBP’s failure to address the segregability of non-exempt material precludes entry of judgment in the agency’s favor. *See, e.g., Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1027 (D.C. Cir. 1999).

CONCLUSION

CBP has failed to carry its burden of showing that it has properly withheld information responsive to CREW's FOIA request, relying instead upon the vague assertion that disclosure of the material would reveal the agency's deliberations on how to respond to published allegations of political favoritism. For the reasons stated above, and those set forth in plaintiff's opening brief, the Court should deny the agency's motion for summary judgment in part, and grant CREW's cross-motion for summary judgment in part.⁴

Respectfully submitted,

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⁴ While plaintiff submits that the agency has plainly failed to meet its burden of establishing that the disputed material has been properly withheld, any doubts the Court may have may be resolved through *in camera* inspection of the records. *See, e.g., Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) ("A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt that he wants satisfied before he takes responsibility for a *de novo* determination."), quoting *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (internal quotation marks omitted).