

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GREG MUTTITT,

*

*

Plaintiff,

*

*

v.

*

*

Civil Action No. 1:10-cv-00202 (BAH)

UNITED STATES CENTRAL
COMMAND, *et al.*,

*

*

*

Defendants.

*

*

* * * * *

**PLAINTIFF’S OPPOSITION TO DEFENDANT UNITED STATES DEPARTMENT
OF STATE’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Greg Muttitt commenced this litigation against Defendants United States Central Command, Department of Defense (“DOD”), Department of State (“State”), and Department of the Treasury (“Treasury”) pursuant to the Freedom of Information Act (“FOIA”) and the Administrative Procedure Act (“APA”) to obtain copies of several different types of records related to the development of Iraq’s energy policy and national hydrocarbon law, to reverse Defendants’ denials of Plaintiff’s requests for public interest fee waivers and expedited processing, and to challenge State’s and Treasury’s pattern or practice of refusing to provide estimated dates of completion to FOIA requesters upon request. As State correctly notes, Plaintiff voluntarily dismissed all claims against Defendants United States Central Command and DOD on December 15, 2010, and dismissed the FOIA claims asserted against Treasury in Counts 22, 23, and 24 of his First Amended Complaint on January 24, 2011. (Defs.’ Mem. P. & A. Supp. Dep’t of State’s Mot. Part. Summ. J. at 6 n.2 [hereinafter State’s Mem.]) A Partial Motion to Dismiss the FOIA and APA claims against State and Treasury is currently pending

before the Court. (*Id.*) This Motion for Partial Summary Judgment under Rule 56(a) of the Federal Rules of Civil Procedure consequently potentially completes the coverage of all of Plaintiff's claims by addressing Counts 12-21.¹

BACKGROUND

Factual and Procedural Background

Plaintiff accepts State's recitation of the factual and procedural background of this Motion (*id.* at 2-9) and will not unnecessarily repeat it here. However, one clarification is needed to forestall a potential misunderstanding. State has identified 24 records responsive to Request Nos. 200908517 and 200907495 with twelve duplicate Bates numbers: E3, E4, E5, E6, E8, E11, E12, E13, E14, E15, E16, and E18. For the remainder of this brief, the twelve listed Bates numbers which pertain to Request No. 200907495 will be followed by an asterisk (e.g., E5*), while their counterparts pertaining to Request No. 200908517 will remain unaltered.²

As an additional note, with respect to the withholdings being challenged herein, Plaintiff has elected to only challenge State's withholding determinations in 44 of the 69 documents identified in the Grafeld Declaration.³ Plaintiff made this decision solely out of a desire to limit

¹ Because the Plaintiff holds the burden of demonstrating that he was entitled to public interest fee waivers and expedited processing for Counts 12, 16, 18, and 19, but State has only argued mootness on those counts, it is unclear if those counts can be completely resolved at this point if the Court finds that they are not moot. It is for this reason that Plaintiff uses the word "potentially" here out of an abundance of caution.

² In keeping with the format of State's brief, documents will hereinafter be referred to solely by Bates number for convenience and consistency. E.g., the document with Bates number A1 will be referred to as "Document A1."

³ Plaintiff is *not* challenging withholdings in the following 25 documents, listed by Bates number: L5 (Grafeld Decl. ¶ 78); L6 (*id.* ¶ 79); L8 (*id.* ¶ 80); N10A (*id.* ¶ 91); N11 (*id.* ¶ 93); N12 (*id.* ¶ 95); N14 (*id.* ¶ 99); N19 (*id.* ¶ 101); N21 (*id.* ¶ 102); N24 (*id.* ¶ 104); N36 (*id.* ¶ 106); NE8 (*id.* ¶ 124); E3 (*id.* ¶ 134); E4 (*id.* ¶ 136); E8 (*id.* ¶ 142); E9 (*id.* ¶ 144); E11 (*id.* ¶ 148);

the scope of the Court's review to only those records which were most important to him, and this should not be construed as a concession of the legitimacy of State's position regarding the documents he is not pursuing further. In a similar vein, Plaintiff is limiting his challenge to Documents A1, E4*, and E13* to certain arguments, which will be discussed in greater detail below.

Statutory Background and Standards of Review

Similarly, Plaintiff accepts State's recitation of the statutory background and standards of review of this Motion (*id.* at 9-12) and will not unnecessarily repeat it here, with the exception of State's statement of opinion, "plaintiff's claims regarding his entitlement to expedited processing and public interest fee waivers have been mooted by State's responses to his FOIA requests." As discussed in greater detail below, State's voluntary cessation of its apparent patterns or practices of improperly denying Plaintiff's requests for public interest fee waivers and expedited processing does not moot Plaintiff's challenge to the pattern or practice. *See Payne Enters. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988). Similarly, because FOIA only precludes courts from reviewing agency denials of expedited processing "after the agency has provided a complete response to the request" (5 U.S.C. § 552(a)(6)(E)(iv) (emphasis added)), Plaintiff's challenges to State's denials of expedited processing are not yet moot, because State has not provided a complete response to Request Nos. 200909199, 200908517, or 200905202.

E12 (*id.* ¶ 150); S6 (*id.* ¶ 164); A4 (*id.* ¶ 170); E8* (*id.* ¶ 186); E14* (*id.* ¶ 194); E18* (*id.* ¶ 200); E20 (*id.* ¶ 202), and E21 (*id.* ¶ 204).

ARGUMENT

I. PLAINTIFF’S CLAIMS REGARDING STATE’S DENIALS OF PUBLIC INTEREST FEE WAIVERS AND EXPEDITED PROCESSING ARE NOT MOOT

As an initial matter, save for one conclusory footnote, which will be discussed in greater detail below (State’s Mem. at 13 n.5), State has not argued that its decisions to deny Plaintiff’s requests for public interest fee waivers and expedited processing were justified, choosing instead to limit its efforts on these issues to arguments that State’s subsequent actions have rendered Plaintiff’s claims moot. (*Id.* at 12-14.) Therefore, because the allegations in a Complaint are presumed to be true unless challenged by a defendant, Plaintiff will not argue the merits of these denials at this point and will similarly limit his argument to the mootness question (except for a brief discussion of the aforementioned Note 5). If State seeks to expand its arguments in its Reply to cover the merits of these denials, Plaintiff will accordingly seek leave to file a Sur-Reply.

A. Public Interest Fee Waivers

Plaintiff admits that State denied his request for a public interest fee waiver in Request No. 200905202, and that it affirmed this denial on appeal. (First Am. Compl. ¶¶ 74-75 [hereinafter FAC].) Plaintiff further admits that State has not granted his requests for public interest fee waivers for *any* of his nine FOIA requests submitted as part of his research, and that this pattern or practice clearly extends beyond the five requests at issue in this case. (Declaration of Kel McClanahan ¶¶ 3-5, attached as Ex. A.) Finally, Plaintiff admits that, despite these denials, he has not yet been charged any fees for the processing of any of his FOIA requests. (Grafeld Decl. ¶¶ 15, 27, 35, 46, 55; McClanahan Decl. ¶ 6.)

With that being said, State’s argument that “even assuming that plaintiff’s claim to a public interest fee waiver is well founded, [he] has already obtained everything that he could recover by a judgment of this court in his favor” (State’s Mem. at 12 (citations omitted) (quotations omitted)) does not accurately represent the state of the law in this Circuit. State’s argument rather selectively relies on *Better Government Ass’n v. Department of State* for the idea that such a declaration at this point “would constitute an advisory opinion which ‘federal courts may not provide.’” (*Id.* at 12-13, quoting 780 F.2d 86, 91 (D.C. Cir. 1986).) However, State neglects to mention that immediately after this statement, *Better Government Ass’n* then states, “There is, however, no question that the appellants’ other arguments concerning the facial validity of the DOJ guidelines and the Interior regulation are *not* moot. . . . The satisfaction of the claims for reversals of the individual fee waiver denials did not render moot the facial challenges to the guidelines and regulation.” *Better Gov’t Ass’n*, 780 F.2d at 91, citing *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974) (proper to award declaratory relief when need for injunction has been removed but challenged governmental practice continues).

Two years later, the D.C. Circuit significantly expanded on this idea in *Payne*, holding:

However, even though a party may have obtained relief as to a *specific request* under the FOIA, this will not moot a claim that an agency *policy or practice* will impair the party’s lawful access to information in the future. In this case, *Payne* has sought to show—and the Air Force has conceded—that the appellees are following an impermissible practice in evaluating FOIA requests, and that it will suffer continuing injury due to this practice. It is clear that *Payne*’s challenge is not moot.

So long as an agency’s refusal to supply information evidences a policy or practice of . . . [a] failure to abide by the terms of the FOIA, and not merely isolated

mistakes by agency officials, a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit.

Nor can the Air Force moot this suit merely by refraining from the conduct of which Payne has complained while the case is pending. On this point, the Supreme Court has spoken unequivocally:

Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); *see also County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

Payne, 837 F.2d at 491 (internal quotations omitted except as indicated) (footnotes omitted).

State's citation to *Schoenman v. FBI* is similarly inapposite. In that opinion, Judge Kollar-Kotelly specifically noted how that case was distinguishable from *Better Government Ass'n*, "where FOIA requesters 'challenged not only the application of [an agency's fee waiver] guidelines . . . to their respective requests, but also the facial validity of these provisions.'" 573 F. Supp. 2d 119, 136 n.4 (D.D.C. 2008) (alterations in original), quoting *Better Gov't Ass'n*, 780 F.2d at 90. Judge Kollar-Kotelly went on to add:

In [*Better Government Ass'n*], while the requesters' as-applied challenges to the agency's fee waiver regulations were moot, their arguments concerning the facial validity of the regulations were not. Here, Plaintiff challenges only the State Department's denial of *his* request for a fee waiver, and as explained above, his claim in that respect is moot.

573 F. Supp. 2d at 136 n.4.

Plaintiff's challenge admittedly falls somewhere in the middle between the standards of *Schoenman* on the one hand and *Better Government Ass'n* and *Payne* on the other. On the one hand, Plaintiff concedes that he did not add a specific count challenging the propriety of State's pattern or practice of using impermissible standards (which will be discussed below) when evaluating and ultimately denying his requests for public interest fee waivers.

However, Plaintiff's Prayer for Relief clearly envisioned a broader application of the Court's review that would affect Plaintiff's future FOIA requests as well, when it asked in general terms for the Court to "[d]eclare and find that DOD, [State], and [Treasury] improperly denied Muttitt public interest fee waivers" separately from asking the Court to "[o]rder DOD[,] [State,] and [Treasury] to grant Muttitt public interest fee waivers where appropriate."⁴ (FAC at 16.) The former request sought the Court's review of the merits of State's determination, with full knowledge of the evidence to be offered in this brief of an impermissible pattern or practice (McClanahan Decl. ¶ 8), and the "where appropriate" language in the latter request was clearly intended to provoke an order that would be applicable to more than just the specific requests in the case, which would necessarily entail opining on the validity of State's pattern or practice. Lastly, the request that the Court "[g]rant such other relief as the Court may deem just and proper" leaves the door open for just the type of declaratory and injunctive relief established by *Payne*.

As in *Better Government Ass'n* and *Payne*, Plaintiff concedes that his challenge to the actual denial of his request for a public interest fee waiver for Request No. 200905202 has been rendered moot, as long as State does not attempt to charge any search or duplication fees if the

⁴ The omission of State from this line in the First Amended Complaint was a typographical error.

Court rules against it on the adequacy of its search or the appropriateness of its withholdings. At this point, Plaintiff's sole argument is that the reasons cited by the State FOIA analyst for his determination that Plaintiff's request for a public interest fee waiver should be denied reflect the use of impermissible standards in this evaluation. (*See Fee Waiver Worksheet*, attached as Ex. B.)⁵ Furthermore, this determination, presumably made for the reasons cited, was upheld on appeal. Lastly, none of Plaintiff's requests for public interest fee waivers, all of which use the same justifications and relate to the same overall topic, have been granted. These facts taken together indicate that this determination is not an "isolated mistake[] by agency officials" (*Payne*, 837 F.2d at 491) but rather the result of a pattern or practice of using these impermissible standards which falls within the scope of *Payne* relief.⁶

With respect to the impermissible standards alluded to above, Plaintiff need only provide the Court with the actual standardized Fee Waiver Worksheet used by State's analyst when evaluating Plaintiff's request for a public interest fee waiver. (*See Fee Waiver Worksheet*.) Without entering into a point-by-point legal analysis of the myriad problems with this document, it should suffice to quote two of the more objectionable reasons cited by the analyst:

- "The Iraq Oil law is a law born to the Iraqi government, debated in the Iraqi legislature. The U.S. Federal Government role and activity are minimal at best and is acting only in the capacity of advisor when requested, guiding the Iraqis in this process." (*Id.* at 1.)

⁵ Plaintiff has redacted the name of the analyst from this worksheet to protect his privacy interest. If the Court so desires, Plaintiff will provide an unredacted copy of the worksheet.

⁶ Plaintiff apologizes profusely to the Court for the unavoidable play on words.

- This statement, while unquestionably naïve and conclusory in any circumstances, let alone at the initial preparatory stage of a fee waiver determination, became downright surreal with the filing of this Motion, in which State touts such considerations as “the degree to which the then-U.S. Ambassador was involved in sensitive internal affairs, including the drafting of key national legislation” as reasons not only for withholding records but for *classifying them* because “release of the withheld information would damage U.S.-Iraqi relations.” (Grafeld Decl. ¶ 179 (emphasis added); *see also, e.g.*, Grafeld Decl. ¶¶ 121 (describing “tactics being used by U.S. officials during negotiations with the Iraqi government” about the oil law), 123 (describing “aspects of U.S. negotiating strategy”).)
- “I don’t think that the public at large has a keen or burning desire to understand the Iraq’s oil policies or inner debates concerning those policies *when faced by more pressing domestic issues.*” (Fee Waiver Worksheet at 2 (emphasis added).)
 - First, a determination that “contributing to the understanding of the public at large” requires a “keen or burning desire to understand” on the public’s part is immensely problematic on its own, but that issue pales in comparison to what follows. By this reasoning, by definition, almost everything that State as an agency does would fall outside the scope of a public interest fee waiver in light of “more pressing domestic issues.”

Plaintiff is willing to concede that it is *possible* that this bizarre worksheet represents a single employee’s misguided mistakes, and that the denials of his other requests for public

interest fee waivers were not so tainted. However, State cannot escape the fact that this determination, made by an official relying on this worksheet, *was affirmed on appeal*. If these comments reflect the true standards being used by State FOIA analysts, then that is an impermissible pattern or practice. If, however, this was one employee's mistake, then the pattern or practice appears to be more akin to "affirming denials of fee waiver requests without any independent review." Either way, there is an impermissible pattern or practice at play. However, without more information about *which* pattern or practice it is, Plaintiff cannot properly assail it. For that reason, and the reasons set forth in the McClanahan Declaration, Plaintiff hereby seeks limited discovery under Fed. R. Civ. P. 56(d) into the nature and extent of the pattern or practice underlying State's denials of *all* of Plaintiff's requests. (*See* McClanahan Decl. ¶ 9.)

For the foregoing reasons, Plaintiff's claim regarding State's denial of his requests for public interest fee waivers should not be dismissed as moot, and limited discovery should commence into the suspected pattern or practice.

B. Expedited Processing

Plaintiff's challenges to State's denial of his requests for expedited processing are not rendered moot for two separate reasons.

1. Even if the specific denials are beyond review, Plaintiff's challenges to the underlying pattern or practice is not.

As discussed above in the context of public interest fee waivers, Plaintiff's Prayer for Relief clearly envisioned relief that would extend beyond the three requests at issue and require review of the underlying pattern or practice that led to the determinations. (*See* FAC at 15-16 ("Declare and find that CENTCOM, DOD, and DOS improperly denied Muttitt expedited processing of his requests; . . . Order CENTCOM, DOD, and DOS to process Muttitt's requests

in an expedited fashion; . . . [and] Grant such other relief as the Court may deem just and proper.”.) Because of the bad faith demonstrated by the Fee Waiver Worksheet which calls into doubt the *other* initial determinations, such as expedited processing,⁷ made by State at this time, Plaintiff should be allowed limited discovery into State’s specific reasons for its denials and the nature and extent of the underlying pattern or practice that led to them.⁸ (*See* McClanahan Decl. ¶ 11.)

With respect to the conclusory assertions in Note 5 purporting to defend State’s denials of expedited processing, State has not supported any of these assertions with sworn declarations that these were in fact the determinations reached by State FOIA analysts at the time of each denial, or even that the respective State officials make such contentions *now*. Furthermore, some of the assertions, if truly representative of the initial determinations, actually evidence the presence of impermissible standards. For instance, State writes, “Mr. Muttitt engaged in *historical research* about the United States’ role in shaping Iraq’s oil policy.” (State’s Mem. at 13 n.5 (emphasis added).) State’s use of the adjective *historical* is curious, given the specific facts surrounding one of the requests for which expedited processing was denied, Request No. 200909199. This request was submitted on November 11, 2009. (Grafeld Decl. ¶ 47.) It requested records that related to two specific visits that Vice President Biden made to Iraq in July and September 2009.

⁷ It does not take a significant stretch of the imagination to conclude that the “keen or burning desire” test would feature prominently in the determination made by the same individual that “[t]he documents plaintiff sought did not ‘concern a matter of current exigency to the American public.’” (State’s Mem. at 13 n.5, quoting *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).)

⁸ Plaintiff’s counsel attempted to obtain the pertinent Expeditious Processing Worksheets (a blank copy of which is attached as Ex. C) prior to this briefing, but State declined to provide them. (McClanahan Decl. ¶ 10.) These worksheets are now specifically sought through Rule 56(d) discovery.

(*Id.*) The most recent responsive document identified by State, Document A4, is dated September 29, 2009. (*Id.* ¶ 170.) The other identified document with a specific date, Document A3, is dated September 12, 2009. (*Id.* ¶ 168.) The remaining two identified documents, Documents N1 and N2, were “information paper[s] drafted in 2009.” (*Id.* ¶¶ 172, 174.) In short, a request for records about a specific meeting which is filed *eight weeks* after the meeting, and *six weeks* after the most recent responsive document was authored, is considered *historical research* by State. With such a definition as this, one must wonder what records are *not* considered historical by State.

State then argues without any factual support that “[t]he documents plaintiff sought did not ‘concern a matter of current exigency to the American public’ when the requests were submitted in 2009 . . . [and that] ‘the consequences of delaying a response [would not have] compromise[d] a significant recognized interest.’” (State’s Mem. at 13 n.5, quoting *Al-Fayed*, 254 F.3d at 310.) However, to support this conclusory statement, State then attempts to argue that the public actually *did not* experience a “significant adverse consequence,” as viewed from the vantage point of June 24, 2011. (*Id.*, quoting *Al-Fayed*, 254 F.3d at 311.) State cannot have it both ways. Either the appropriate test is what was known when the request was submitted in 2009 (which is actually the proper test), or the appropriate test is whether or not the predicted harm actually occurred, as viewed in retrospect from 2011. The former argument, despite being the appropriate test, is suspect in this case because of the presence of the “keen and burning desire” standard evidenced in the fee waiver determination (Fee Waiver Worksheet at 1). However, the latter argument fares no better, as it would by definition only allow FOIA analysts to grant expedited processing to requesters who could definitively prove that the harm they

predicted would occur. Either way, State's effort at arguing futility in Note 5 is without merit and supports rather than undermines the need for discovery on this issue.

2. State has not provided a complete response to these requests.

According to FOIA, “[a] district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided *a complete response* to the request.” 5 U.S.C. § 552(a)(6)(E)(iv) (emphasis added). “[B]ecause defendant has . . . provided *a complete response* to the request for records, this Court no longer has subject matter jurisdiction over the claim that defendant failed to expedite processing of plaintiff's request.” *Judicial Watch, Inc. v. U.S. Naval Observatory*, 160 F. Supp. 2d 111, 112 (D.D.C. 2001) (emphasis added). When State provides *a complete response* to Plaintiff's requests, the issue of the specific denials of expedited processing will become moot if they have not yet been resolved by the Court.⁹ However, State has yet to do so.

State draws a false equivalence between the statutory restriction to an agency which “provides a complete response to the request” (5 U.S.C. § 552(a)(6)(E)(iv)) and its concept of an agency which “has completed processing [the] request” (State's Mem. at 13). The two concepts are not interchangeable, at least not at this stage of the case. “[A]n agency's substantive response to the underlying FOIA request does not negate the court's ability to review the agency's determination unless and until that response is ‘complete’ – the inclusion of ‘complete’ in this provision was presumably intended to provide for judicial review over the substantive merits of the agency's disclosure.” *NAACP Legal Def. and Educ. Fund v. HUD*, No. 07-3378, 2007 U.S. Dist. LEXIS 88027, at *20 (S.D.N.Y. Nov. 30, 2007).

⁹ As discussed above, this will still not render Plaintiff's challenges to the underlying pattern or practice moot.

First, an agency which is withholding information has not provided “a complete response” to a request until either the plaintiff concedes the withholding or the Court deems the withholding proper. *See id.* at *22. “[T]here is no support in the statute, or in the case law, for defendant’s interpretation – FOIA itself authorizes courts to review an agency’s expedited request determination . . . , and that authority extends until the agency has made *complete* disclosure of the requested material (unless the material is otherwise protected under FOIA’s exemptions).” *Id.* at *23. State even recognizes the role of exemptions in this matter, citing *Tijerina v. Walters* for the idea that the Court must be convinced that an agency has “released all *non-exempt* material” to rob the Court of jurisdiction over a FOIA claim.¹⁰ (State’s Mem. at 13-14 (emphasis added), quoting 821 F.2d 789, 799 (D.C. Cir. 1987).) Tellingly, *Tijerina* does not narrow the scope of this statement to include only material *claimed by the agency to be non-exempt*, which is the definition proffered by State. On the contrary, *Tijerina* only makes this pronouncement *after* deciding that the withheld records were “clearly exempt under FOIA.” *Id.* Admittedly, there is no case completely on point in this Circuit with respect to the nuanced meaning of the term “complete response” as it relates to expedited processing, but Judge Kollar-Kotelly has used the term to describe a FOIA release “with no exceptions.”¹¹ *Schmidt v. Shah*, No. 08-2185, 2010 U.S. Dist. LEXIS 25539, at *1 (D.D.C. Mar. 18, 2010). Therefore, this is not completely a question of first impression in this Circuit.

¹⁰ It should be noted that *Tijerina* was not discussing expedited processing, but rather an allegation of improper delay. 821 F.2d at 799.

¹¹ Presumably this is a typographical error for “exemptions,” since Judge Kollar-Kotelly then proceeded to discuss the agency’s withholdings.

Second, logic dictates that an agency which has not performed an adequate search cannot be said to have provided “a complete response.” *See id.* (finding that agency’s inadequate search precluded “a complete response”). To do so would create the untenable situation where an agency could improperly deny a request for expedited processing, immediately provide an allegedly “final” response after a clearly inadequate search, and argue at the same time that the expedited processing denial was now moot because of its “final” response. After the court then ruled that the search was inadequate, the agency could take as long as it liked to conduct a new search, secure in the knowledge that the requester could no longer challenge the initial denial of expedited processing to speed up the process.

This limitation, however, only applies to Request No. 200908517. If the Court finds that State’s search for responsive records was adequate, Plaintiff concedes that his challenge to State’s specific denial of that request for expedited processing will be rendered moot.¹²

For the foregoing reasons, Plaintiff’s claim regarding State’s denial of his requests for expedited processing should not be dismissed as moot, and limited discovery should commence into the suspected pattern or practice.

II. STATE DID NOT CONDUCT A REASONABLE SEARCH FOR EMAILS AUTHORED BY MEGHAN O’SULLIVAN

Plaintiff does not allege that State’s search of the records system it *did* search were inadequate. For this reason, State’s argument that “[b]y challenging the fact that State’s search did not return emails authored by Dr. O’Sullivan, plaintiff is effectively asking the agency ‘to prove a negative—that the files in question do not exist’ is inapposite. (State’s Mem. at 15,

¹² As discussed above, this will still not render Plaintiff’s challenges to the underlying pattern or practice moot.

quoting *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986).) Rather, Plaintiff and State are in perfect agreement:

The adequacy of State's search must be determined not by its results, "but by the appropriateness of the methods used to carry out the search." Without evidence that State's search was not reasonably calculated to uncover the emails Mr. Muttitt seeks, plaintiff's allegations [would be] insufficient to defeat a motion for summary judgment.

(*Id.*, quoting *Meeropol*, 790 F.2d at 952-54 (internal citations omitted).) The only distinction between Plaintiff's position and State's position is with respect to whether or not State's search was reasonably calculated to uncover the emails in question. Contrary to State's contention, Plaintiff's evidence on this count is straightforward and unrefuted.

Before entering into a point-counterpoint, it will be helpful to first stipulate the points that Plaintiff concedes or has no reason to doubt:

- "[Dr. O'Sullivan's] temporary duty assignment [at Embassy Baghdad] ended approximately two years before the date of Plaintiff's FOIA request." (Grafeld Decl. ¶ 57.)
- "As a general matter, e-mail accounts remain active only for a limited period of time after a Department official ends his or her assignment or employment with the Department." (*Id.* ¶ 58.)
- "The Information Systems Officer at Embassy Baghdad scoured the Embassy's servers for any current or former email account assigned to the last name 'O'Sullivan' or 'OSullivan.' The Information Systems Officer located no active or closed account for Meghan O'Sullivan." (*Id.* ¶ 59.)
- "O'Sullivan no longer has an e-mail account that may be searched electronically . . ." (*Id.* ¶ 60.)

In fact, the only point of controversy is with respect to the last conclusory line of Part II of the Grafeld Declaration: “There are no other Department components or active or retired records systems that are reasonably likely to contain electronic or paper versions of e-mails authored by Meghan O’Sullivan between June 1, 2007 and October 1, 2007.” (*Id.* ¶ 62.) This statement appears irreconcilable with other information known about State’s records systems.

First, Item A-03-020-14 of the U.S. Department of State Records Schedule, entitled “Electronic Mail Records,” states the following:

Description: Senders’ and recipients’ versions of electronic mail messages that meet the definition of Federal records, and any attachments to the record messages after they have been copied to an electronic recordkeeping system, paper, or microform for recordkeeping purposes.

[NOTE: Along with the message text, the recordkeeping system must capture the names of sender and recipients and date (transmission data for recordkeeping purposes) and any receipt data when required.]

Disposition: Delete from the e-mail system *after copying to a recordkeeping system.*

(Records Schedule, attached as Ex. D (italics added).) In other words, State is required by its own recordkeeping guidelines to copy all email messages of substantive importance to another recordkeeping system before deleting them. Plaintiff’s counsel informed State’s counsel of this issue and specifically requested that the Grafeld Declaration cover the issue of which “recordkeeping system” Dr. O’Sullivan’s emails (or any State employee’s emails, for that matter) would be copied to before an email account was purged. (McClanahan Decl. ¶ 12.) Despite this advance indication that Plaintiff would raise this argument in his briefing, the Grafeld

Declaration remains noticeably silent on this Records Schedule and why State did not search the backup system to which such emails are required to be copied.¹³

Furthermore, this is not the first case in this Circuit, even the first case in this Circuit *this year*, in which State has failed to provide enough information to the court regarding its backups of employee emails. In *Ancient Coin Collectors Guild v. Department of State*, Ms. Grafeld herself declared that the appropriate component's staff "searched their emails *as well as the archived emails of a former staff member*" in response to a request. Declaration of Margaret Grafeld at 17 [hereinafter *ACCG Grafeld Decl.*], *Ancient Coin Collectors Guild*, 673 F. Supp. 2d 1 (D.D.C. 2009), *rev'd*, 641 F.3d 504 (D.C. Cir. 2011). As in this case, Ms. Grafeld concluded the relevant portion of her declaration in that case, "There are no other places that if searched would have a reasonable likelihood of containing additional responsive material." *ACCG Grafeld Decl.* at 26. When considering this specific matter, the D.C. Circuit reversed the District Court's decision, stating in response to a virtually identical legal argument:

Nowhere does State explain whether it possesses email archives for [agency] employees other than the [identified] former staff member, whether there are backup tapes containing staff member emails and, if so, whether such backup tapes might contain emails no longer preserved on staff member's computers.

[G]iven that the [plaintiff] raised the issue of backup tapes before the district court, we think this is a gap that State needed to fill in order to carry its burden as to the adequacy of its search. Specifically, under the circumstances it is reasonable to inform the court and plaintiffs whether backup tapes of any potential relevance exist; if so whether their responsive material is reasonably likely to add

¹³ In anticipation of State's potential argument that Plaintiff's stated concerns about the backup emails were not relevant because they were not raised at the time of the request, it is well established in this Circuit that "the court evaluates the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception." *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998).

to that already delivered; and, if these answers are answered affirmatively, whether there is any practical obstacle to searching them.

We therefore reverse the district court's summary judgment in favor of State on the adequacy of its search and remand for further clarification about backups and about the seeming gaps in State's discussion of archived materials.

Ancient Coin Collectors Guild, 641 F.3d at 514-15.

In other words, only two months before State filed this Motion, the D.C. Circuit specifically held that State's position on this issue is untenable. In *Ancient Coin Collectors Guild*, as in this case, State relied on an argument based on *Iturralde v. Comptroller of Currency* that "failure of an agency to turn up one specific document in its search does not alone render a search inadequate." *Ancient Coin Collectors Guild*, 641 F.3d at 514, quoting 315 F.3d 311, 315 (D.C. Cir. 2003). (State's Mem. at 15.) The Circuit conceded that argument, but then held that it was not relevant when the plaintiff was alleging that an entire records system was not searched. *Ancient Coin Collectors Guild*, 641 F.3d at 514-15. This case is virtually identical, down to the allegation stated herein (and previously conveyed to State's counsel) that State has not searched the unspecified "recordkeeping system" identified in the Records Schedule, or even provided information to the Court *identifying* the recordkeeping system in the first place. *See Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986) (affidavits should "identify the searched file and describe at least generally the structure of the agency's file system"), *aff'd*, 484 U.S. 9 (1987).

Therefore, in accordance with established case law, "if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Morley v. CIA*, 508 F.3d 1108, 1116 (D.C. Cir. 2007). Furthermore,

Plaintiff should be allowed discovery regarding the scope of State's search and its recordkeeping system for copied emails. *See Weisberg v. DOJ*, 627 F.2d 165, 371 (D.C. Cir. 1980). "[A] court should not, of course, cut off discovery before a proper record has been developed; for example, where the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory." *Exxon Corp. v. FTC*, 466 F. Supp. 1088, 1094 (D.D.C. 1978).

III. STATE HAS NOT ESTABLISHED THAT IT PROPERLY INVOKED EXEMPTIONS (B)(1) OR (B)(5) TO WITHHOLD RESPONSIVE MATERIAL

The primary goal of FOIA is promoting government transparency. This laudable goal must, however, be tempered by the "legitimate governmental and private interests [that] could be harmed by release of certain types of information." *United Techs. Corp. v. DOD*, 601 F.3d 557. 559 (D.C. Cir. 2010). In recognition of the need for this balance, Congress included nine particularized exemptions in the statute. 5 U.S.C. § 552(b). "These exemptions are explicitly made exclusive, and must be narrowly construed." *Milner v. Dep't of the Navy*, --- U.S. ---, 131 S. Ct. 1259, 1262 (2011) (internal quotations and citations omitted), citing *EPA v. Mink*, 410 U.S. 73, 79 (1973) and *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

"The government agency has the burden to demonstrate that the documents requested are exempt from disclosure." *Judicial Watch, Inc. v. Dep't of the Treasury*, No. 09-1508, 2011 U.S. Dist. LEXIS 74121, at *15 (D.D.C. July 11, 2011), quoting *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003). "To enable the Court to determine whether documents properly were withheld, the agency must provide a detailed description of the

information withheld through the submission of a so-called ‘Vaughn Index,’ sufficiently detailed affidavits or declarations, or both.” *Hussain v. DHS*, 674 F. Supp. 2d 260, 267 (D.D.C. 2009).

“An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of FOIA.” *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). “An affidavit that contains merely a ‘categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.” *PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993), quoting *King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987). “[T]he affidavits must show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency’s claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping.” *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979) (footnote omitted). “The [D.C.] Circuit, though expressly disclaiming any attempt to provide ‘an encompassing definition of *conclusory assertions*,’ noted that ‘it is enough that where no factual support is provided for an essential element of the claimed privilege or shield, the label *conclusory* is surely apt.’” *Jarvik v. CIA*, 741 F. Supp. 2d 106, 120 (D.D.C. 2010), quoting *Senate of Puerto Rico v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987).

The Grafeld Declaration is woefully inadequate for the purposes for which it was intended, relying almost entirely on “boilerplate” language that merely parrots the statutory standards, much of it virtually unaltered from previous declarations in other cases. On the record currently before the Court, many of State’s withholdings under Exemptions (b)(1) and (b)(5) are completely unsupported by any specific factual evidence and should be rejected. The 9th Circuit has held that “‘boilerplate’ explanations [that] were drawn from a ‘master’ response filed by [an

agency] for many FOIA requests . . . are precisely the sort of ‘categorical descriptions of redacted material coupled with categorical indication of anticipated consequences of disclosure’ the D.C. properly rejected in *King* as ‘clearly inadequate.’” *Wiener v. FBI*, 943 F.2d 972, 978-79 (9th Cir. 1991) (noting that “[t]he FBI’s explanation for the withholding of information [pertaining to intelligence sources] in *King* and the FBI’s explanation for the withholding in this case . . . are virtually identical.”) In 1998, the 9th Circuit’s standard was imported into the D.C. Circuit. *See Campbell*, 164 F.3d at 30-31 (“Notably, the Pitts declaration does not contain any . . . language suggesting that the FBI tailored its response to a specific set of documents”), citing *Wiener*, 943 F.2d at 979.

To the degree that the Grafeld Declaration *does* argue specifics, its arguments are not supported by established case law.

A. Exemption (b)(1)

Exemption (b)(1) exempts matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). State relies on two sections of Executive Order 13526 (“E.O. 13526”) for its Exemption (b)(1) withholdings. E.O. 13526 § 1.4(b) allows for the classification of “foreign government information,” which is defined elsewhere in the Order, in pertinent part, as “information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence.” *Id.* § 6.1(s). Plaintiff is challenging withholdings under § 1.4(b) in 36 documents.

E.O. 13526 § 1.4(d) allows for the classification of information pertaining to the “foreign relations or foreign activities of the United States, including confidential sources.” A “confidential source” is defined elsewhere in the Order as “any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.” *Id.* § 6.1(k). Plaintiff is challenging withholdings under § 1.4(d) in 36 documents.

1. State has not demonstrated that it followed proper procedure.

As an initial matter, it is well established that a record is not exempt under Exemption (b)(1) if it is not “properly classified.” “To demonstrate that the documents are properly classified as secret and therefore clearly exempt from disclosure, an agency must demonstrate that (1) it followed proper classification procedures, and (2) by its description, the document logically falls within the claimed exemption.” *Hayden*, 608 F.2d at 1386-87; *see also Lesar v. DOJ*, 636 F.2d 472, 483 (D.C. Cir. 1980) (noting that proper classification requires that both procedural and substantive requirements be met); *Jarvik*, 741 F. Supp. 2d at 119 (same).

While Plaintiff has no reason to doubt Ms. Grafeld’s statement that she is “authorized to classify and declassify national security information” (Grafeld Decl. ¶ 1), for six of the withheld documents that authority is not by itself sufficient. Documents N13, NE2, NE4, NE10, and N1 were all originally unclassified or “Sensitive” records and were later classified CONFIDENTIAL. (*Id.* ¶¶ 97, 120, 122, 128 (unclassified); *id.* ¶ 172 (Sensitive).) The Grafeld Declaration makes no mention of when these documents were classified CONFIDENTIAL or by whom.

An agency may classify information for which it has already received a FOIA request “only if such classification . . . is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of [E.O. 13526].” E.O. 13526 § 1.7(d). Ms. Grafeld’s attempts to satisfy this requirement on her own is not new to this Court. In a case virtually identical to this one with respect to this issue, Judge Kennedy rebuffed a similar attempt once before:

Because Ms. Grafeld is not the agency head, the deputy agency head, or the senior agency official, nor claims that she classified documents under the direction of such an official, she does not have proper authority to classify documents which the [plaintiff] had already requested under FOIA, although she may have had the authority to classify documents for which no FOIA request had been made. Therefore, because the State Department did not classify the documents currently withheld under Exemption 1 in accordance with proper procedure, the documents must be disclosed.

Council for a Livable World v. Dep’t of State, No. 96-1807, 1998 U.S. Dist. LEXIS 23643, at *12-13 (D.D.C. Nov. 23, 1998).

To satisfy this procedural requirement, State must offer convincing evidence that either (a) Documents N13, NE2, NE4, NE10, and N1 were classified CONFIDENTIAL prior to receipt of Plaintiff’s FOIA Request Nos. 200903039 (N13), 200908517 (NE2, NE4, NE10), and 200909199 (N1); or (b) these documents were classified on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of E.O. 13526. The Grafeld Declaration makes no mention of either item. If State is unable to provide such evidence to the Court, “the documents must be disclosed.” *Id.*

2. State has not convincingly demonstrated that all of the alleged “foreign government information” was obtained in confidence.

As noted above, one of the linchpin inquiries when making a determination regarding § 1.4(b) of E.O. 13526 is whether the information was provided to the United States “with the expectation that the information, the source of the information, or both, are to be held in confidence.” E.O. 13526 § 6.1(s). “To carry this burden, the government need[s] to ‘provide the court and [Plaintiff] with information sufficient to determine whether the source was truly a confidential one and why disclosure of the withheld information would lead to exposure of the source.’” *Rosenfeld v. DOJ*, 57 F.3d 803, 807 (9th Cir. 1995), quoting *Wiener*, 943 F.2d at 980; *see also Wiener*, 943 F.2d at 980 (applying Exemption (7)(D) tests for express and implied grants of confidentiality to § 1.4(b) claims).

In order to establish an express grant of confidentiality, State “need only establish the [source] was told his name [or information] would be held in confidence.” *Wiener*, 943 F.2d at 986. Given the “substantial weight” granted to declarations in national security matters (*King*, 830 F.2d at 217), this could likely be accomplished by saying as much in the Grafeld Declaration. Yet, Ms. Grafeld has not done so. More likely, given the vague and conclusory language of the Grafeld Declaration, State is maintaining the presence of an implied grant of confidentiality. However, State has not provided enough information beyond rote statements that material was “obtained in confidence” to allow Plaintiff or the Court to determine the legitimacy of these claims.

State has a longtime practice of offering “boilerplate” declarations that do not meet the *King* test. The Grafeld Declaration is no exception. State is particularly reluctant to give specifics when it comes to the “foreign government information” protected by E.O. 13526 §

1.4(b). In recent years, virtually identical sweeping language has appeared in no less than five declarations offered by State to defend its withholding of records under §§ 1.4(b) and (d), sometimes accompanied by a rider which actually discusses the specific issue, and sometimes (as in this case) without even that. In this case, Ms. Grafeld declares:

An essential understanding that governs all diplomatic intercourse, and that constitutes an essential element in all successful diplomatic exchanges, is that confidentiality will be observed. Mutual trust in this realm is vital for the development of cordial and productive diplomatic relations. Unwillingness or inability to maintain confidentiality in diplomatic exchanges would inevitably chill our relations with other countries and lead to diminished access to sources of information important to the successful formulation and implementation of U.S. foreign policy, and thereby would damage the national security.

Information that the U.S. Government obtained in confidence from foreign government officials is withheld from documents described in this declaration. The ability to obtain information from foreign governments is essential to the formulation and successful implementation of U.S. foreign policy. Disclosure of foreign government information provided in confidence, either voluntarily by the Department or by order of a court, would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such interchanges. Governments would become less willing in the future to furnish information important to the conduct of U.S. foreign relations, and in general less disposed to cooperate with the United States in the achievement of foreign policy objectives of common interest.

(Grafeld Decl. ¶¶ 67-68 (citations omitted).)

On September 17, 2010, Ms. Grafeld declared:

Information that the U.S. Government obtained in confidence from foreign government officials is withheld from one document described in this declaration. Diplomatic exchanges are premised upon, and depend upon an expectation that confidentiality will be observed. Mutual trust between governments in this realm is vital to U.S. foreign relations. The inability of the United States to maintain confidentiality in its diplomatic exchanges would inevitably chill relations with other countries. It would damage the national security by diminishing our access to vital sources of information.

The ability to obtain information from foreign governments is essential to the formulation and successful implementation of U.S. foreign policy. Disclosure of foreign government information provided in confidence, either voluntarily by the

Department or by order of a court, would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such exchanges. Governments would become less willing in the future to furnish information important to the conduct of U.S. foreign relations, and in general less disposed to cooperate with the United States in the achievement of foreign policy objectives of common interest.

Declaration of Margaret Grafeld ¶¶ 33-34 [hereinafter *Darui Grafeld Decl.*], *Darui v. Dep't of State*, No. 09-2093, 2011 U.S. Dist. LEXIS 73848 (D.D.C. July 11, 2011) (emphasis added for language that duplicates this case).

On June 8, 2009, Celeste Houser-Jackson¹⁴ declared:

An essential understanding that governs all diplomatic intercourse, and that constitutes an essential element in all successful diplomatic exchanges, is that confidentiality will be observed. Mutual trust in this realm is vital for the development of [cordial and] productive diplomatic relations. Unwillingness or inability to maintain confidentiality in diplomatic exchanges would inevitably chill our relations with other countries and lead to diminished access to sources of information important to the successful formulation and implementation of U.S. foreign policy, and thereby would damage the national security.

[Information that the U.S. Government obtained in confidence from foreign government officials is withheld from documents described in this declaration.] The ability to obtain information from foreign governments is essential to the formulation and successful implementation of U.S. foreign policy. Disclosure of foreign government information provided in confidence, either voluntarily by the Department or by order of a court, would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such interchanges. Governments would become less willing in the future to furnish information important to the conduct of U.S. foreign relations, and in general less disposed to cooperate with the United States in the achievement of foreign policy objectives of common interest.

Houser-Jackson Decl. at 27-28 (alterations represent the 22 words that are present in this case but absent from the Houser-Jackson Declaration).

¹⁴ Ms. Houser-Jackson was the Acting Director of the Office of Information Programs and Services during Ms. Grafeld's absence. Declaration of Celeste Houser-Jackson ¶ 1, *Gov't Accountability Proj. v. Dep't of State*, 699 F. Supp. 2d 97 (D.D.C. 2010).

On March 13, 2009, Ms. Grafeld declared:

An essential understanding that governs all diplomatic intercourse, and that constitutes an essential element in all successful diplomatic exchanges, is that confidentiality will be observed. Mutual trust in this realm is vital for the development of *cordial and* productive diplomatic relations. Unwillingness or inability to maintain confidentiality in diplomatic exchanges would inevitably chill our relations with other countries and lead to diminished access to sources of information important to the successful formulation and implementation of U.S. foreign policy, and thereby would damage the national security.

The ability to obtain information from foreign governments is essential to the formulation and successful implementation of U.S. foreign policy. Disclosure of foreign government information provided in confidence, either voluntarily by the Department or by order of a court, would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such interchanges. Governments would become less willing in the future to furnish information important to the conduct of U.S. foreign relations, and in general less disposed to cooperate with the United States in the achievement of foreign policy objectives of common interest.

ACCG Grafeld Decl. at 28-29 (emphasis added to show the two words that differentiate this declaration from the Houser-Jackson Declaration). As far back as 2007, Ms. Grafeld submitted a declaration containing virtually identical language as the *ACCG Grafeld Declaration*, only substituting “The ability to obtain information from foreign governments . . .” with “Such information . . .” and adding one sentence to the beginning of the second paragraph: “Information that the U.S. Government obtained in confidence from foreign government officials is withheld from 17 documents described in this declaration.” Declaration of Margaret Grafeld ¶¶ 18-19 [hereinafter *Miller Grafeld Decl.*], *Miller v. DOJ*, 562 F. Supp. 2d 82 (D.D.C. 2008).

While Plaintiff concedes that there is a role for “boilerplate” language in declarations, it is only useful when followed by specifics. For instance, in *Ancient Coin Collectors Guild*, Ms. Grafeld immediately followed the above quoted language with the sufficiently specific sentence, “The risk of harm to U.S. foreign relations is particularly clear where, as here, each of the foreign

governments that provided information has expressly reached a joint agreement with the United States whereby information confidentially exchanged with it relating to import restrictions under the Convention cannot be publicly released, and [the withheld documents] contain such confidential information.” *ACCG Grafeld Decl.* at 29-30 (then describing an “express mutual understanding regarding information exchanged in confidence” and discussing how State consulted with a foreign government regarding release of the material). By doing so, Ms. Grafeld sufficiently alleged the existence of an express grant of confidentiality.

However, *Ancient Coin Collectors Guild* has proven the exception in that regard. In *Government Accountability Project*, the Houser-Jackson Declaration offered the conditional statement, “Given the sensitive and often charged politics of the Middle East, the nature and extent of cooperation with the U.S. is *frequently* a subject that foreign governments want and expect to be treated confidentially.” Houser-Jackson Decl. ¶ 29 (emphasis added) (then summarily stating without factual support that each piece of information withheld under § 1.4(b) was obtained “in confidence [from foreign government officials] [during] the conduct of U.S. foreign relations” (*id.* ¶¶ 42, 57, 59, 60, 77, 79, 85, 97, 119)). In *Darui*, Ms. Grafeld did not even provide that much information, limiting her argument to, “In view of the close relationship between the United States and Saudi Arabia, protecting foreign government information is particularly important to our relationship and conduct of foreign relations,” accompanied by an unsupported statement that the document in question expresses the “confidential views” of the Kingdom of Saudi Arabia. *Darui Grafeld Decl.* ¶ 34.

However, the Grafeld Declarations in *Miller* and this case manage to provide even *less* particularized information than even *Darui*. In *Miller*, Grafeld provides *no* particularized analysis after the “boilerplate” language, and the only evidence she offers to demonstrate that the

specific information withheld was “confidential” (as required by § 1.4(b)) consists of tautological implications that it *is* confidential. *See Miller Grafeld Decl.* ¶¶ 69 (“These conversations were held with a clear expectation of privacy”), 81 (“[Telegrams] include information provided by St. Kitts officials and indicate involvement at important levels of the island’s government.”), 93 (“The information withheld contains frank commentary on the Kittian justice system, including . . . information obtained from foreign governments.”), 107 (“The withheld material in . . . these documents . . . discusses U.S. government options, in cooperation with top officials of the government of St. Kitts”).

In none of these remaining declarations (nor in this case) did State make any mention of express grants of confidentiality or, in fact, of any factual reasons that the Court should find the existence of an implied grant. State’s entire argument appears based on the questionable philosophy that *all* exchanges of information between foreign government officials and the United States come with implied grants of confidentiality. All of these declarations even call that an “essential understanding.” (*See, e.g., Grafeld Decl.* ¶ 67.) If the Court adopts this position, then it would effectively remove most if not all of State’s records from the reach of FOIA, since by definition almost everything State does involves the exchange of information with foreign governments. Such a decision would leave FOIA requesters at the mercy of the whims of State FOIA analysts, who could decide that any piece of information they do not want to release is classified because it contains “foreign government information.” Instead, this Court is encouraged to follow the more practical lead of the 9th Circuit (*vis-à-vis Wiener*, which has already been adopted for one point of law in the D.C. Circuit) and the District of Connecticut, which held:

[T]he Grafeld declaration asserts that document E7 ‘was obtained in confidence from a foreign government[]’ Thus, it merely restates the standards promulgated in E.O. 13,292. The declaration goes on to note that ‘release of this information would hinder the ability to obtain such information in the future and damage relations with the government concerned.’ Such a statement is conclusory. It does not provide sufficiently detailed and specific information as to why the information would hinder the ability to obtain such information in the future or why such secrecy is allowed by the terms of the executive order.

El-Badrawi v. DHS, 583 F. Supp. 2d 285, 314 (D. Conn. 2008).

For the foregoing reasons, the Court should find that the following conclusory statements of confidentiality do not sufficiently allege an express or implied grant of confidentiality, thereby rendering § 1.4(b) inapplicable:¹⁵

- L2 – “[I]ncludes information received from a foreign government official.”
(Grafeld Decl. ¶ 75.)
- L3 – “[A] draft shared with the U.S. advisers in the Embassy with the expectation of confidentiality.” (*Id.* ¶ 77.)
- N4A, N4B – “[A]n internal Government of Iraq document shared in confidence with U.S. officials.” (*Id.* ¶ 88.)
- N13 – “[C]ontains information obtained from a senior foreign official provided with the expectation of confidentiality.”¹⁶ (*Id.* ¶ 98.)

¹⁵ Of particular concern are four of the five documents (N13, NE2, NE4, and NE10) identified above which were originally unclassified, but are now alleged to be covered by § 1.4(b) because of express or implied grants of confidentiality. One would presume that if the information was provided with such an obvious expectation of confidentiality, as State now claims, it would have been properly classified in the first place.

¹⁶ See Note 15 *supra*.

- A32 – “[A] report on sensitive internal events about which U.S. officials were given, in confidence, privileged insight and information with the expectation of confidence.”¹⁷ (*Id.* ¶ 109.)
- S3C – “[R]eports a confidential e-mail conversation between a senior Department of State official visiting Baghdad and an Iraqi official, who was speaking with the expectation of confidentiality.”¹⁸ (*Id.* ¶ 111.)
- S3E – “[C]ontains information and commentary derived from confidential sources from within the Government of Iraq.” (*Id.* ¶ 113.)
- S3F – “[R]eports on and analyzes information provided to the U.S. Embassy in confidence by Iraqi interlocutors.” (*Id.* ¶ 115.)
- S3G – “The discussion . . . took place with the expectation on both sides that confidentiality would be maintained.” (*Id.* ¶ 117.)
- S3K – “[D]rawing on and quoting from information obtained from Iraqi official and other sources with the expectation of confidentiality.” (*Id.* ¶ 119.)
- NE2 – “[C]ontains reporting of information . . . that was exchanged in confidence between the Embassy and government of Iraq officials.”¹⁹ (*Id.* ¶ 121.)
- NE4 – “[C]ontains . . . information from the Iraqi side provided with the expectation of confidentiality.”²⁰ (*Id.* ¶ 123.)

¹⁷ For some reason this document warranted redundant conclusory statements regarding confidentiality, yet still lacked any specifics.

¹⁸ See Note 17 *supra*.

¹⁹ See Note 15 *supra*.

²⁰ See Note 15 *supra*.

- NE9 – “[I]nformation on the inner workings of the Iraqi government was provided with the expectation of confidentiality.” (*Id.* ¶ 127.)
- NE10 – “[I]nformation was provided with the expectation of confidentiality.”²¹ (*Id.* ¶ 129.)
- E5 – “[R]eports and comments on information received from foreign government officials.” (*Id.* ¶ 139.)
- E6 – no mention of confidentiality (*Id.* ¶ 141.)
- E10 – “The Iraqi official expected that his comments would remain confidential.” (*Id.* ¶ 147.)
- E13 – “The former Prime Minister assumed that these discussions were confidential.”²²
- E14 – “[P]articipants released sensitive information regarding the various personalities within the government and anticipated that their discussions would remain confidential.”²³ (*Id.* ¶ 155.)
- E15 – “The participants assumed that their discussions were confidential.” (*Id.* ¶ 157.)

²¹ See Note 15 *supra*.

²² Plaintiff is unaware of any case law which allows classification under § 1.4(b) of information obtained from *former* foreign government officials. If, however, State provides evidence that this individual returned to public office in Iraq, Plaintiff withdraws this objection, although maintains his challenge to the express or implied grant of confidentiality.

²³ Plaintiff is similarly unaware of any case law which allows classification under § 1.4(b) of information shared in a single meeting among multiple foreign government officials, each with their own agendas. In the context of the “confidentiality” prong of the Exemption (b)(5) attorney-client privilege, information is generally not “confidential” if it has been shared with third parties. *Cf. Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 863 (D.C. Cir. 1980).

- E16 – “Such high-level discussions would only have taken place with the assurance of confidentiality from all participants.”²⁴ (*Id.* ¶ 159.)
- E17 – no mention of confidentiality (*Id.* ¶ 161.)
- E18 – no mention of confidentiality (*Id.* ¶ 163.)
- A1 – “The conversation in which Embassy officers and other Iraqi officials also participated took place with the expectation of confidentiality.”²⁵ (*Id.* ¶ 167.)
- A3 – “[D]rawing on a wide array of Iraqi government sources.” (*Id.* ¶ 129.)
- N2 – no mention of confidentiality (*Id.* ¶ 175.)
- E3* – “The meeting took place with the expectation of confidentiality.” (*Id.* ¶ 177.)
- E4* – no mention of confidentiality (*Id.* ¶ 179.)
- E5* – “[D]raws on information provided in confidence by foreign government officials and other sources.” (*Id.* ¶ 181.)
- E7 – “This discussion included frank comments by both the U.S. Ambassador and Iraqi Prime Minister, which were made and then reported in confidence.” (*Id.* ¶ 185.)
- E11* – “[The meeting] was frank and confidential in nature.” (*Id.* ¶ 189.)
- E12* – “The discussions took place in a confidential atmosphere.” (*Id.* ¶ 191.)

²⁴ This statement exemplifies the conclusory nature of the Grafeld Declaration, but also raises an additional issue. Ms. Grafeld oversees the Office of Information Programs and Services, and has “served with the Department’s Information Access Program for most of [her 37-year] tenure with the Department.” (Grafeld Decl. ¶ 1.) It is unclear why State offers her testimony as an expert on what would and would not be expected in high-level negotiations. For a broad statement such as this, State must provide an affidavit from someone with diplomatic expertise.

²⁵ See Note 23 *supra*.

- E13* – no mention of confidentiality²⁶ (*Id.* ¶ 193.)
- E15* – “[R]eports confidential discussions between U.S. advisers and Government of Iraq officials [T]hese officials expected the conversations to remain confidential.” (*Id.* ¶ 197.)
- E16* – “This frank discussion took place with the expectation of confidentiality.” (*Id.* ¶ 199.)

3. State has not convincingly demonstrated that all of the material allegedly protected under § 1.4(d) is properly classified.

Because of the vague and sweeping statements that purport to justify the invocation of § 1.4(d), often with even less specificity than the § 1.4(b) language, Plaintiff cannot effectively contest the vast majority of these withholdings. State relies on the “substantial weight” that is to be afforded its declaration. “However, deference is not equivalent to acquiescence; the declaration may justify summary judgment only if it is sufficient ‘to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.’” *Campbell*, 164 F.3d at 31, quoting *King*, 830 F.2d at 218. State has not met this burden, and summary judgment should not be awarded until it does.

To the extent that State relies on an allegation of “confidential sources” for its invocation of § 1.4(d), these claims should be treated the same as the § 1.4(b) invocations discussed above.

Plaintiff is fully challenging State’s withholdings under § 1.4(d) in the following 34 documents: L2, L3, N4A, N4B, N13, A32, S3C, S3E, S3F, S3G, S3K, NE2, NE4, NE9, NE10, E5, E6, E10, E13, E14, E15, E16, E17, E18, A3, N1, N2, E3*, E5*, E7, E11*, E12*, E15*, and E16*. To clarify any potential misunderstandings, Plaintiff is *not* challenging the invocation of §

²⁶ See Note 22 *supra*.

1.4(d) in Document A1, even though he is challenging the invocation of § 1.4(b). Similarly, Plaintiff draws the Court's attention to the fact that he is challenging the invocation of § 1.4(d) in Document N1, for which § 1.4(b) was not claimed (it is the only challenged (b)(1) withholding that does not cite § 1.4(b)).

With respect to Documents E4* and E13*, Plaintiff concedes that the material pertains to foreign relations, but maintains that by describing the records as she did in her declaration, Ms. Grafeld has officially released part of the information currently being withheld, which begs a segregability analysis. *See Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). With respect to Document E4*, State has now released the following pieces of information:

- The U.S. Ambassador took a trip on or shortly before February 27, 2007, to meet with the Kurdistan Regional Government. (Grafeld Decl. ¶¶ 178-79.)
- They discussed the text of the cover letter to the hydrocarbon framework law. (*Id.* ¶ 179.)
- He subsequently (but still on or before February 27, 2007) discussed the issue with the two Iraqi Presidents. (*Id.* ¶¶ 178-79.)
- The U.S. Ambassador was involved in the drafting of this cover letter. (*Id.* ¶ 179.)
- There was an agreed upon cover letter. (*Id.*)

Plaintiff concedes that such information as the exact modifications that the Ambassador made, what options were negotiated, how they were negotiated, and the like are properly exempt from disclosure. However, State must segregate the information which only relays the information already publicly released described above, as well as the final agreed upon cover letter, which would not show the exact degree to which he influenced the text.

Similarly, information should be segregated and released from Document E13* which solely relays the fact of the discussion, the fact that the Ambassador asked for the Prime Minister's assistance on "de-Ba'athification" and passage of a hydrocarbon law, and matters of similarly acknowledged scope. (*See id.* ¶ 193.)

For the foregoing reasons, State should be ordered to provide a more sufficient *Vaughn* index regarding the Exemption (b)(1) withholdings still at issue, to provide these documents to the Court for *in camera* review, or to release these records to Plaintiff.

B. Exemption (b)(5)

State has invoked Exemption (b)(5) to withhold certain material under the deliberative process privilege and the attorney-client privilege. Plaintiff is challenging State's invocation of the deliberative process privilege in ten documents (Documents L2, L10, N3, N4, N5, N13, S3E, NE9, NE11A, and NE11B). Plaintiff is challenging State's invocation of the attorney-client privilege in Document L10.

1. State has not convincingly demonstrated that all of the material allegedly protected by the deliberative process privilege is both pre-decisional and deliberative.

The basics of Exemption (b)(5) and the deliberative process privilege are well-known to this Court and do not warrant extensive recitation. Simply put, "[t]o come within the privilege, . . . a document must be both 'pre-decisional' and 'deliberative.' A document is pre-decisional if it was generated before agency policy was adopted and deliberative if it 'reflects the give and take of the consultative process.'" *Judicial Watch v. Dep't of the Treasury*, 2011 U.S. Dist. LEXIS 74121, at *21, quoting *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). The "give and take" must regard "opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). "The agency has the burden of establishing what

deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Coastal States*, 617 F.2d at 868, citing *Vaughn*, 523 F.2d at 1144. “Because the applicability of the deliberative process privilege is dependent on the content of each document and the role it plays in the decisionmaking process, an agency’s affidavit describing the withheld documents must be specific enough so that the elements of the privilege can be identified.” *Judicial Watch, Inc. v. U.S. Post. Serv.*, 297 F. Supp. 2d 252, 257 (D.D.C. 2004) (citations omitted).

The deliberative process privilege can be defeated by many factors. For example, purely factual information is not covered by this privilege unless “the material is so inextricably intertwined with the deliberate sections of documents that its disclosure would inevitably reveal the government’s deliberations.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). If agency officials merely compiled information without exercising any significant level of judgment regarding which facts to include, the privilege does not apply. *See Petroleum Info. Corp. v. Dep’t of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992).

If the information is “adopted formally or informally, as the agency position on an issue, [or] used by the agency in its dealings with the public,” the privilege does not apply, “for both actions involve the exposure of the withheld documents to third parties.” *Judicial Watch v. U.S. Post. Serv.*, 297 F. Supp. 2d at 261, citing *Mead Data Cent.*, 566 F.2d at 257-58; *see also Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982) (requiring disclosure of pre-decisional documents “used by the agency in its dealings with the public”); *Nat’l Res. Def. Council v. DOD*, 388 F. Supp. 2d 1086, 1104 (C.D. Ca. 2005) (“Because DoD fails to provide the names or organizational affiliations of the document’s author, recipient, or copyees on its *Vaughn* list, it is entirely speculative whether any of these ‘predecisional’ documents were

disclosed to third parties.”). Records that recommend that no agency action be taken, when coupled with no evidence of agency action, are considered to have been “adopted formally or informally as the agency position.” *ACLU v. DHS*, 738 F. Supp. 2d 93, 112-13 (D.D.C. 2010).

Lastly, the ultimate question with respect to an invocation of the deliberative process privilege is whether “the document is so candid or personal in nature that public discourse is likely in the future to be stifled honest communication within the agency.” *Wilderness Soc’y v. Dep’t of the Interior*, 344 F. Supp. 2d 1, 15 (D.D.C. 2004), quoting *Coastal States*, 617 F.2d at 866. Because of this, whether or not the author will be exposed is a significant factor. Judge Walton summed up the issue quite succinctly:

However, in cases where there is no identifying information that would link an individual to a document, this potential is unlikely. The defendants bear the burden of demonstrating, with respect to this record, that their non-disclosure was appropriate under Exemption 5. The defendants have not met this burden because neither their declarations nor their description in the *Vaughn* index state specifically why the wholesale redaction of this document is warranted, given that the identity of the author is unknown and any information that might make it possible to identify the author could be redacted. Without a more detailed description upon which the Court can rely, it can only conclude that the factual information can be selectively redacted in a manner that protects the confidentiality of the author.

ACLU v. DHS, 738 F. Supp. 2d at 110-11.

For one or more of the following reasons, State fails to justify its withholding of the material in the ten challenged records under the deliberative process privilege. As with Exemption (b)(1) above, each assertion is limited to general conclusory statements followed by talismanic incantations of the words “deliberative,” “pre-decisional,” and “chilling effect.”

- L2 – The Grafeld Declaration fails to identify the deliberative process in question or the role played by the withheld information. It also fails to mention if the emails consisted of opinions on legal or policy matters. It also fails to mention if

the withheld information was shared with third parties or was formally or informally adopted as agency policy. Lastly, it fails to mention any segregable factual material. (Grafeld Decl. ¶ 75.)

- L10 – The Grafeld Declaration simply states that this email contains discussions of “various aspects, *including legal aspects*, of U.S.-Iraq negotiations.” It then fails to address any of the issues discussed above. (*Id.* ¶ 83.)
- N3, N4 – The Grafeld Declaration fails to address any of the issues discussed above. (*Id.* ¶ 86.) Furthermore, the Iraqi government, a clear third party, was party to the email chain, thereby waiving the privilege. (*Id.* ¶ 84.)
- N5 – The Grafeld Declaration does not even identify the agencies, let alone the deliberative process. The only information provided to support this claim is the sentence “This e-mail exchange contains deliberative and pre-decisional comments.” (*Id.* ¶ 90.)
- N13 – This claim appears to rest on the idea that the draft is inherently protected because it is a draft. It does not purport to pertain to legal or policy matters, it does not purport to claim that the information was not formally or informally adopted as agency policy, and it does not purport to say that the authors’ identities cannot be protected. All it says is that the material “is pre-decisional and deliberative regarding the content of and proposed revisions to the draft.” (*Id.* ¶ 98.)
- S3E – This telegram discusses possible options and recommendations for U.S. policy. It does not, however, state whether or not any of those options or

recommendations were adopted formally or informally as agency policy. (*Id.* ¶ 113.)

- NE9 – This exchange discusses recommendations for dealing with the oil negotiations. It does not, however, state whether or not any of those recommendations were adopted formally or informally as agency policy. (*Id.* ¶ 113.)
- NE11A, NE11B – These documents are “information paper[s] comparing two versions of the proposed hydrocarbon law.” They summarize changes made *by the government of Iraq to its own hydrocarbon law*. They do not purport to analyze the changes or comment on them; they *summarize* them for *informational* purposes. (*Id.* ¶¶ 130-33.) These records are neither pre-decisional nor deliberative.

2. State has not convincingly demonstrated that the material in Document L10 is protected by the attorney-client privilege.

To satisfy its burden in an invocation of the attorney-client privilege, State “must show that the withheld document (1) involves confidential communications between an attorney and his client and (2) relates to a legal matter for which the client has sought professional advice.” *Wilderness Soc’y*, 344 F. Supp. 2d at 16 (citations omitted). The privilege does not simply require that the communication be between an agency and its lawyers. *Coastal States*, 617 F.2d at 862-63. “The burden is on the agency to demonstrate that confidentiality was expected in the handling of these communications, and that it was reasonably careful to keep this confidential information protected from disclosure.” *Id.* at 863.

With respect to Document L10, the Grafeld Declaration only includes two lines pertinent to the attorney-client privilege. First, it states that the emails “contain discussion of various aspects, including legal aspects, of U.S.-Iraq negotiations.” (Grafeld Decl. ¶ 83.) Then it states, “Two of the three e-mails in the exchange also contain attorney client privileged information.” (*Id.*). That is the extent of the discussion.

As an effective response to this statement, Plaintiff will simply quote without comment from Judge Kennedy’s opinion in *Judicial Watch v. U.S. Postal Service*, substituting the word “State” for the acronym “USPS.” No further argument will be necessary.

[State] does little more than identify these documents as attorney-client communications without establishing that they involve the provision of legal advice. [State] fails to show that these documents involved the provision of specifically *legal* advice or that they were intended to be confidential. These documents might well contain legal advice and confidential information, but [State] does not say so. As a result, the court cannot grant summary judgment in favor of either party with regard to these pages.

297 F. Supp. 2d at 267 (citations omitted) (emphasis in original).

For the foregoing reasons, the Court should order State to release the ten documents at issue to Plaintiff.

C. Segregability

“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). “This rule of segregation applies to all FOIA exemptions.” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007). “Before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld.” *Id.*

To meet its burden, State must provide a “statement of its reasons” for not segregating and “describe what proportion of the information is non-exempt and how that material is dispersed throughout the document.” *Mead Data Cent.*, 566 F.2d at 261. “Conclusory language in agency declarations that does not provide a specific basis for segregability findings by a district court may be found inadequate.” *Judicial Watch v. Dep’t of the Treasury*, 2011 U.S. Dist. 74121, at *34, citing *Animal Legal Def. Fund, Inc. v Dep’t of the Air Force*, 44 F. Supp. 2d 295, 301 (D.D.C. 1999).

State’s only concession to the segregability requirement is a single “boilerplate” statement at the end of each entry in the *Vaughn* index: “There is no non-exempt information that may be segregated and released.”²⁷ (See Grafeld Decl. ¶¶ 74-205.) Not surprisingly, State has already been criticized by one court for just this practice, *nineteen years ago*:

All of Marchak’s insufficient indexes fail to discuss segregability. Document 266 is a classic example. The index describes information contained in the document and particularizes the anticipated harm from release of the document. It then appends a boilerplate statement found at the end of *every single Marchak index*, which merely asserts that “no segregation of non-exempt, meaningful information can be made for disclosure.” This is entirely insufficient.

Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of State, 818 F. Supp 1291, 1300 (N.D. Ca. 1992).

Based on Ms. Grafeld’s statement that she has been working in Information Programs and Services for most of her career since 1974, it is not difficult to imagine her helping to write the declarations that Judge Henderson found so objectionable. It is a testament to both her personal dedication and State’s institutional perseverance that this practice has not changed noticeably in

²⁷ The only deviations from this language are in the form of two typographical errors (“maybe” replaces “may be” in ¶¶ 83 and 86) and the inexplicable absence of any segregability language from ¶ 145.

the last two decades. *See, e.g., Miller Grafeld Decl.; ACCG Grafeld Decl.; Houser-Jackson Decl.; Darui Grafeld Decl.* Nevertheless, in the face of such conclusory statements, “the Court must therefore conclude that defendants have not demonstrated that the factual information in the documents is not reasonably subject to segregation . . . [and] order [State] . . . to release the challenged documents or submit an amended *Vaughn* index concerning them.” *Wilderness Soc’y*, 344 F. Supp. 2d at 19.

CONCLUSION

For the foregoing reasons, State’s Motion for Summary Judgment should be denied. Limited discovery should be allowed into the nature and extent of State’s patterns or practices regarding the denials of Plaintiff’s requests for public interest fee waivers and expedited processing, and into State’s recordkeeping practices regarding copied emails. State should be ordered to identify the recordkeeping system to which Dr. O’Sullivan’s emails were transferred before her email account was closed and purged and perform a search of said system. State should also be ordered to either provide a more sufficient *Vaughn* index, to provide the records still at issue to the Court for *in camera* review, or to release the records still at issue to Plaintiff.

Date: August 2, 2011

Respectfully submitted,

/s/ Kelly B. McClanahan
Kelly B. McClanahan, Esq.
D.C. Bar #984704
National Security Counselors
1200 South Courthouse Road, Suite 124
Arlington, VA 22204
301-728-5908
240-681-2189 fax
Kel@NationalSecurityLaw.org

Counsel for Plaintiff

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GREG MUTTITT,

*

*

Plaintiff,

*

*

v.

*

*

Civil Action No. 1:10-cv-00202 (BAH)

UNITED STATES CENTRAL
COMMAND, *et al.*,

*

*

*

Defendants.

*

*

* * * * *

DECLARATION OF KEL MCCLANAHAN

I, KEL MCCLANAHAN, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge and in support of Plaintiff's Opposition to Defendant United States Department of State's Motion for Summary Judgment (filed June 24, 2011).

2. I serve as Plaintiff's counsel in the above captioned case. I received my Juris Doctor degree from the American University Washington College of Law in 2007 and have been a practicing member of the Bar of the District of Columbia since 2008.

3. Plaintiff has submitted nine FOIA requests to State, including the five at issue in this case. The four remaining requests were submitted between March-October 2010.

4. Plaintiff has requested a public interest fee waiver for each FOIA request.

5. State has not granted any of Plaintiff's requests for public interest fee waivers.

6. Despite this, State has not charged Plaintiff any fees for his requests.

7. In 2009, Plaintiff obtained from a State FOIA analyst a copy of the standardized Fee Waiver Worksheet that was completed for Request No. 200905202. A true and accurate

copy, excluding a redaction of the analyst's name, has been attached to Plaintiff's brief as Ex. B. Plaintiff provided me with a copy when I began representing him.

8. At the time Plaintiff filed this suit, he and I knew of the improper fee waiver criteria evidenced in the Fee Waiver Worksheet.

9. Without further information regarding the provenance of the Fee Waiver Worksheet and whether it represents a pattern or practice of using impermissible fee waiver standards or a pattern or practice of affirming appeals without substantive review, Plaintiff cannot effectively challenge the underlying pattern or practice. To this end, Plaintiff seeks Rule 56(d) discovery.

10. I attempted to obtain copies of the completed Expeditious Processing Worksheets (a blank copy of which has been attached to Plaintiff's brief at Ex. C) from State's counsel, but State declined to provide them.

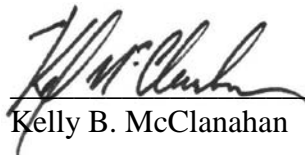
11. Without further information regarding the reasons for denying Plaintiff's requests for expedited processing, including copies of the standardized Expeditious Processing Worksheets, Plaintiff cannot effectively challenge the underlying pattern or practice. To this end, Plaintiff seeks Rule 56(d) discovery.

12. During the course of this litigation, I contacted State's counsel and informed her of Plaintiff's concerns regarding the Records Schedule A-03-020-14, which indicated that emails from Dr. O'Sullivan should have been copied elsewhere before the email account was purged. Through her, I asked State to perform a search of that backup recordkeeping system and include a discussion of it in the Grafeld Declaration.

13. Without further information regarding the scope of State's search and its recordkeeping system for copied emails, Plaintiff cannot effectively challenge the adequacy of State's search. To this end, Plaintiff seeks Rule 56(d) discovery.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: August 2, 2011



Kelly B. McClanahan

EXHIBIT B

FEE WAIVER WORKSHEET

Case No. 200905202
Date: July 1, 2009

Requester: Muttitt, Greg
Prepared by: [REDACTED]

INITIAL PROCESSING QUESTIONS

- 1. Is the Department likely to have responsive records? Yes No
- 2. Are the records or portions of the records likely to be released? Yes No
- 3. Are the assessed fees likely to be above the threshold amount of \$25.00? Yes No

FOIA FEE WAIVERS

(All six criteria must be addressed before the fees can be waived or reduced.)

A. Is disclosure of the information likely to contribute significantly to the public understanding of the operations and activities of the government?

- 1. **The Subject of the Request:** Does the subject matter of the requested records concern identifiable “**operations or activities of the government**”? Is there a strong link between furnishing the requested information and benefiting the general public?

Yes No

Comment: The Iraq Oil law is a law born to the Iraqi government, debated in the Iraqi legislature. The U.S. Federal Government role and activity are minimal at best and is acting only in the capacity of advisor when requested, guiding the Iraqis in this process. Requester has failed to clearly demonstrate how the release of information would benefit the general public.

- 2. **The Informative Value of the Information to be Disclosed:** Is the disclosure “likely to contribute” to an understanding of government operations or activities? Will disclosure of the requested information provide meaningful information in relation to the subject matter of the request? NOTE: Requests for information that is already in the public domain may not warrant a fee waiver because the disclosure would not likely contribute to an understanding of government operations or activities when nothing **new** would be added to the public’s understanding.

Comment: Yes No
A lot of information is already available on this subject. I am not sure that the release of additional records would shed more light on the subject, or bring a new dimension to it.

3. **The Contribution to the Understanding of the Subject by the Public Likely to Result from Disclosure:** Does disclosure of the requested information contribute to the understanding of the **public at large**, as opposed to the individual understanding of the requester of a narrow segment of interested persons?

Yes____ No X

Comment: I don't think that the **public at large** has a keen or burning desire to understand the Iraq's oil policies or inner debates concerning those policies when faced by more pressing domestic issues.

4. **The Significance of the Contribution to Public Understanding:** Is the contribution to the public understanding of government operations or activities **significant**? Upon disclosure, will the public's understanding of the subject matter be enhanced as compared to the level of the public's understanding prior to the disclosure?

Yes____ No_X____

Comment: Most likely not.

- B. Is the disclosure of the information primarily in the commercial interest of the requester?

5. **The Existence and Magnitude of a Commercial Interest:** Does the requester have a commercial interest that would be furthered by the requested disclosure? A "commercial interest" is one that furthers a commercial, trade, or profit interest (as those terms are commonly understood).

Yes____ No_X__

Comment: Although the information will be used in the publication of a book, I don't believe that the requester intends to use any information disclosed for personal profit interest.

6. The Primary Interest in Disclosure: How will the requested material be used? The Primary interest of the disclosure to:

- (a) Further the trade or profit interests of the requester?

(a) Yes____ No X Unclear

- (b) Disclose information to the public?

Yes X No__ Unclear__

Comment:

Is a fee waiver warranted? Yes _____ No **X**

Is a partial fee waiver warranted? Do some of the records to be released satisfy the requirements for a waiver of reduction of fees?

Yes _____ No _____

Concurrence Regarding Fee Waiver Recommendation:

RC Team Leader: _____ Agree _____ Disagree _____ Date _____

RC Branch Chief: _____ Agree _____ Disagree _____ Date _____

If waiver granted, Branch Chief approval required.

Approval: _____

Date: _____

If waiver is granted or denied on appeal, Division Chief approval required.

Approval: _____

Denial: _____

Date: _____

EXHIBIT C

RELEASED IN FULL

UNCLASSIFIED

IS

REQUEST FOR EXPEDITIOUS PROCESSING WORKSHEET

Case No. _____ Requester: _____

Date: _____ Prepared by: _____

Expedited Processing must be granted to a FOIA requester if the requester demonstrates a compelling need for the information requested. A requester demonstrates a compelling need by submitting a written statement, certified to be true and correct to the best of the requester's knowledge, explaining as specifically as possible why the requester needs the information requested immediately.

1. Has the requester provided enough information to make a determination on the expedited processing?

a. Does the statement explain as specifically as possible why the requester needs the information immediately?

Yes _____ No _____ (if no, ask for more information)

2. Has a "compelling need" been shown by the requester in one of the following ways:

a. Will failure to obtain the records on a expedited basis reasonably be expected to pose an imminent threat to the life or physical safety of an individual?

Yes _____ No _____

Please Explain _____

b. Is the information urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity?

I. Is the requester primarily engaged in disseminating information to the public and is the requester's primary activity to disseminate information to the public?

Yes _____ No _____

Please explain: _____

If requester is a member of the "news media," please specify what news media: _____

UNCLASSIFIED

UNCLASSIFIED

II. Does the request involve **actual or alleged Federal Government activity**? **Actual or alleged Federal Government activity** means that the information concerns some action taken, contemplated, or alleged to be taken by the Government of the United States (namely, the Executive, the Legislative, or the Judiciary) or one of its components or agencies).

Yes _____ No _____

Please explain: _____

III. Is the information **urgently needed** by the requester? **Urgently needed** means that the information has a particular value that will be lost if it is not disseminated quickly. A breaking news story of the general public interest about actual or alleged Federal government activity usually will be **urgently needed** by a requester primarily engaged in disseminating information to the public and will therefore qualify. However, information is **not urgently needed** simply because the requester has an upcoming publication or broadcast deadline to meet that is unrelated to the news-breaking nature of the information. Finally, information sought for the commercial or litigation purposes or information of only historical interest is **usually not urgently needed** within this definition.

Yes _____ No _____

Please explain: _____

b. Will failure to obtain the records on an expedited basis reasonably be expected to impair **substantial due process rights** to the requester? (An example of a **substantial impairment** of due process rights is a situation where a defendant in a criminal case will be denied a fair trial if he or she does not obtain the information requested immediately.)

Yes _____ No _____

Please explain: _____

c. Will failure to obtain the records on an expedited basis reasonably be expected to harm substantial humanitarian concerns?

Yes _____ No _____

Please explain: _____

UNCLASSIFIED

UNCLASSIFIED

Recommendation:

I recommend granting _____ denying _____ expedition.

RC/IP Officer: _____ (initials) Date: _____

Concurrence Regarding Expedition Recommendation:

RC Team Leader: _____ Agree _____ Disagree _____ Date _____

RC Branch Chief: _____ Agree _____ Disagree _____ Date _____

RL Division Chief: _____ Agree _____ Disagree _____ Date _____

L/M: JBFreeman Agree _____ Disagree _____ Date _____

UNCLASSIFIED

EXHIBIT D

U.S. Department of State Records Schedule

Chapter 03: Records Common to Most Organizational Areas

A-03-020-14 Electronic Mail Records

Description: Senders' and recipients' versions of electronic mail messages that meet the definition of Federal records, and any attachments to the record messages after they have been copied to an electronic recordkeeping system, paper, or microform for recordkeeping purposes.

[NOTE: Along with the message text, the recordkeeping system must capture the names of sender and recipients and date (transmission data for recordkeeping purposes) and any receipt data when required.]

Disposition: Delete from the e-mail system after copying to a recordkeeping system.

DispAuthNo: GRS 20, item 14

Date Edited: 9/1/2009

A-03-020-15a Electronic Spreadsheets

Description: Electronic spreadsheets generated to support administrative functions or generated by an individual as background materials or feeder reports.

a. When used to produce hard copy that is maintained in organized files.

Disposition: Delete when no longer needed to update or produce hard copy.

DispAuthNo: GRS 20, item 15a

Date Edited: 9/1/2009

A-03-020-15b Electronic Spreadsheets

Description: Electronic spreadsheets generated to support administrative functions or generated by an individual as background materials or feeder reports.

b. When maintained only in electronic form.

Disposition: Delete after the expiration of the retention period authorized for the hard copy by the GRS or a NARA-approved SF 115. If the electronic version replaces hard copy records with differing retention periods and agency software does not readily permit selective deletion, delete after the longest retention period has expired.

DispAuthNo: GRS 20, item 15b

Date Edited: 9/1/2009
