

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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RICHARD TARZIA,

Plaintiff,

v.

HILLARY CLINTON, Secretary, United States  
Department of State,

Defendant.  
-----X

No. 10-cv-5654 (FM)

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

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### **PRELIMINARY STATEMENT**

Defendant Hillary Clinton, Secretary of the United States Department of State (the “State Department” or the “Government”) respectfully submits this memorandum of law in support of her motion for summary judgment, dismissing the claims filed by Plaintiff Richard Tarzia (“Plaintiff”) under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As demonstrated by the accompanying declaration and exhibits attached thereto, the Government has sufficiently demonstrated its adherence to all obligations under FOIA.

As described in the declaration, the State Department had conducted a thorough search that was reasonably calculated to locate documents responsive to Plaintiff’s FOIA request. In that regard, the State Department located responsive documents, produced more than 250 pages of documents to Plaintiff, and withheld one page in full and eight pages in part. The State Department has also provided a detailed description of its justifications for the redactions and withholding pursuant to the applicable statutory FOIA exemptions.

Plaintiff now contests the adequacy of the agency’s search and its withholding of one document and redactions in a second document. Because the State Department has demonstrated that its searches were reasonable and that Plaintiff has received all information to which he is entitled, because the declaration submitted by the State Department in support of this motion is entitled to a presumption of good faith, and because Plaintiff will not be able to meet his countervailing burden of demonstrating bad faith on the part of the State Department, the Court should grant the Government’s summary judgment motion.

### **PROCEDURAL HISTORY**

By letter dated May 14, 2010, Plaintiff submitted a FOIA request to the Office of Information Programs and Services at the State Department (the “FOIA Request”). *See*

Declaration of Margaret P. Grafeld, dated August 25, 2011 (“Grafeld Decl.”), ¶ 4; *see also* May 14, 2010 Letter from Plaintiff to the State Department, attached to the Grafeld Decl. as Exhibit 1.

The FOIA Request provided:

Please search the records of the Bureau of Democracy, Human Rights and Labor files for all documents, research notes, papers, etc., regarding the research, investigation, preparation and publication of Part IV (and all of its subsections) entitled: CLAIMS BASED ON POPULATION POLICIES, of the May 2007, CHINA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS.

*Id.* Plaintiff further requested that the State Department “include the names and titles of the person or persons who is or was responsible and/or assisted in the research, investigation and publication” of the May 2007 Report. *Id.* Plaintiff provided a timeframe of January 1, 2004 through May 30, 2007 for this request. *See id.* Plaintiff submitted two additional, identical FOIA requests to the State Department on May 26, 2010 and June 1, 2010. *See* Grafeld Decl., Exhibit 2 and Exhibit 3, respectively. Plaintiff initiated this lawsuit on July 26, 2010. *See* Docket No. 1.<sup>1</sup>

By letter dated August 5, 2010, the State Department formally acknowledged receipt of Plaintiff’s request. *See* Grafeld Decl., Exhibit 4. Plaintiff was notified that the processing of his request had begun and that he would be informed as soon as responsive material was retrieved and reviewed. *See* Grafeld Decl. ¶ 6.

By letter dated December 17, 2010, the State Department informed Plaintiff that searches of files at the Bureau of Democracy, Human Rights and Labor (“DRL”) had been initiated and completed, and had resulted in the retrieval of thirteen documents responsive to the FOIA Request. *See* Grafeld Decl., Exhibit 7. Of these, one document was released in its entirety and

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<sup>1</sup> Following the filing of the complaint, the parties informed the Court that they were attempting to resolve this matter without the need for further judicial intervention, or at a minimum, to narrow the issues in dispute.

four documents were released with redactions, and one was withheld in full.<sup>2</sup> *See id.* The seven remaining documents required interagency coordination, and were transferred to the United States Citizen and Immigration Services (“USCIS”) for its direct reply to the Plaintiff. *See id.* Moreover, the State Department notified Plaintiff that it was also searching its Central Foreign Policy File for documents responsive to the FOIA Request.<sup>3</sup> *See id.*

On January 26, 2011, USCIS advised Plaintiff that it had reviewed the seven documents referred to it by the State Department and determined that the documents were responsive to the FOIA Request. *See* Declaration of Ellen Blain, dated August 25, 2011, Exhibit 1. USCIS released seven pages in their entirety and four pages in part. *See id.* Plaintiff is not challenging the redactions in the documents produced by USCIS.

By letter dated March 17, 2011, the State Department again informed Plaintiff that, although his FOIA Request had directed the Department to search only the files of DRL, the Department had also conducted a search of the Central Foreign Policy File. *See* Grafeld Decl., Exhibit 8. The State Department advised Plaintiff that such a search had been completed, and resulted in the retrieval of no additional responsive documents. *See id.* In addition, the State Department advised Plaintiff that five additional, publicly available, documents were responsive to his request, and provided Plaintiff with a copy of each of the five documents. *See id.* Finally, the State Department advised Plaintiff that it had completed processing his request. *See id.*

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<sup>2</sup> The State Department has labeled each document it produced to Plaintiff with the letter “D” and a number. Specifically, in the production on December 17, 2010, the document produced to Plaintiff in its entirety is labeled D4 and the documents produced to Plaintiff with redactions are labeled D5, D6, D7, D8 and D9. Plaintiff now challenges the withholding of D4 and the redactions in D7.

<sup>3</sup> The Central Foreign Policy File is the State Department’s “centralized records system and contains over 30 million documents of a substantive nature that establish, discuss, or define foreign policy, set precedents, or require action or use by more than one office.” Grafeld Decl. at ¶ 20; *see generally id.* (giving detailed description of the Central Foreign Policy File).

Plaintiff now challenges the adequacy of the State Department's search, as well as the withholding of document D4 and the redactions in document D7.

### ARGUMENT

In a FOIA action, summary judgment for the Government is warranted when the Government makes two showings. Specifically, “[i]n order to prevail on a motion for summary judgment, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA.” *Associated Press v. DOJ*, No. 06 Civ. 1758 (LAP), 2007 WL 737476, at \*3 (S.D.N.Y. Mar. 7, 2007), *aff'd* 549 F.3d 62 (2d Cir. 2008). As set forth below, the Court should grant the Government summary judgment in this case because the declaration submitted by the State Department demonstrates that its search for documents responsive to the FOIA Request was adequate and its withholdings were proper.<sup>4</sup>

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<sup>4</sup> In accordance with the general practice in this Circuit, the Government has not submitted a Local Civil Rule 56.1 statement in this FOIA action because Plaintiff is not proceeding *pro se*. See, e.g., *Ferguson v. FBI*, 89 Civ. 5071 (RPP), 1995 WL 329307, at \*2 (S.D.N.Y. June 1, 1995) (noting the “general rule in this Circuit” is that Local Civil Rule 56.1 statements not be submitted in FOIA cases), *aff'd*, 83 F.3d 41 (2d Cir. 1996); see also *NAACP Legal Def. & Educ. Fund, Inc. v. HUD*, 07 Civ. 3378 (GEL), 2007 WL 4233008, at \*1 n.1 (S.D.N.Y. Nov. 30, 2007) (granting Government's summary judgment motion as “properly made” without Rule 56.1 statement); cf. *Carlson v. DOJ*, 10 Civ. 5149 (PAC) (KNF), 2011 U.S. Dist. LEXIS 81738, at \*4-5 (S.D.N.Y. July 22, 2011) (requiring a Local Civil Rule 56.1 statement where plaintiff proceeded *pro se*). The rationale underlying this practice is that, in FOIA cases, “agency affidavits alone will support a grant of summary judgment.” *Ferguson*, 1995 WL 329307, at \*2. Accordingly, a Rule 56.1 statement here would be, in essence, a restatement of the material facts as set forth in the agency's declaration.

**I. THE STATE DEPARTMENT’S SEARCH FOR RESPONSIVE DOCUMENTS WAS ADEQUATE**

**A. An Agency Is Required To Conduct A Search Reasonably Calculated To Locate Responsive Documents**

For purposes of FOIA, an agency’s search for responsive records is adequate if it is reasonable. *See, e.g., Garcia v. DOJ, Office of Info. & Privacy*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002). In turn, a search is reasonable if it is “‘reasonably designed to identify and locate responsive documents.’” *See id.* at 368 (quoting *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 566 (S.D.N.Y. 1989)). Adequacy thus turns on “‘whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.’” *Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (quoting *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)); *see also Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (“[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was *adequate*.”) (emphases in original).

The Second Circuit has stressed that “an agency’s search need not be perfect.” *Grand Cent. P’ship*, 166 F.3d at 489; *see also Garcia*, 181 F. Supp. 2d at 368. In that regard, an “agency is not expected to take extraordinary measures to find the requested records.” *Garcia*, 181 F. Supp. 2d at 368; *see also Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999) (“[A]n agency need not conduct a search that plainly is unduly burdensome.”). Indeed, “FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.” *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000) (quoting *Assassination Archives & Research Ctr. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989)). Instead,

a reasonable search will include those systems of records reasonably believed likely to contain responsive documents. *See Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

**B. An Agency Can Meet Its Burden Through A Declaration, Which Is Entitled To A Presumption Of Good Faith**

“Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search . . . are sufficient to sustain the agency’s burden.” *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *see, e.g., Garcia*, 181 F. Supp. 2d at 366-67. Although the specificity required in an agency declaration “varies depending on the particular context,” *Halpern*, 181 F.3d at 297, agency declarations should be detailed and nonconclusory, *Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005). The declaration should explain “the search terms and the type of search performed, averring that all files likely to contain responsive materials . . . were searched,” *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003), but the agency need not “set forth with meticulous documentation the details of an epic search,” *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). Such declarations may be made by any individual supervising an agency’s search. *See Carney*, 19 F.3d at 814 (“An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search.”); *see also Garcia*, 181 F. Supp. 2d at 368. Once an agency submits a search declaration describing a reasonable search, the agency is entitled to a presumption of good faith, and the Court may award summary judgment on that basis. *See Carney*, 19 F.3d at 812; *see also Grand Cent. P’ship*, 166 F.3d at 489.

A FOIA plaintiff may then defeat summary judgment only upon a demonstration of bad faith. *Grand Cent. P’ship*, 166 F.3d at 489; *see also Triestman v. DOJ, Drug Enforcement Agency*, 878 F. Supp. 667, 672 (S.D.N.Y. 1995) (“[O]n a motion by the government for

summary judgment, if the government's affidavits are adequate on their face to merit judgment in the government's favor, summary judgment should be denied . . . only if the plaintiff makes a showing of bad faith sufficient to impugn the affidavits."); *Garcia*, 181 F. Supp. 2d at 366. A plaintiff cannot establish bad faith "by purely speculative claims about the existence and discoverability of other documents." *Grand Cent. P'ship*, 166 F.3d at 489.

**C. The State Department's Search For Responsive Documents Was Adequate**

Here, the State Department has submitted a declaration describing the searches conducted in response to Plaintiff's FOIA Request, and demonstrating that those searches were adequate.

*1. The Search of DRL/MLGA Files*

As an initial matter, the FOIA Request specifically asked that the State Department search the files of its Bureau of Democracy, Human Rights and Labor ("DRL") for documents regarding Part IV: Claims Based on Population Policies, in the May 2007 China: Profile of Asylum Claims and Country Conditions (the "May 2007 Report"). *See Grafeld Decl.*, Exhibit 1. Accordingly, the State Department searched DRL's files. As set forth in the Declaration of Margaret P. Grafeld, State Department personnel conducted a search for responsive documents within those files in the following manner. *See Grafeld Decl.* at ¶¶ 13-19. First, the Government identified the office within DRL which was responsible for drafting the May 2007 Report – the Office of Multicultural and Global Affairs ("DRL/MLGA"). *See id.* at ¶ 14. Second, the Government identified two individuals within DRL/MLGA to conduct the search: the Asylum Coordinator and a Foreign Affairs Officer. *See id.* at ¶ 15. Both of these officials were familiar with the files maintained in that office, and the Foreign Affairs Officer had worked there during the time frame of the May 2007 Report. *Id.*

Third, the two individuals searched emails, paper files and electronic files within DRL/MLGA, including both classified and unclassified documents. *See id.* at ¶¶ 16-18. DRL/MLGA maintains an archive email folder (in .pst format) that contains the drafter's emails on matters related to China. *See id.* at ¶ 16. The current Asylum Coordinator reviewed each of the emails in that folder. *See id.* In addition, the Foreign Affairs Officer searched his email for all emails sent to, and received from, the drafter of the 2007 report. *See id.* Further, although the drafter's emails are no longer preserved electronically, DRL/MLGA took additional steps to locate paper copies of emails by searching classified and unclassified paper files. *See id.* at ¶ 17. Specifically, DRL/MLGA searched all classified and unclassified paper and electronic files that were reasonably likely to contain responsive records. *See id.* The search encompassed the "China" country file and subject-matter files for a number of high-profile asylum claims and general DRL/MLGA management issues. *See id.* DRL/MLGA also searched for, but did not locate, a specific subject-matter file for the May 2007 Report. *See id.*

Finally, a State Department researcher within the Office of Information Programs and Services reviewed indexes of DRL/MLGA files that have been archived. *See id.* at ¶ 18. The researcher determined that there were no indexes that were responsive to the FOIA Request. *See id.*

## 2. *The Search of the Central Foreign Policy File*

Separately, the State Department expanded its search to encompass records that Plaintiff had not even requested be searched. Although Plaintiff's FOIA Request directed the State Department to search only files within DRL, *see* Grafeld Decl., Exhibit 1, the State Department also searched its Central Foreign Policy File ("Central File"), *see* Grafeld Decl. at ¶¶ 20-23. The Central File "is the Department's most comprehensive and authoritative compilation of

documents,” and it is therefore “by far the record system most frequently searched in response to FOIA requests.” *Id.* at ¶ 20. Using the State Archiving System (“SAS”) interface, “which searches the full text of millions of telegrams and other substantive correspondence documents in the Central File,” a State Department researcher “familiar with Plaintiff’s FOIA request and the SAS interface conducted searches of the Central File that were designed to identify documents potentially used in the preparation of [the May 2007 Report].” *Id.* at ¶¶ 20-21. Specifically, the researcher conducted a full-text search of the Central File using the title of the report – “China\* Profile of Asylum Claims and Country Conditions” – and the title of multiple sub-sections of the report, including: “Claims Based on Population Policies” and “National Law on Population and Birth Planning.” *Id.* at ¶ 22. The asterisk ensured that the search would include any misspellings of the title, and the search spanned the time frame identified by Plaintiff in the FOIA Request.

*See id.*

### 3. *The Drafter of the May 2007 Report*

Finally, the State Department researcher who searched the Central File also reached out to the drafter of the May 2007 Report, and asked the drafter to identify the documents relied upon in drafting the May 2007 Report. *See id.* at ¶ 24. The drafter responded that he relied upon publicly available documents, which the State Department located and produced to Plaintiff on March 17, 2011. *See id.*; *see also id.* at ¶ 10.

In sum, the Grafeld Declaration demonstrates that these searches were reasonably calculated to uncover all potentially responsive documents requested by Plaintiff. *See Grand Cent. P’ship, Inc.*, 166 F.3d at 489. Furthermore, this affidavit is entitled to a presumption of

good faith. *See Carney*, 19 F.3d at 812. The State Department thus has made a showing sufficient to sustain the agency's burden regarding the adequacy of its search.<sup>5</sup> *See id.*

## II. THE STATE DEPARTMENT PROPERLY WITHHELD OR REDACTED DOCUMENTS PURSUANT TO THE APPLICABLE FOIA EXEMPTIONS

### A. The State Department's Withholding Of Document D4 Under Exemption (b)(5) Was Appropriate

The State Department withheld document D4 in its entirety pursuant to the FOIA exemption codified at 5 U.S.C. § 552(b)(5). Exemption (b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991); *see also Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5 . . . ." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (citation omitted).

In enacting Exemption (b)(5), "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84. An agency record must satisfy two criteria to qualify for

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<sup>5</sup> To the extent that Plaintiff claims that the State Department was also obligated to identify "the names and titles of the person or persons who is or was responsible and/or assisted in the research, investigation and publication" of the May 2007 Report," Grafeld Decl., Exhibit 1, the obligations of an agency in responding to a FOIA request do not include responding to questions outside of the request for documents. *See, e.g., Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435 (LAP), 2008 WL 2519908, at \*13 (S.D.N.Y. June 19, 2008) (noting that "FOIA is a mechanism to obtain access to records, not answers to questions"). Therefore, State Department's refusal to answer Plaintiff's questions has no bearing on the adequacy of its search. *See Carney*, 19 F.3d at 812.

the deliberative process privilege: it “must be both ‘predecisional’ and ‘deliberative.’” *Grand Cent. P’ship*, 166 F.3d at 482 (citations omitted); *see also Hopkins*, 929 F.2d at 84; *Local 3, Int’l Brotherhood of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988).

A document is “predecisional” when it is “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Renegotiation Bd.*, 421 U.S. at 184, *quoted in Hopkins*, 929 F.2d at 84, and *Grand Cent. P’ship*, 166 F.3d at 482. This category of material includes “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Grand Cent. P’ship*, 166 F.3d at 482 (citation and quotation marks omitted). While a document is necessarily predecisional if it “precedes, in temporal sequence, the ‘decision’ to which it relates,” *see id.*, the government need not “point to a specific decision” made by the agency to establish the predecisional nature of a particular record. *Tigue*, 312 F.3d at 80. Rather, so long as the document “was prepared to assist [agency] decisionmaking on a specific issue,” it is predecisional. *Tigue*, 312 F.3d at 80; *see also Moye, O’Brien, O’Rourke, Hogan, & Pickert v. Nat. R.R. Passenger Corp.*, 376 F.3d 1270, 1280 (11th Cir. 2004) (“Amtrak need not cite to a specific policy decision in connection with which the audit work papers and internal memoranda were prepared in order for these documents to be protected from disclosure by the deliberative process privilege.”).

“A document is ‘deliberative’ when it is actually . . . related to the process by which policies are formulated.” *Grand Cent. P’ship*, 166 F.3d at 482 (citation and quotation marks omitted; alteration in original); *see also New York Public Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 337 (S.D.N.Y. 2003) (“A record is deliberative when ‘it reflects the give-and-take of the consultative process’”) (quoting *Wolfe v. HHS*, 839 F.2d 768, 774 (D.C. Cir. 1988)).

(*en banc*)) (citation and quotation marks omitted). The Second Circuit has defined “deliberative” as “indicative of the agency’s thought processes.” *Local 3*, 845 F.2d at 1180. In determining whether a document is deliberative, courts inquire as to whether it “formed an important, if not essential, link in [the agency’s] consultative process,” *Grand Cent. P’ship*, 166 F.3d at 483, whether it reflects the opinions of the author rather than the policy of the agency, *id.*; *Hopkins*, 929 F.2d at 84, and whether it might “reflect inaccurately upon or prematurely disclose the views of [the agency],” *Grand Cent. P’ship*, 166 F.3d at 483.

In this case, document D4 is a May 5, 2005 email exchange dated May 5, 2006 between a State Department officer stationed in the United States Embassy in Beijing and a State Department officer stationed in Washington, D.C. *See* Grafeld Decl. at ¶ 40. It reflects a discussion between the two officers about the “plausibility and weight to be given to reports of family planning practices received through hearsay.” *Id.* at ¶ 41. The email reflects the officers’ candid opinions about those reports, and the email was exchanged before the May 2007 Report was completed. *See id.* The discussion, if released, “would have a chilling effect on the candid examination and analysis of often diverse and conflicting streams of information in the deliberative process leading to decisions regarding the United States’ approach to foreign government practices.” *Id.* The discussion is both pre-decisional and deliberative, and therefore properly withheld by the State Department under Exemption (b)(5). *See* 5 U.S.C. § 552(b)(5); *Tigue*, 312 F.3d at 80; *Grand Cent. P’ship*, 166 F.3d at 482.

**B. The State Department’s Redaction of Document D7 Under Exemptions (b)(1) and (b)(6) Was Appropriate**

The State Department redacted portions of document D7 pursuant to the FOIA exemptions codified at 5 U.S.C. § 552(b)(1) and (b)(6).

1. *Standards for Withholding Pursuant to Exemptions (b)(1) and (b)(6)*

(a) *Exemption (b)(1)*

The statutory exemption codified at 5 U.S.C. § 552(b)(1) exempts from disclosure matters that are “specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). Executive Order 13526, Section 1.4 provides that “[i]nformation may not be considered for classification unless it concerns: . . . (b) foreign government information; . . . (d) foreign relations or foreign activities of the United States, including confidential sources . . . .” Executive Order 13526, Section 6.1(5), in turn, defines “foreign government information” 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 . . . .

An agency can demonstrate that it has properly withheld information under Exemption 1 if it establishes that it has met the substantive and procedural requirements of the Executive Order. Substantively, the agency must show that the records at issue logically fall within the exemption, *i.e.*, that E.O. 13526 authorizes the classification of the information at issue. Procedurally, the agency must demonstrate that it followed the proper procedures in classifying the information. *See Salisbury v. United States*, 690 F.2d 966, 970-73 (D.C. Cir. 1982); *Military Audit Project v. Casey*, 656 F.2d 724, 737-38 (D.C. Cir. 1981). An agency meeting both tests is then entitled to summary judgment. *See, e.g., Abbotts v. NRC*, 766 F.2d 604, 606-08 (D.C. Cir. 1985); *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984). The burden on the State Department in making this showing is not great. Indeed, “little proof or explanation is required

beyond a plausible assertion that information is properly classified.” *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). Because assessment of harm to national security is entrusted to the executive branch rather than courts, “the government’s burden is a light one”; “searching judicial review” is inappropriate, and “plausible” and “logical” arguments for nondisclosure will be sustained. *ACLU v. DoD*, 628 F.3d 612, 624 (D.C. Cir. 2011).

(b) *Exemption (b)(6)*

The statutory exemption codified at 5 U.S.C. § 552(b)(6) exempts from disclosure information from personnel, medical, or other similar files that “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Exemption (b)(6) does not merely apply to “files ‘about an individual,’” but applies more broadly to “bits of personal information, such as names and addresses,” contained in otherwise releasable documents. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006); *see also U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982).

2. *The State Department Properly Redacted Portions of Document D7*

Document D7 is a telegram dated October 11, 2005 from the Beijing Embassy to an officer in the State Department, is classified as confidential, and contains information covered by both exemption (b)(1) and (b)(6). *See Grafeld Decl.* at ¶ 42. All of the redacted portions except for the next-to-last paragraph on page three of the telegram reflect “a candid briefing by a Chinese official on a sensitive, ongoing topic of concern to the U.S. government given in the expectation of confidentiality.” *Id.* at ¶ 43. Such information constitutes “foreign government information” that was “provided to the United States Government by a foreign [entity]” with the expectation of confidentiality, and is thus covered by Executive Order 13526. E.O. 13526 Section 6.1(5); *see also* E.O. 13526, Section 1.4. In addition, the last redacted paragraph

contains “candid Embassy comment on this sensitive issue.” *Id.* Release of that information “would have a damaging effect on future exchanges on this and other sensitive topics between U.S. officials and Chinese officials,” *id.*, and is therefore properly withheld by the State Department under Exemption (b)(1), *see* 5 U.S.C. § 552(b)(1); *Morley*, 508 F.3d at 1124.

Moreover, the next-to-last redacted paragraph contains personal information about the source of much of the information in the telegram. *See* Grafeld Decl. at ¶ 43. Its release “would be an invasion of that person’s privacy and might also lead to harassment and serious personal and professional disadvantage.” *Id.* Accordingly, this paragraph is also properly withheld by the State Department under Exemption (b)(6). *See* 5 U.S.C. § 552(b)(6); *see also* *Judicial Watch*, 449 F.3d at 152.

In sum, the State Department properly withheld in full document D4 and redacted in part document D7, as discussed in the narrative *Vaughn* Index, pursuant to one or more statutory exemptions. The Grafeld Declaration provides sufficiently detailed descriptions of the documents and justifications for each exemption asserted. *See generally* Grafeld Decl. at ¶¶ 40-43. Accordingly, the State Department has sufficiently justified its withholding of D4 and the production of D7 with redactions, and summary judgment is merited as to this issue as well as to the sufficiency of the State Department’s search. *See* *Carney*, 19 F.3d at 814; *Associated Press*, 2007 WL 737476, at \*3.

**CONCLUSION**

For all of the foregoing reasons, the Government respectfully requests that the Court grant its motion for summary judgment under Federal Rule of Civil Procedure 56.

Dated: New York, New York  
August 25, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ELLEN BLAIN, an Assistant United States Attorney for the Southern District of New York, hereby certify that on August 25, 2011, I caused a copy of the foregoing Defendant's Motion for Summary Judgment, Memorandum of Law in support thereof, and declaration and exhibits in support thereof, to be served through the Court's Electronic Filing System upon the following:

Kelly Brian McClanahan, Esq.  
National Security Counselors  
1200 South Courthouse Road, Suite #124  
Arlington, VA 22204  
Fax: (301) 728-5908

Dated: New York, New York  
August 25, 2011

By: /s/ Ellen Blain  
ELLEN BLAIN  
Assistant United States Attorney



case file established for processing the subject request, and upon information furnished to me in the course of my official duties.

2. The core responsibilities of IPS include: (1) responding to records access requests made by the public (under the FOIA, the Privacy Act, the mandatory classification review requirements of the Executive Order on classified national security information, or the Ethics in Government Act), members of Congress, and government agencies, and those that have been made pursuant to judicial process, such as subpoenas, court orders, and discovery requests; (2) records management; (3) privacy protection; (4) national security classification management and declassification review; (5) corporate records archives management; (6) research; (7) operation and management of the Department's library; and (8) the application of technology that supports these activities.

3. This declaration explains the Department's search for, and review of, records responsive to the FOIA request at issue in this litigation.

## **I. ADMINISTRATIVE PROCESSING OF THE FOIA REQUEST**

### **Request No. 201002983**

4. By letter dated May 14, 2010 (Exhibit 1), Richard Tarzia ("Plaintiff"), submitted a FOIA request, asking that the Department "[s]earch the records of the Bureau of Democracy, Human Rights and Labor files for all documents, research notes, papers, etc., regarding the research, investigation, preparation and publication of Part IV (and all of its subsections) entitled: Claims Based on Population Policies, of the May 2007, China: Profile of Asylum

Claims and Country Conditions.” Plaintiff provided a timeframe of January 1, 2004 through May 30, 2007 for this request, and agreed to pay up to \$250 for the processing of his request.

5. Plaintiff submitted two additional, identical requests on May 26, 2010 (Exhibit 2) and June 1, 2010 (Exhibit 3).

6. By letter dated August 5, 2010 (Exhibit 4), IPS formally acknowledged receipt of Plaintiff’s request and assigned it case control number 201002983. Plaintiff was notified that the processing of his request had begun and he would be notified as soon as responsive material was retrieved and reviewed. Plaintiff was advised that the cut-off date for retrieving records was either the date that he had given the Department by specifying a particular time frame, or the date the search was initiated. Plaintiff was advised that he had been placed in the “all other” category for fee purposes, and noted his willingness to pay up to \$250 for the processing of this request. Plaintiff was further advised that unusual circumstances may arise requiring an extension of the FOIA’s time limit.

7. By fax dated August 13, 2010 (Exhibit 5), Plaintiff requested expeditious processing of his request.

8. By letter dated October 14, 2010 (Exhibit 6), IPS informed Plaintiff that his request for expeditious processing had been denied. Plaintiff was further notified of his right to appeal the denial of expedition within 30 days of receipt of this letter.

9. By letter dated December 17, 2010 (Exhibit 7), IPS informed Plaintiff that searches of the Central Foreign Policy Records and the Bureau of Democracy, Human Rights and Labor had been initiated. IPS further advised Plaintiff that the search of the Bureau of Democracy, Human Rights and Labor had been completed, and had resulted in the retrieval of 13

documents responsive to his request. Of these, one was released in full, four were released with excisions, and one was withheld in full. The seven remaining documents required interagency coordination, and were transferred to another government office for their direct reply to the Plaintiff. Plaintiff was further advised that the Department would keep him informed as his case progressed.

10. By letter dated March 17, 2011 (Exhibit 8), IPS informed Plaintiff that a search of the Central Foreign Policy Records had been completed. Plaintiff was informed that this search, though not originally requested, was done as a courtesy, and resulted in the retrieval of no additional responsive documents. Further, in an abundance of caution, Plaintiff was advised that five additional, publicly available, documents were responsive to his request. IPS provided Plaintiff with a copy of each of the five documents. Plaintiff was further advised that the Department had completed processing his request.

## **II. THE SEARCH PROCESS**

11. When the Department receives a FOIA request, IPS evaluates the request and determines which offices, overseas posts, or other records systems within the Department may reasonably be expected to contain the information requested. This determination is based on the description of the records requested and requires a familiarity with the Department's records system holdings, applicable records disposition schedules, and the substantive and functional mandates of numerous Department offices and Foreign Service posts. Factors such as the nature, scope, and complexity of the request itself are also relevant.

12. Since Plaintiff's request specifically set forth the Bureau to be searched for documents responsive to his request, IPS tasked that Department component. As a courtesy, the Department also conducted a search of the Central Foreign Policy Files, and alerted the Plaintiff to publicly available responsive documents as well.

**Bureau of Democracy, Human Rights and Labor**

13. Each Office within the Department, as well as each Foreign Service post, maintains working files concerning foreign policy and other functional matters related to the daily operations of the respective office or post. These files generally consist of working copies of documents, information copies of documents maintained in the Central File and other documents prepared by or furnished to the office in connection with the performance of its official duties.

14. The Office of Multilateral and Global Affairs within the Bureau of Democracy, Human Rights, and Labor (DRL/MLGA) was responsible for coordinating the drafting of the 2007 China: Profile of Asylum Claims and Country Conditions Report. DRL/MLGA is the Department office that is responsible for coordinating the review by DRL country officers, regional bureaus, and other interested offices of individual claims for asylum in the United States and providing policy oversight to those offices for such reviews; responding on behalf of the bureau to requests for review from the Department of Homeland Security or the Executive Office for Immigration Review; and preparing individual communications for use by Department of Homeland Security and Department of Justice asylum adjudicators. In that capacity, DRL/MLGA periodically drafts or oversees the drafting of reports on asylum claims and country

conditions that are primarily for the use of DHS asylum officers, Immigrations and Customs Enforcement attorneys, and EOIR immigration judges.

15. DRL/MLGA personnel who have knowledge of the organization of DRL/MLGA records systems were assigned to the search, and searched paper and electronic files for records responsive to the request. The search was conducted by the current “Asylum Coordinator” and a “Foreign Affairs Officer” who is a retired Foreign Service Officer who works on a part-time basis reviewing asylum cases involving China, among other countries. The Foreign Affairs Officer was employed by DRL/MLGA at the time the 2007 China report was drafted. The current Asylum Coordinator began his duties in September 2008.

16. DRL/MLGA searched classified and unclassified emails for documents responsive to the FOIA request. DRL/MLGA maintains an archive email folder (in .pst format) that contains the emails of the DRL/MLGA Asylum Coordinator from 2007 to 2008 on DRL/MLGA matters related to China. The current Asylum Coordinator reviewed each of the emails in that folder. In addition, the Foreign Affairs Officer searched his email for all emails sent to, and received from, the drafter of the 2007 report. DRL/MLGA determined that it no longer maintains emails from the account of the drafter of the 2007 report.

17. Although the drafter’s emails are no longer preserved electronically, DRL/MLGA took additional steps to locate paper copies of emails by searching classified and unclassified paper files. Specifically, DRL/MLGA searched all classified and unclassified paper and electronic files that were reasonably likely to contain responsive records. The search encompassed the “China” country file and subject-matter files for a number of high-profile asylum claims and general DRL/MLGA management issues. DRL/MLGA searched for, but did

not locate a specific subject-matter file for the 2007 China: Profile of Asylum Claims and Country Conditions.

18. Given the timeframe of the request, an IPS researcher determined that potentially responsive DRL paper files may have been retired. The IPS researcher conducted the retired file search by reviewing the retired file manifests from DRL, and DRL/MLGA specifically, for the time period of the request. The retired file manifests serve as an index of the contents of retired paper files, and are used to direct a researcher to particular file folders or documents in retired file boxes. No manifests from the time period of the request were found.

19. All responsive documents, appropriate for release, have been provided to Plaintiff. There are no other locations within DRL that are reasonably likely to maintain records responsive to the FOIA request.

#### **The Central Foreign Policy File**

20. The records of the Department are maintained in both centralized and decentralized records systems. The Central Foreign Policy File (or “Central File”) is the Department’s centralized records system and contains over 30 million documents of a substantive nature that establish, discuss, or define foreign policy, set precedents, or require action or use by more than one office. Among other things, the Central File includes official record copies of almost all incoming and outgoing telegrams between the Department and Foreign Service posts, as well as other select substantive correspondence documents, including diplomatic notes; correspondence to and from the White House, members of Congress, and other federal agencies; position papers and reports; memoranda of conversations; and interoffice memoranda. Because the Central File is the Department’s most comprehensive and authoritative

compilation of documents, it is by far the record system most frequently searched in response to FOIA requests. Searches of the Central File are conducted through an automated interface, known as the State Archiving System (“SAS”), which searches the full text of millions of telegrams and other substantive correspondence documents in the Central File. For all documents in the Central File that are not directly full-text searchable through SAS, including some older correspondence documents, SAS will search the text of a customized index reference that directs a searcher to a full copy of the document. Thus, a SAS search will encompass all documents in the Central File.

21. A researcher in the Department’s Office of Information Programs and Services (IPS) who is familiar with Plaintiff’s FOIA request and the SAS interface conducted searches of the Central File that were designed to identify documents potentially used in the preparation of Part IV (“Claims Based on Population Policies”) of the May 2007, China: Profile of Asylum Claims and Country Conditions.

22. Specifically, the IPS researcher conducted a full-text search of the Central File using the title of the report—“China\* Profile of Asylum Claims and Country Conditions”—and the title of multiple sub-sections of the report, including: “Claims Based on Population Policies” and “National Law on Population and Birth Planning.” Because the asterisk acts as a wildcard, this search would include misspellings of the title of the report. The date range for this search was provided by the requester and spanned from January 1, 2004 to May 30, 2007.

23. The search of the Central File located no responsive documents.

24. In addition, the IPS researcher also reached out to the drafter of the 2007 China: Profile of Asylum Claims and Country Conditions. In the course of conversations with him, the

drafter responded that he relied upon several publicly available documents, including the 2005 China Asylum Profile. Accordingly, the IPS researcher located each of the publicly available documents and provided them to Plaintiff.

### **III. EXEMPTIONS CLAIMED**

25. As a result of the parties' efforts to narrow the issues in dispute, Plaintiff has agreed to challenge the withholdings of only two documents. Based on the withholdings in the documents at issue, this section provides an overview of the Department's basis for the Department's assertion of exemptions (b)(1), (b)(5) and (b)(6). Section IV of this declaration, a narrative *Vaughn* index, addresses the application of these exemptions to the documents that Plaintiff seeks to challenge.

#### **FOIA Exemption (b)(1) – Classified Information**

26. Title 5 U.S.C. Section 552 (b)(1) states that the FOIA does not apply to 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.

27. State Department information in documents to which the (b)(1) exemption has been applied continues to meet the classification criteria of Executive Order 13526. Information withheld in documents in this case under exemption (b)(1) is classified Confidential.

Section 1.2(a)(3) of E.O. 13526 states that:

“Confidential” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the

national security that the original classification authority is able to identify or describe.

Section 6.1(j) of E.O. 13526 states that:

Damage to the national security means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility and provenance of that information.

28. Section 1.4. of E.O. 13526 states in pertinent part that: “Information may not be considered for classification unless it concerns:... (b) foreign government information; ... (d) foreign relations or foreign activities of the United States, including confidential sources; ...”

Section 1.4(b) – Foreign Government Information

29. Section 6.1(r) of E.O. 13526 states in pertinent part that:

“Foreign government information” means:

(1) 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;

30. 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.

31. Information that the U.S. Government obtained in confidence from a foreign government official is withheld from one document 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. Disclosure of this information “reasonably could be expected to result in damage to the national security” (Section 1.1(a)(4), E.O. 13526). The withheld State Department information is currently and properly classified pursuant to Section 1.4(b) of E.O. 13526 and is, therefore, exempt from disclosure under FOIA exemption (b)(1).

Section 1.4(d) – Foreign Relations or Foreign Activities

32. Information withheld from a document described in this declaration is classified under Section 1.4(d) of E.O. 13526. The withheld information concerns confidential sources, as well as a sensitive aspect of U.S. foreign relations relating to the promotion of human rights. Public disclosure of this information would risk undermining U.S. efforts in this important area of U.S. foreign policy. This information is currently and properly classified pursuant to Section 1.4(d) of E.O. 13526 and is, therefore, exempt from disclosure under FOIA exemption (b)(1).

FOIA Exemption (b)(5) – Deliberative Process

33. Title 5 U.S.C. Section 552(b)(5) states that the FOIA does not apply to:

inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency...

34. This exemption is designed to protect the candid views and advice of U.S. Government officials in their pre-decisional deliberations respecting policy formulation and administrative direction. Disclosure of material containing such deliberations or of material on which such deliberations are based would prejudice the free flow of internal recommendations and other necessary exchanges. It would hamper the ability of responsible officials to formulate and carry out executive branch programs. Information in documents in this case has been withheld on the basis of this exemption. Disclosure of this information, which is intra-agency and pre-decisional and contains selected factual material intertwined with opinion, would inhibit candid internal discussion and the expression of recommendations and judgments regarding current problems and preferred course of action. There are no reasonably segregable facts which may be released. The withheld information is, accordingly, exempt from release under FOIA exemption (b)(5).

FOIA Exemption (b)(6) – Personal Privacy

35. Title 5 U.S.C. Section 552 (b)(6) states that the FOIA does not apply to:

...personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy....

36. The courts have interpreted the language of exemption (b)(6) broadly to encompass all information that applies to an individual without regard to whether it was located in a particular type of file. Documents in this case contain information that has been withheld under this privacy exemption by excising names and other identifying personal information.

37. Inasmuch as the information withheld is personal to an individual, there is clearly a privacy interest involved. I am required, therefore, to determine whether there exists any public interest in disclosure and to weight any such interest against the extent of the invasion of privacy.

38. In United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), the Supreme Court laid down two rules for determining public interest in disclosure of information involving a privacy interest: (1) whether disclosure would serve the “core purpose” for which Congress enacted the FOIA, i.e., to show “what the government is up to,” and (2) public interest means the interest of the public in general, not particular interest of the person or group seeking the information. Accordingly, the identity of the requester as well as the purpose for which the information is sought is irrelevant in making the disclosure determination.

39. I have concluded that (1) disclosure of the information would result in a clearly unwarranted invasion of personal privacy; and (2) disclosure of the information would not serve the “core purpose” of the FOIA, i.e., it would not show “what the government is up to.” Accordingly, the privacy interest clearly outweighs any public interest in disclosure of such personal information and must, therefore, prevail.

#### **IV. NARRATIVE VAUGHN INDEX**

40. Document No. D4 is an email exchange dated May 5, 2006 between a Department official at the United States Embassy in Beijing and a Department official in Washington, D.C. One page. Originally and currently UNCLASSIFIED. Denied in full. FOIA Exemption (b)(5).

41. This email contains a candid discussion between two Department officials involved in the policy-planning process regarding the plausibility and weight to be given to reports of family planning practices received through hearsay. The discussion in the email occurred before the completion of the Profile and consisted of officials' varying opinions in interpreting the reports. The discussion, if released, would have a chilling effect on the candid examination and analysis of often diverse and conflicting streams of information in the deliberative process leading to decisions. This document is therefore exempt from disclosure under FOIA exemption (b)(5). There is no non-exempt information that maybe segregated and released.

42. Document No. D7 is telegram No. 16344 dated October 11, 2005 from Embassy Beijing to the Department. Four pages. Originally and currently classified CONFIDENTIAL under E.O. 13526, Sections 1.4 (b) and (d). Denied in part under FOIA Exemptions (b)(1) and (b)(6).

43. Most of the redacted portions of this telegram report a candid briefing by a Chinese official on a sensitive, ongoing topic of concern to the U.S. government given in the expectation of confidentiality. Release of the information conveyed and the name of the briefing official would have a damaging effect on future exchanges on this and other sensitive topics between U.S. officials and Chinese officials. The last paragraph of the redacted material contains candid Embassy comment on this sensitive issue, the release of which would seriously undermine U.S. efforts to accomplish an important policy objective. The withheld information is therefore currently and properly classified under Sections 1.4(b) and (d) of E.O. 13526 and it is, therefore, exempt from release under FOIA exemption (b)(1). The information withheld in

the next-to-last paragraph contains personal information about the source of much of the information in this telegram in this telegram. Its release would be a clearly unwarranted invasion of that person's privacy and might also lead to harassment and serious personal and professional disadvantage. This information is therefore exempt from release under FOIA exemption (b)(6). There is no non-exempt information that may be segregated and released.

**CONCLUSION**

44. In summary, the Department conducted multiple searches in an exhaustive effort to locate the records sought by the requester on Plaintiff's behalf. The Department searched the Central Foreign Policy File and the Bureau of Democracy, Human Rights and Labor – the places most likely to have responsive records – and found 18 documents responsive to the request. Of these, six documents were released in full, four were withheld in part, one was withheld in full, and seven documents were transferred to another agency for their direct reply to the Plaintiff.

\* \* \*

Executed this 25<sup>th</sup> day of August 2011.



Margaret P. Grafeld