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

RICHARD TARZIA,

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Plaintiff,

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v.

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Civil Action No. 1:10-cv-05654 (FM)

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HILLARY CLINTON,

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in her capacity as U.S. Secretary of State,

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Defendants.

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**PLAINTIFF’S OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Richard Tarzia commenced this litigation against Defendant Hillary Clinton, in her official capacity as Secretary of State (“State”), to obtain copies of original records substantiating the statements made in the May 2007 State publication, *China: Profile of Asylum Claims and Country Conditions* (“2007 Asylum Profile”). On August 25, 2011, State filed a Motion for Summary Judgment under Rule 56(a) of the Federal Rules of Civil Procedure.

BACKGROUND

Factual and Procedural Background

Plaintiff accepts State’s recitation of the factual and procedural background of this Motion (Def.’s Mem. Law Supp. Mot. Summ. J. at 1-4 [hereinafter State’s Mem.]) and will not unnecessarily repeat it here. Plaintiff will, however, add additional information which will provide context for the below arguments.

The 2007 Asylum Profile and Plaintiff's Initial FOIA Request

According to the document itself:

Country profiles are produced by the Office of Multinational and Global Affairs in the Department of State's Bureau of Democracy, Human Rights and Labor. They are produced for use by the Department of Homeland Security, the Executive Office of Immigration Review, and asylum officers and immigration judges. By regulation, the Department of State may provide asylum officers and immigration judges information on country conditions that may be relevant to the adjudication of asylum claims. Profiles are written by Department of State officers with country-specific expertise and experience, and are reviewed by overseas posts and within the Department.

2007 Asylum Profile at 1, attached in pertinent part as Ex. A.¹ In short, these reports are given the imprimatur of the State Department and provided as authoritative evidence to asylum officers and immigration judges, ostensibly to allow them to assess the credibility of asylum seekers from the respective countries.

However, as the Court will quickly note, virtually none of the statements in the 2007 Asylum Profile are supported with citations to other authorities or primary sources of data, beyond the conclusory introductory statement, "It includes information from the most recent Department of State annual Country Reports on Human Rights Practices, International Religious Freedom Report, and Trafficking in Persons Report, and other publicly available information deemed credible." *Id.* However, much of the information included in the 2007 Asylum Profile does not appear in these other Country Reports, or, if it does, appears in an equally conclusory

¹ This is not the original version of the 2007 Asylum Profile, but one which has been edited by a third party to improve readability (by numbering paragraphs for easy reference) and to provide citations where known. However, the citations in superscript are *not* in the original 2007 Asylum Profile and should be disregarded for the purposes of this Motion. The full edited document may be found at http://cdjp.org/gb/fileupload/China_May_2007.pdf (last accessed Sept. 25, 2011). Page numbers cited in this brief are taken from this edited version and not the original publication.

fashion with no citation to primary sources.² Plaintiff, an immigration attorney who represents asylum seekers from China, filed this Freedom of Information Act (“FOIA”) request in an effort to substantiate the statements made in the 2007 Annual Report and accepted as fact by immigration judges, or to provide countervailing evidence as to their lack of reliability. Specifically, Plaintiff sought records pertaining to the Part entitled “Claims Based on Population Policies,” attached as pages 26-39 of Ex. A.

Clarification of the FOIA Request

As State correctly notes, Plaintiff initiated this lawsuit on July 26, 2010. (State’s Mem. at 2.) However, after mentioning that State acknowledged the request on August 5, 2010 (Grafeld Decl. ¶ 6) and briefly discussing Plaintiff’s request for expedited processing (*id.* ¶¶ 7-8), State skips forward in time to December 17, 2010, when State “informed Plaintiff that searches of files at the Bureau of Democracy, Human Rights, and Labor . . . had been initiated and completed, and had resulted in the retrieval of thirteen documents responsive to the FOIA Request.” (State’s Mem. at 2). Inexplicably, State’s brief omits any mention of the intervening discussion in which it requested through counsel that Plaintiff provide it with more information about what information he was seeking.

On August 31, 2010, Assistant U.S. Attorney Amy Barcelo, State’s then-counsel of record, contacted Plaintiff and asked him to provide a more detailed list of exactly what information he was seeking, since the portion of the 2007 Asylum Profile he had cited was nine

² In fact, by State’s own admission, at least part of the 2007 Asylum Profile is based on other non-publicly available information, the reliability of which is questioned even by State’s own officials. (Grafeld Decl. ¶ 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.”))

pages long.³ (See Email from Tarzia to Barcelo of 8/31/10, attached as Ex. B (“As per our conversation, attached is a more detailed description of my FOIA request.”).) Accordingly, Plaintiff meticulously went through the 2007 Asylum Profile and provided Ms. Barcelo with a 12-page line-by-line description of exactly what information he was requesting. A copy of this detailed request is attached as Ex. C.

State now maintains that it was not required to search for any of the information requested in the August 31 correspondence, or even to use that information to interpret the meaning of the initial request. In fact, the majority of its arguments regarding the adequacy of its search are predicated on this idea, despite the fact that it does not even mention the existence of this correspondence in its brief.⁴ This argument will be addressed later, but for the moment it is important to note that: a) Plaintiff *did* provide a more detailed explanation of what information he was seeking, and b) he did so after State’s counsel of record *asked him to*, ostensibly to aid in State’s search for records.

Statutory Background and Standard of Review

“In order to prevail on a motion for summary judgment in a FOIA case, 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.” *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). “In resolving a summary judgment motion in a FOIA case, a court must construe the statute broadly

³ Thirteen pages in the edited version attached as Ex. A.

⁴ To be completely fair, State *may* have intended for this correspondence to be covered by the statement, “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.” (State’s Mem. at 2 n.1.) However, such a major development as the submission upon request of an extensively detailed supplement to the request warrants more than an ambiguous allusion in a footnote.

in favor of public disclosure and must construe the exemptions narrowly. . . . In keeping with FOIA’s goal of full disclosure, all doubts should be resolved in favor of disclosure.” *Fox News Network, LLC v. Dep’t of the Treasury*, 739 F. Supp. 2d 515, 533 (S.D.N.Y. 2010) [hereinafter *Fox News II*], citing *DOJ v. Julian*, 486 U.S. 1, 8 (1998), and *Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999).

ARGUMENT

I. STATE DID NOT CONDUCT A SEARCH REASONABLY CALCULATED TO LOCATE RESPONSIVE DOCUMENTS

“[A]n agency responding to a FOIA request must conduct a search reasonably calculated to uncover all relevant documents, and, if challenged, must demonstrate beyond material doubt that the search was reasonable.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). It is well established that an “agency is not expected to take extraordinary measures to find the requested records.” *Garcia v. DOJ, Ofc. of Info. & Privacy*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002); *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*.”).

State correctly notes that agencies may meet their burden through declarations (State’s Mem. at 6-7), but its characterization of how such declarations are to be evaluated conflates two distinct requirements that the declarations must meet, misconstruing the legal framework. State’s first statement is itself accurate: “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.” (*Id.* at 7.) However, the conditional language of that statement appears to be lost in State’s later arguments. An agency is not entitled to a

presumption *that its search was adequate* once it says so in a declaration; it is entitled to a presumption of good faith *once* it has submitted a declaration that *describes a reasonable search*. Put another way, the declaration must describe a search that the Court objectively deems reasonable on its face *before* the declaration is entitled to a presumption of good faith.

The distinction here is a nuanced one, but critical to the case. State's next sentence, while technically true in isolation, is used to imply something completely different in the context of this case. "A FOIA plaintiff may *then* defeat summary judgment only upon a demonstration of bad faith." (*Id.* (emphasis added).) The operative word in that sentence is *then*; a FOIA plaintiff may defeat summary judgment only upon a demonstration of bad faith *only after* the Court has decided that the declaration itself describes a reasonable search. *See 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." (emphasis added)).

State concludes its argument thusly: "In sum, the Grafeld Declaration demonstrates that these searches were reasonably calculated to uncover all potentially responsive documents requested by Plaintiff. Furthermore, this affidavit is entitled to a presumption of good faith. The State Department thus has made a showing sufficient to sustain the agency's burden regarding the adequacy of its search." (State's Mem. at 9-10 (citations omitted).) In doing so, it falsely conflates the presumption of good faith with the reasonableness of the search. Because the Grafeld Declaration fails to describe a search that is reasonable on its face, the question of good faith is not at issue here, and so the Grafeld Declaration is entitled to no presumption whatsoever.

A. State's Refusal to Search for the Information in the Detailed Request Was Improper

As stated above, Plaintiff submitted a supplemental detailed request (“the detailed request” or “the August 31 letter”) to State’s counsel upon request explaining the specific information that he was seeking. Despite this submission, the Grafeld Declaration quite clearly is only describing a search for records which did not look beyond the four corners of the original request. For instance, “DRL/MLGA searched for, but did not locate a specific subject-matter file for the 2007 China: Profile of Asylum Claims and Country Conditions.” (Grafeld Decl. ¶ 17.) Or, “[T]he . . . researcher . . . 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.” (State’s Mem. at 9.) Both of these statements indicate a clear focus on the statement, “This request is specifically for all the documents, research methods, notes, all writings or electronic communications of any type *that were used or relied upon* for the statements contained in the above section of the 2007 China asylum profile,” which itself was not even present in the original request but was drawn from a later letter sent by Plaintiff. (Grafeld Decl., Ex. 5.)

As an aside, this fact in itself indicates a confusing double standard that was used in the processing of this FOIA request. Plaintiff’s initial request was quite broad, asking for “all documents, research notes, papers, etc., regarding the research, investigation, preparation and publication of Part IV.” Such a request would cover all drafts, all notes, all correspondence, all meetings, all reviews, all comments, etc., even remotely related to the 2007 Asylum Profile. In short, it would have covered the author’s entire work product and everything he read for the duration of time he was working on the 2007 Asylum Profile. However, State does not describe a search for *those* records in the Grafeld Declaration. Instead, it pulls language about records

“used or relied upon” by the author from a letter Plaintiff sent to the FOIA office two weeks after he commenced litigation. It then reverses its position and refuses to consider anything he wrote two weeks later, *after* its counsel asks him for more details. In other words, State is not limiting its review to the four corners of the *original* request; it’s limiting its review to the four corners of the version that it can interpret the most narrowly. The Court should find that State must perform a search reasonably calculated to locate responsive records to either the most recent detailed request or the original request; either would be completely acceptable to Plaintiff. The only search that State can *not* be allowed to perform is one of its own choosing based on a letter that was neither the first nor the last word on the matter.

Returning to the discussion of the most recent iteration of the request, the state of the law is clear in this matter, albeit not immediately obvious. The usually definitive case on the issue, *Kowalczyk v. DOJ*, is in this particular instance the case to which this fact pattern is the exception. In *Kowalczyk*, the court ruled that a requester could not alter or clarify the scope of a request after the search was already performed. *See* 73 F.3d 386, 388-89 (D.C. Cir. 1996) (“Requiring an additional search each time the agency receives a letter that clarifies a prior request could extend indefinitely the delay in processing new requests.”). The plaintiff in that case had not originally specified in his request that the New York field office of the Federal Bureau of Investigation (“FBI”) would be likely to possess responsive records, and provided no information in his request that would have suggested a connection to New York. Accordingly, the FBI limited its search to FBI Headquarters. *Id.* at 389. The complete discussion warrants inclusion here:

The Bureau’s duty, however, is only to “conduct a search reasonably calculated to uncover all relevant documents.” The agency is not required to speculate about potential leads. More specifically, the Bureau is not obliged to look beyond the

four corners of the request for leads to the location of responsive documents. Of course, if the requester discovers leads in the documents he receives from the agency, he may pursue those leads through a second FOIA request.

This is not to say that the agency may ignore what it cannot help but know, but we suspect that it will be the rare case indeed in which an agency record contains a lead so apparent that the Bureau cannot in good faith fail to pursue it.

Id. (citation omitted).

Kowalczyk, despite being cited by the government in most cases involving a subsequent clarification, actually applies to a very limited fact pattern, especially in the Second Circuit. Courts in this Circuit have tightly cabined the scope of this exception, which left unchecked could potentially remove any incentive for agencies and requesters to work together to efficiently process requests. For instance, in *Halpern v. FBI*, the Second Circuit stated that an answer received from a requester *in response to an agency request for clarification* would constitute a “clear and certain” lead that an agency must pursue. *See* 181 F.3d 279, 289 (2d Cir. 1999) (finding that plaintiff could not argue that FBI failed to process cross-referenced files because he did not respond to agency inquiry asking if he wanted them included until after filing suit). In a similar vein, Chief Judge Preska recently suggested in *dicta* that *Kowalczyk* applied in part to her case because “[t]he Government does not admit to harboring any doubts as to the meaning of the request.” *See Amnesty Int’l USA v. CIA*, No. 07 Civ. 5435, 2008 U.S. Dist. LEXIS 47882, at *41-42 (S.D.N.Y. June 19, 2008) [hereinafter *Amnesty Int’l I*].

The application of *Halpern* and *Amnesty Int’l I* to this case is clear. Because State specifically requested the detailed request submitted on August 31, 2010, ostensibly to assist in its search for responsive records, all statements in that detailed request are entitled to be interpreted as “clear and certain” leads that State cannot in good faith fail to pursue them.

Simply put, an agency that does not harbor any doubts as to the meaning of a request does not ask for clarification.

In anticipation of State's argument that the August 31 letter was phrased in the form of questions, and an agency is not required to "answer questions disguised as a FOIA request" (*Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985)), it must be noted that the original request was *not* in the form of questions, and neither was the initial letter of clarification. Plaintiff only phrased his request in the form of questions after he was specifically asked by State's counsel to clearly elucidate what information he was seeking in as detailed a manner as possible. Being an attorney himself, he could easily have phrased the clarifications in convoluted, non-question forms that would require a sentence diagram to decipher, but instead he acted in good faith to convey what exact information he was seeking as clearly, concisely, and unambiguously as possible. For an agency to request such a clarification and then turn around and argue that it is not required to answer questions is the FOIA equivalent of entrapment and should not be rewarded.

As a final note, the one remaining inconsistency in State's position regarding the detailed request is the fate of the August 31 letter, if it was not processed as a clarification to Plaintiff's request. If an agency FOIA office receives a letter requesting information, and that letter is not tied to a previous request, then the agency processes the letter as a new FOIA request. Even accepting State's argument *arguendo* that the August 31 letter was not an acceptable clarification of Plaintiff's earlier request, the unanswered question remains, why did State not then process it as a new request? While much of it was phrased in question form, there were parts that were not, thereby rendering it at the very least a partially-proper request worthy of being processed. The fact that Plaintiff has never received *any* response to the August 31 letter stands in silent witness

against the proposition that State truly considered that letter in good faith to be unrelated to Plaintiff's original request.

For the foregoing reasons, the Court should find that State failed to perform an adequate search and order State to conduct a search specifically designed to locate records responsive to Plaintiff's request, relying on the August 31 letter when designing its search strategy.

Alternatively, the Court should find that State failed to perform an adequate search and order State to conduct a search specifically designed to locate records responsive to Plaintiff's *original* request, *not* relying on any correspondence received from Plaintiff after the commencement of litigation.

B. Even Allowing for the Disregarding of the August 31 Letter, State's Search Was Still Inadequate

On its face, even assuming *arguendo* that State was correct to disregard the August 31 letter (or to rely at all on the first clarification), the Grafeld Declaration nevertheless describes a search that was not reasonably calculated to locate responsive records. This declaration suffers from four significant deficiencies. First, it is internally inconsistent with respect to what records the author of the 2007 Asylum Profile used or relied upon. Second, State failed to locate the records that the 2007 Asylum Profile itself indicated would be present. Third, by solely relying on titles and subtitles from the report, which as of the time the author's research was being performed had not been written yet, State searched the Central Foreign Policy File for the wrong terms. Fourth, State improperly rejected the second part of Plaintiff's request as a question that it was not required to answer. These deficiencies will be addressed in turn.

1. *The records the author relied upon*

Of all four issues, this is the most unusual. According to the Grafeld Declaration, when asked about what records he relied upon when writing the 2007 Asylum Profile, the author stated that he solely relied on the five publicly available documents that were released to Plaintiff.⁵ However, this statement can only be reconciled with the rest of the record in one of three instances, any one of which evidences an insufficient declaration.

As will be discussed in greater detail later, State withheld one record, Document D4, in its entirety under Exemption (b)(5), citing the deliberative process privilege. (Grafeld Decl. ¶¶ 40-41.) As justification for this withholding, State argues that the record consists of “a candid [email] 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.” (*Id.* ¶ 41.) In and of itself, this statement is not unusual (although it is insufficient to support a (b)(5) exemption, which will be discussed in that section). However, when combined with the author’s statement regarding what sources he used, a strange paradox emerges.

In order to be withheld under Exemption (b)(5), a record must be predecisional. In a declaration supporting such a withholding, an agency will generally state the decision which the record precedes. In this case, State claims that the fact that this record precedes the completion

⁵ While it is true that the Grafeld Declaration does not use the word “solely,” State’s counsel informed the undersigned several months ago that the author had stated as much.

of the 2007 Asylum Profile satisfies this requirement. Therefore, the email exchange must relate to the drafting of the 2007 Asylum Profile.

In addition to being predecisional, a record must also be deliberative in order to warrant (b)(5) protection. The record must aid in the deliberation of a substantive policy decision. In the case of Document D4, the only way in which such a claim is relevant is if the discussion aided in the deliberation over what to write in the 2007 Asylum Profile.

Assuming *arguendo* that State invoked Exemption (b)(5) in good faith, this leaves two options. First, one of the officials involved in the email discussion was the author of the 2007 Asylum Profile. Second, the author was not involved in the discussion.⁶ If the author was involved in the discussion, then the statement that he relied only on the five released publicly available records is inaccurate. If, however, the author was not involved in the discussion, then a third party (one of the officials in the discussion) has to have made a final determination regarding the credibility of reports that he/she then relayed as a directive to the author. At which point, the question must be asked, where is the record of that instruction?

This analysis is predicated on the assumption that State properly withheld Document D4 under Exemption (b)(5). If Document D4 is in fact an email discussion between two officials that had nothing to do with the 2007 Asylum Profile and of which the author was ignorant, then this analysis is unnecessary. However, in such an instance, State's justification for the predecisional nature of this record would be wholly insufficient, as the fact that it preceded the completion of the 2007 Asylum Profile would be no more relevant than the fact that it preceded the election of President Barack Obama or the Arab Spring. Simply put, either Document D4

⁶ State refuses to clarify this ambiguity despite being directly asked through counsel.

was properly withheld under Exemption (b)(5), or the author of the 2007 Asylum Profile only relied upon the five released publicly available records. Both cannot be true statements.

2. *Pre-Publication Reviews*

According to the 2007 Asylum Profile, “Profiles are written by Department of State officers with country-specific expertise and experience, *and are reviewed by overseas posts and within the Department.*” 2007 Asylum Profile at 1 (emphasis added). Of the four issues, this is the most straightforward. If the 2007 Asylum Profile was reviewed by overseas posts and within the Department, then it is highly unlikely (though not impossible) that there would be no record of such review.

As this Court has previously noted, “the question is not whether [the agency’s] search was perfect, but whether [Plaintiff] has identified any flaws that would reveal that [the agency’s] search was not ‘reasonable.’” *Fox News II*, 739 F. Supp. 2d at 533. While Plaintiff concedes that even a reasonable search can still fail to “uncover every document extant” (*Grand Cent. P’ship*, 166 F.3d at 489), failing to uncover *any* documents in a broad class that the official agency publication in question itself dictates must exist is a flaw of a completely different scale. Such evidence is far removed from the “purely speculative claims about the existence and discoverability of other documents” discussed in *Grand Cent. P’ship* and its progeny. *See id.*

3. *State’s Phrase Search in the Central Foreign Policy File*

An agency may not “read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester.” *Amnesty Int’l I*, 2008 U.S. Dist. LEXIS 47882, at *37, quoting *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985). “[A]ll federal agencies should go as far as they reasonably can to ensure that they include what requesters want to have included within the

scopes of their FOIA requests.” *Id.*, quoting Department of Justice, Office of Information Privacy, *OIP Guidance: Determining the Scope of a FOIA Request*, FOIA Update, Vol. XVI, No. 3, at 4 (1995). *See also Amnesty Int’l USA v. CIA*, 728 F. Supp. 2d 479, 499 (S.D.N.Y. 2010) (rejecting CIA’s *Kowalczyk* argument that its search for records about the “attention shake” interrogation technique was adequate because it located no records due to the technique being called the “attention grasp”) [hereinafter *Amnesty Int’l II*].

An adequate electronic search uses appropriate search terms. This idea is so well ingrained in our culture that the undersigned could not find a clear case citation for it. Anyone who has ever used Google or Westlaw understands it. Inexplicably, State appears not to. The Grafeld Declaration describes a search of the Central Foreign Policy File in which the full title of the report, “China* Profile of Asylum Claims and Country Conditions,”⁷ and the full titles of sub-sections, such as “Claims Based On Population Policies,” were used as search terms *as complete phrases*. (Grafeld Decl. ¶ 22.) Put simply, a search for “China Profile of Asylum Claims and Country Conditions” would only return documents that contained *all eight words in exactly that order*. It would not return a document that contained the phrase “Profile of Asylum Claims and Country Conditions – China.” Nor would “Claims Based on Population Policies” return a document that contained the sentence, “Chinese asylum claims are often based on population policies, which will be discussed extensively.”

It would be more surprising if this nonsensical search *had* resulted in any responsive records. Not only did State use titles from a report that had not been written yet to search for

⁷ Contrary to the statement in the Grafeld Declaration that the asterisk acts as a wildcard, allowing the search to include misspellings of the title (Grafeld Decl. ¶ 22), State’s counsel has clarified that the asterisk only acts as a single-character wildcard, allowing the search to detect only variations of the last character of that word, such as “China:” or “China-.”

records that would have been used in its writing, but the length of the exact phrases being searched virtually guaranteed a “no records” response. Extensive reports discussing Chinese family planning practices and how they affect asylum claims could exist that never would be identified by this search unless the subject headings happened to be identical to the 2007 Asylum Profile. Most surprising, however, is that when the undersigned suggested several months ago a simple search strategy using the “AND” modifier but not entire phrases, State flatly refused, despite the guarantee that Plaintiff would stipulate to the reasonableness of such a search. In the face of such intransigence, the Court should order State to perform the *exact* searches of the Central Foreign Policy File specified by Plaintiff, with no deviation.

4. *Plaintiff’s second line item is not a question*

In addition to the first paragraph, discussed extensively above and in State’s brief, Plaintiff’s request also contained a second paragraph that State staunchly asserts it was free to ignore: “Included in the search of records in request above, please 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 Part IV (and all of its subsections) [of the 2007 Asylum Profile].” (Grafeld Decl., Ex. 1.) State argues that it need not respond to this portion of the request because agencies do not have to answer questions. (State’s Mem. at 10 n.5, citing *Amnesty Int’l I*, 2008 U.S. Dist. LEXIS 47882, at *40, and *Carney v. DOJ*, 19 F.3d at 812.) State fundamentally misunderstands the nature of the question prohibition.

“The focus of the FOIA is information, not documents” *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). This axiom forms the entire basis for the segregability requirement written into the statute in 1974. A request for a piece of information, especially when made in the context of a greater request for other records, is not a

question; it is a request for *information*. Simply put, questions have question marks. There is no difference between a request which states, “Please provide me with the name of the author of the report described above,” and a request which states, “Please provide me with *a record containing* the name of the author of the report described above.” Unlike the unapologetic questions included in the detailed August 31 letter, this was a straightforward line item in a FOIA request. There is no reasonable basis for State’s refusal to provide the requested information on the grounds that it is “a question.” If State wishes to withhold these names, it must first locate and process the records and then invoke Exemption (b)(6) to do so.

For the foregoing reasons, the Court should deny State’s Motion and find that State failed to perform an adequate search reasonably calculated to locate all responsive documents.

II. STATE DID NOT PROPERLY WITHHOLD INFORMATION

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.*, 566 F.2d at 258. “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, State’s withholdings under Exemptions (b)(1) and (b)(5) are

completely unsupported by any specific factual evidence and should be rejected.⁸ 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. Circuit 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.”)

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 Executive Order 13526 (“E.O. 13526”) for its Exemption (b)(1) redactions from Document D7. 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

⁸ Plaintiff is not challenging the redaction of identifying information from Document D7 pursuant to Exemption (b)(6).

expectation that the information, the source of the information, or both, are to be held in confidence.” *Id.* § 6.1(s).⁹

1. *State has not convincingly demonstrated that 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 a rote statement that the material

⁹ State also relies on § 1.4(d) to withhold the last redacted paragraph from Document D7, but Plaintiff is not challenging that redaction.

was “given in the expectation of confidentiality” 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), 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 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.

(Grafeld Decl. ¶¶ 30-31.)

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-Jackson¹⁰ 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 a foreign government official is withheld from a 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

¹⁰ 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).

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).

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.

Declaration of Margaret Grafeld at 28-29 [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).

(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. ¶ 30.) 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*) and one court in this Circuit, 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).

The Court should find that the conclusory statement of confidentiality offered to withhold information from Document D7 does not sufficiently allege an express or implied grant of confidentiality, thereby rendering § 1.4(b) inapplicable. Beyond simply stating without support that the briefing was “given in the expectation of confidentiality,” the Grafeld Declaration does not even identify the “sensitive, ongoing topic of concern” being discussed or specify the damage that would occur from disclosure, except for declaring that it would “seriously undermine U.S. efforts to accomplish an important policy objective.” (Grafeld Decl. ¶ 43.)

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 Document D7 to the Court for *in camera* review, or to release the unredacted record to Plaintiff.

B. Exemption (b)(5)

As discussed above, State has invoked Exemption (b)(5) to withhold Document D4 under the deliberative process privilege. 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, “[i]n order for the privilege to apply, a document must be . . . predecisional[] and deliberative.” *Fox News Network, LLC v. Dep’t of the Treasury*, 678 F. Supp. 2d 162, 167 (S.D.N.Y. 2009) [hereinafter *Fox News I*]. “To be ‘predecisional,’ the document must be prepared to ‘assist an agency decisionmaker in arriving at his decision.’” *Id.*, quoting *Grand Cent. P’ship*, 166 F.3d at 482. When assessing this prong, the Court should evaluate whether the agency can “pinpoint the specific agency decision to which the document correlates . . . and . . . verify that the document precedes, in temporal sequence, the ‘decision’ to which it relates.” *Grand Cent. P’ship*, 166 F.3d at 482, quoting *Providence Journal Co. v. Dep’t of the Army*, 981 F.2d 552, 557 (1st Cir. 1992).

State argues that the agency need not point to a specific decision. (State’s Mem. at 11.) Rather than engage in a direct argument on this issue, it should suffice to quote from this Court’s previous ruling in *Fox News I*, substituting “State” for “Treasury” and making other small modifications where appropriate:

[State] also needs to identify the particular policy decision[] to which [Document D4] correspond[s]. [State] cites *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002),] for the proposition that it need not identify a specific decision made in reliance on the document, only a specific policy issue. (See [State’s Mem. at 11]). However, in *Tigue* the Second Circuit also stated that, “while the agency need not show *ex post* that a decision was made, it must be able to demonstrate that, *ex ante*, the document for which . . . privilege is claimed related to a specific decision facing the agency.” *Tigue*, 312 F.3d at 80.

Fox News I, 678 F. Supp. 2d at 167.

“To be deliberative, a document must actually be ‘related to the process by which policies are formulated.’” *Id.* at 168, quoting *Grand Cent. P’ship*, 166 F.3d at 482. It must “reflect[] the give and take of the consultative process.” *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, release of the information must inaccurately reflect or prematurely disclose the views of the agency. *Grand Cent. P’ship*, 166 F.3d at 482. The views of the agency regarding certain asylum claims are already public knowledge due to the 2007 Asylum Profile itself, so it is unreasonable to think that someone reading this email exchange would mistake which conclusions were adopted as the official agency position.

For that matter, 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). As with the last item, the ultimate decision regarding credibility assessments has been made and included in the 2007 Asylum Profile.

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. With the exception of the identity of the author of the 2007 Asylum Profile, which may not even be in this record, Plaintiff does not object to the withholding of the names of the officials in the email exchange. As for the author, which conclusion *he* ultimately adopted is a matter of public record.

For the foregoing reasons, the Court should order State to release Document D4 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. LEXIS 74121, at *34, (D.D.C. July 11, 2011), 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 both entries in the *Vaughn* index: “There is no non-exempt information that may be segregated and released.”¹¹ (*See Grafeld Decl.* ¶¶ 41, 43.) 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.

¹¹ The typographical error “maybe” replaces “may be” in ¶ 41.

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 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. 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: September 25, 2011

Respectfully submitted,

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EXHIBIT A

China Profile of Asylum Claims and Country Conditions
Office of Country Reports and Asylum Affairs
Bureau of Democracy, Human Rights and Labor
U.S. Department of State
Washington, D.C. 20520
May 2007 (replaces the October 2005 Profile)

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I. Introduction

[1] This profile addresses the issues most frequently raised by Chinese asylum applicants.^a Given the diversity of political, ethnic, religions, social, and economic conditions in China, a vast country of 1.3 billion people, and the uneven local enforcement of national polices, it cannot cover every conceivable circumstance asylum applicants may raise.^b However, where possible, it contains detailed information regarding the regions and issues most frequently at the root of asylum requests, notably information regarding Fujian Province, birth planning, and religious practices.^c It includes information from the most recent Department of State annual Country Reports on Human Rights Practices, International Religious Freedom Report, and Trafficking in Persons Report, and other publicly available information deemed credible.^d

[2] Country profiles are produced by the Office of Multinational and Global Affairs in the Department of State's Bureau of Democracy, Human Rights and Labor.^a They are produced for use by the Department of Homeland Security, the Executive Office of Immigration Review, and asylum officers and immigration judges.^b By regulation, the Department of State may provide asylum officers and immigration judges information on country conditions that may be relevant to the adjudication of asylum claims.^c Profiles are written by Department of State officers with country-specific expertise and experience, and are reviewed by overseas posts and within the Department.^d

II. Overview

[3] The People's Republic of China (*PRC*) is an authoritarian state in which the Chinese Communist Party (*CCP*) is the paramount source of power.^a Party members hold almost all top government, police, and military positions throughout China.^b The party's authority rests on its ability through the government to maintain social stability;^c appeal to nationalism and patriotism; control key personnel, media, and security institutions;^d and continue to improve the living standards of most of China's citizens.^e Chinese citizens are not free to publicly advocate changing national leaders, key policies, or the form of government.^f Party-controlled propaganda and security organs work with a high degree of success to isolate and control any opposition to party rule and its key policies in print, broadcast, and other media, including electronic postings.^g Public protests by those seeking to

Democracy’ Some applicants have alleged fear of persecution should they return to China, citing articles they have written for these parties’ journals on political subjects, including articles deriding Communist theory and Chinese leaders.^a

[79] These applications often are accompanied by copies of one or more petitions or open letters (*e.g.*, a letter to President Jiang Zemin or a copy of the ‘Seattle Declaration’ of November 21, 1993) bearing the applicant’s and perhaps other signatures.^a These are presented to demonstrate the applicant’s pro-democracy bona fides, and support their assertions that they would be in trouble with the Chinese government should they return to China;^b we have no independent information about how people involved in these groups are treated if they return to China.^c

[80] Case of Yang Wei. Asylum applications sometimes include material about the case of Yang Wei, a Chinese student who was arrested in China in January 1987 after his return from Arizona.^a However, Yang Wei also was charged with engaging in anti-regime activities in China, his case is not analogous to claims based on United States only political activity.^b See Section III.D.1. – Past Political Events in China: 1986 Student Movement.^c

E. Social Group

[81] Asylum claims in this category usually relate to homosexuality.^a Chinese law no longer criminalizes homosexual acts, and, as of 2001, the China Psychiatric Association no longer lists homosexuality as a mental illness, a move that many Chinese homosexuals saw as a sign of increased tolerance.^b While there have been a few open, large-scale meetings in larger Chinese cities on social issues affecting homosexuals, homophobia remains widespread in China.^c

[82] There have been no recent reported cases in China of detention or imprisonment because of a person’s homosexuality.^a Sporadic instances of police harassment of homosexual citizens seem to reflect traditional social taboos and homophobia rather than systematic official harassment, and reportedly, Chinese police generally adopt a ‘don’t ask, don’t tell’ attitude towards homosexuals.^b

IV. Claims Based on Population Policies

[83] China's birth planning policies retain harshly coercive elements in law and practice.^a A high percentage of all Chinese asylum applicants cite China's coercive birth planning policy as a reason for their request.^b Published law and regulations restrict the rights of families to choose the number of children they may have and the period of time between births.^c The penalties for violating the law are strict, leaving some women believing they have no choice but to abort pregnancies.^d In cases of families that already have two children, one parent is often pressured to undergo sterilization.^e Beyond this pressure, while central government policy prohibits the use of physical coercion to compel persons to submit to abortion or sterilization, there have been continuing reports of physical coercion to meet birth targets in some areas, notably and recently, in rural Shangdong Province.^f

[84] National law purportedly standardizes the implementation of the birth limitation policy, but local enforcement and important aspects of local regulations vary significantly from place to place.^a The law grants married couples the right to have one birth and allows eligible couples to apply for permission to have a second child if they meet conditions stipulated in local and provincial regulations.^b The law requires couples who have an unapproved child to pay a 'social compensation fee,' which sometimes reaches 10 times a person's annual disposable income;^c there are also some benefits for couples who adhere to the birth limitation policy.^d Social compensation fees are set and assessed at the local level.^e The law requires birth planning officials to obtain court approval before taking 'forcible' action, such as detaining family members or confiscating and destroying property of families who refuse to pay social compensation fees, but this requirements is not always followed in practice.^f

[85] Because penalties can be theoretically levied against a spouse's work unit or against local officials for allowing out-of-plan births, many individuals and organizations are affected providing multiple sources of pressure on couples.^a The scope and intensity of the pressure often leave expectant mothers feeling that they have little choice but to undergo abortion.^b According to the U.S. Embassy in Beijing, violations of the birth planning policy are civil offenses and result in civil penalties.^c They are not considered criminal offenses. Nevertheless, unpaid 'social compensation fees' have sometimes resulted in confiscation or destruction of private property.^d There are reports that village officials have expelled women and

their families from their homes and then destroyed the houses.^e The 'social compensation fees' and other penalties often left women with little practical choice but to undergo abortion or sterilization.^f

[86] The one-child policy is more strictly applied in the cities, where only couples meeting certain conditions (*such as both parents being only children*) are permitted to have a second child.^a In most rural areas (*including towns of under 200,000 persons*), which included approximately 60 percent of China's population, the policy is more relaxed generally allowing couples to have a second child if the first was a girl or had a disability.^b China's 55 ethnic minorities often are allowed to have more children, though they are encouraged to have fewer.^c

[87] The implementation of birth planning policy in villages, the situation relevant to most asylum applicants, is the responsibility of local officials, but not normally public security officers.^a The personalities, interests, and personal connections of these local officials often influence their enforcement of national, provincial, and local laws, regulations, and policies, including birth planning policies, resulting in uneven enforcement, sometimes more strict and sometimes more permissive.^b

A. National Law of Population and Birth Planning

[88] In September 2002, the first National Population and Birth Planning Law came into effect.^a Intended to standardize national birth planning limitations policies, the law grants married couples permission under most circumstances to have a single child and allows eligible couples to have a second child if they meet conditions pursuant to local and provincial regulations.^b The law requires couples to employ birth control measures and stipulates that couples that have an unapproved child must pay a 'premium to a fund set up for bringing up children in society.'^c This premium is often referred to as a social maintenance or compensation fee.^d

[89] The law delegates to the provinces and autonomous regions the responsibility for drafting implementing regulations, including establishing a scale for assessment of social compensation fees.^a All provincial level governments have done so.^b State Council Degree 357 provides general

guidance to local authorities, and also permits birth planning officials to ask a court to take forcible action against families that refuse to pay social compensation fees.^c

[90] Rewards for couples that adhere to the policy include monthly stipends and preferential medical, food, and educational benefits.^a Both social and economic pressures are common.^b During unauthorized pregnancies, women are visited by birth planning workers who remind them of their potential liability to pay the social compensation fees.^c Seven provinces – Anhui, Hebei, Heilongjiang, Hubei, Hunan, Jilin, and Ningxia – require ‘termination’ of pregnancies that violate provincial birth planning regulations.^d Another 10 provinces – Fujian, Guizhou, Guangdong, Gansu, Jiangxi, Qinghai, Sichuan, Shanxi, Shaanxi, and Yunnan – require unspecified ‘remedial measures’ to deal with out-of-plan pregnancies.^e In at least two provinces (*Fujian and Hunan*), couples who have conditions that would cause serious genetic illnesses in their offspring may not have children.^f Additional disciplinary measures against those who violate the limited-child policy by having an unapproved child or helping another to do so may include loss of government-subsidized health benefits, job loss or demotion, loss of promotion opportunity for one or more years, expulsion from Communist Party (*membership in which is an unofficial requirement for certain jobs*), and other administrative punishments.^g Under these circumstances, government employees are particularly vulnerable to loss of employment when they have a child outside of locally established regulations.^h In some areas, violators of birth planning regulations were held and abused in ‘population schools,’ which were nothing more than unofficial prisons.ⁱ Chinese officials have said that government-subsidized education benefits are no longer denied to out-of-plan children, but it is unclear if that is the case.^j

[91] Central government policy prohibits the use of physical coercion to compel persons to submit to sterilization or abortion.^a However, U.S. diplomats in China have hard reports that local officials occasionally employ illegal means, such as forcibly performing abortions or sterilizations, in order to demonstrate their resolve to meet birth planning targets and keep their jobs.^b Reports of physical coercion continue to be heard. For example, the Chinese press reported the March 21, 2005 death of an unmarried 19-year-old woman during a forced late-term abortion in Pi County, Sichuan Province.^c So far, no officials are known to have been held accountable for this death. In June 2004, officials in Jieshou City, Anhui Province, forced a

woman to be sterilized, and state media reported that the woman was injured when she jumped out of a window in the operating room in an attempt to avoid the procedure.^d In the same city, another woman committed suicide when her relatives were detained in ‘population schools.’^e According to state-media reports, the local officials responsible for the detentions were fired or sanctioned administratively.^f Earlier in 2004, media reports noted that a drug offender in Gansu Province was forced to have an abortion before her trial on charges punishable by the death sentence.^g

[92] China’s birth planning law is most strictly enforced on Han Chinese in urban areas, where the one-child policy is the norm.^a The constant scrutiny of neighbors makes it difficult to conceal a pregnancy, and small apartments encourage small families.^b Couples seldom receive permission to have more than one child, although the government maintains that members of urban couples who themselves were only children may now receive permission to have two children.^c Residents of rural areas enjoy more flexibility de jure and de facto in having a second child.^d

A.1. Minority and Transient Populations

[93] Government policy is more relaxed and/or sporadically applied in China’s substantial ethnic minority and transient migrant (*estimated at 150 million persons*) populations.^a China’s economic migrants (*the ‘floating population’*) work for long periods without permanent household registration documents allowing them to live legally in their current, usually urban, locations.^b U.S. officials in China have heard several recent reports of attempts to enforce birth planning laws more strictly in Anhui Province, a major source of migrant labor.^c Minority ethnic groups are subject to less stringent population controls and are generally allowed at least two children.^d In remote rural areas, there are no effective limits.^e However, there are reports of enforcement of the one-child rule on the Uighur minority in Xinjiang Province.^f There have also been reports that the government has engaged in coerced abortion and forced sterilization of the Uighur minority.^g (*See Section C.2. – Uighur above*).^h Ethnic minority persons who are government workers or CCP members are coming under increasing pressure to adhere to the birth limits imposed on Han Chinese.ⁱ

A.2. Marriage Age/Single Parenting

[94] In order to delay childbearing, the law sets the minimum marriage age for women at 20 years and for men at 22 years, and couples are encouraged by birth planning authorities to delay childbearing.^a The National Marriage Law, amended in October 2003, no longer mandates premarital medical examinations.^b Persons who marry before the legal age generally are not allowed to register their marriage or to obtain a notarized certificate of marriage.^c This may result in loss of social benefits, such as access to a larger apartment, subsidized healthcare, or better educational opportunities for their child.^d

[95] There are no provisions in the National Law on Population and Birth Planning to detain or jail cohabiting couples for having an unauthorized child.^a However, couples that are not underage but cohabit and have an unauthorized child are liable for `social compensation fees.'^b It is illegal in almost all provinces for a single woman to have a child, and social compensation fees have been levied on unwed mothers.^c

A.3. Birth Planning Methods

[96] Chinese law requires couples to practice birth control, and an increasing number of birth planning clinics give patients a range of options and promote `informed choice' of birth control methods.^a Married women may be required to be examined from one to four times a year to show they are not pregnant.^b This practice is not universal and some women are never tested.^c Typically, pregnancy checks are required only after the birth of the first child.^d Checking is most common for migrant workers and others that the authorities suspect might try to violate family planning regulations.^e Unmarried women are generally not checked, but there was a press report of a complaint by a Putian County, Fujian resident that unmarried women over the age of 18 were required to be tested.^f Pregnancy checks are not mentioned in the national birth planning law, but are required by some provinces.^g For example, Anhui's regulations state that `organizations engaged in birth planning technical services must implement pregnancy checks and follow-up visits for married women.'^h Fujian has no such provision.ⁱ

[96] Whether in the cities or in rural areas, abortion and sterilization are important methods along with IUDs, used in pursuit of China's one-child-

policy, with abortions performed more frequently in urban areas than in rural ones.^a The Ministry of Health reported that in 2005 there were 7.1 million abortions, 6.8 million IUD insertions, 1.4 million tubal ligations, and just under 200,000 vasectomies.^b Comparable figures for 1983, the peak year for many of these procedures, were 14.3 million abortions, 17.7 million IUD insertions, 16.4 million tubal ligations, and 4.4 million vasectomies.^c Birth control pills and condoms are used as well, but more often in urban areas than in rural areas.^d Condom use, especially outside of marriage, is growing because of their promotion for HIV/AIDS prevention.^e

[97] The government (*whether or not it has actual or sampling data*) does not publicize data on forced abortions or forced sterilizations, although the press occasionally reports abuses.^a Individuals can sue officials who have exceeded their authority in implementing family planning law, but there are no known successful suits on these grounds.^b In 2003, officials in one province who tried to force a woman to be sterilized were reprimanded after she complained to national family planning officials and insisted on her right under the law to choose her method of birth control.^c She subsequently chose an IUD.^d

A.4. Abortion and Birth Control Documents

[98] The U.S. Embassy and Consulate General are unaware of any so-called 'abortion certificates,' which sometimes are presented as evidence of forced abortion as part of asylum applications.^a According to Embassy officials, the only document that might resemble and be confused with such a certificate is a document issued by hospital upon a patient's request after a voluntary abortion.^b Patients use this certificate to request two weeks of sick leave after an abortion has been performed, a right provided by the law.^c It is possible that the holder of a document indicating a requested voluntary abortion may, in fact, have only submitted to an abortion as a result of pressure.^d Local authorities, usually at the township or neighborhood committee levels, issue birth permits, birth planning certificates (*obtained at marriage and entitling couples to use birth planning services, including birth control*);^e and 'one-child-certificates' to couples promising to have only one child.^f

B. Fujian Province

[99] According to the Fujian Province Birth Planning Committee (FPBPC), there have been no cases of forced abortion or sterilization in Fujian in the last 10 years.^a It is possible to confirm this claim, and, in 2006, reportedly, there were forced sterilizations in Fujian.^b Hundreds of asylum applicants from Fujian claim that forced abortions and sterilizations continue to the present day.^c The FPBPC acknowledged that during the 1980s and early 1990s there were isolated cases of forced abortion and sterilization.^d Since that time, the FPBPC asserts that it has insisted that all men and women who undergo surgical procedures provide informed, written consent before surgery.^e Local physicians in contact with the U.S. Consulate General in Guangzhou report that they have not seen signs of forced abortions or sterilization among their patients from Fujian and Guangzhou Provinces since the 1980s.^f However, Gao Xiaoduan, a former birth control planning officer in Yonghe Town, Jianjing Municipality, Fujian Province, told a subcommittee of the U.S. House of Representative in June 1998 that the birth planning office where she worked was performing involuntary abortions and sterilizations as late as 1998.^g Gao stated that 'planned birth supervision teams' often carried out nighttime raids on the homes of suspected violators of birth planning policy and dismantled their homes.^h Female violators apprehended during these nighttime raids would have sterilization or abortion procedures performed on them against their will.ⁱ More recently, a hospital director in Changle, Fujian, stated that the hospital would take 'measures' (*unspecified*) to induce some patients to undergo abortions in the name of compliance with the birth planning law.^j Consulate General officials visiting Fujian have found that coercion through public and other pressure has been used, but they did not find any cases of physical force employed in connection with abortion or sterilization.^k In interviews with visa applicants from Fujian, representing a wide cross-section of society, Consulate General Officers have found that many violators of the one-child policy paid fines but found no evidence of forced abortion or property confiscation.^l

[100] According to the FPBPC, each married couple is allowed to have one child without a birth permit.^a Article 15 of the Fujian provincial regulations states that a first birth permit is required, but the U.S. Consulate General in Guangzhou reports that, since September 2002, first birth permits have in practice been replaced by family planning service cards, which are issued to couples upon marriage and given them access to contraception and reproductive health services, including prenatal services for the first child.^b

While service cards are technically required before a couple is allowed to get pregnant, the Consulate General has heard of cases where rural governments are willing to issue these cards retroactively after a first birth with marriage.^c Also according to the FPBPC, the provincial government only imposes penalties on families that do not comply with the birth planning law;^d it does not impose criminal penalties or physically coercive methods to ensure compliance.^e However, birth planning law violators sometimes lose their jobs or positions, especially if they are Communist Party members.^f Couples with unauthorized children are not allowed to work for the provincial government.^g

[101] There is wide variation in the amount of social compensation fees, and the severity of hardship they impose, for out-of-plan births.^a According to the FPBPC, social compensation fees are based on net per capita income levels for rural households and disposable per capita income for urban households (*the 'baseline'*).^b The exact figure is based on county-level statistics, so the baseline varies throughout the province.^c For households with incomes significantly greater than the relevant income baselines, the local birth planning commission can increase the social compensation fees.^d Social compensation fees range from the baseline or less for unmarried couple that has a child to greater than six times the baseline for couples with four children or more and are determined by the local birth planning committee in the city or county where the couple resides.^e In 2003, urban disposable income in Changle City and Lianjiang County was approximately 10,500 renminbi (*about \$1210*) and rural net income per capita was approximately 4,401 renminbi (*about \$530*).^f In 2004, Changle City and Lianjiang county urban disposable per capita income was 11,437 renminbi (*about \$1380*) and rural net income per capita was 4,815 renminbi (*about \$580*).^g

[102] According to the FPBPC, couples unable to pay the fee immediately may be allowed to pay in installments.^a Local birth planning committees have the power to sue families that refuse to pay the requisite fees, but they cannot garnish wages.^b The FPBPC asserts that parents cannot be sterilized if they are unable or refuse to pay the fee.^c Some asylum applicants from Fujian have stated that, starting in mid-2004, couples who had had an unauthorized pregnancy, even one that ended in abortion, were

required to post security deposits as high as 20,000 renminbi (*about \$2,500*) to guarantee that they would abide by birth planning limitations.^d These applicants claim that they were threatened with arrest if they did not post the deposits.^e While U.S. officials in China cannot confirm that the practice of posting deposits is currently taking place, a notice on the Quanzhou, Fujian website banning the practice suggests deposits may have been collected in past years.^f The Guangzhou site states: ‘All family planning security deposits that were collected over historical years must be returned. New types of security deposits are strictly forbidden.’^g

[103] The media have reported some cases in which a person was punished because his or her relatives either violated birth planning restrictions or had not paid fees for violating birth planning regulations, although these cases have not been independently verified.^a Chinese birth planning officials admit the possibility of ‘overzealous’ officials exceeding their authority, but they assert that such behavior is neither the norm nor sanctioned by the government.^b

C. Other Provinces

Guangdong Province

[104] Guangdong no longer requires couples to obtain a permit before having their first child.^a However, newly wed couples must attend a birth planning education course within the first three months of their marriage.^b Afterwards, they submit a form stating that they have completed the course to their local birth planning committee and receive a birth service card.^c

[105] U.S. Consulate General officers are aware of one case in which a woman pregnant with an unauthorized second child lost her job at a local market due to pressure from a local birth planning committee.^a After the child was born, officials would not register her child in the family’s residency booklet (*see Section V.C. – Household Registration and Identity Card*) until she paid a fee, even though there are no provisions in the provincial birth planning regulations that permit local authorities to withhold registration until social compensation fees are paid in full.^b

[106] Anecdotal and empirical evidence suggests that self-employed individuals and rural residents can evade birth limitation regulations and authorities with relative ease.^a Job loss threats mean less to self-employed

persons than they do to state enterprise employees.^b Many self-employed individuals use economic means to skirt restrictions, using methods including bribing authorities before birth and paying fees after the birth.^c Urban residents can sometimes evade constraints simply by moving to the countryside or staying with relatives in other areas until the child is born, then returning home and paying a fee.^d

Jiangxi Province

[107] According to a Xinhua News Agency report in February 2004, new provincial regulations state that couples without an official marriage certificate who produce offspring will be fined 1.05 times the baseline income for their locality.^a If one or both of the members of the couple is younger than the lawful marriage age, the fine rises to 1.75 times the baseline. Couples who give birth in violation of the 'one child policy' will face fines of up to 3.5 times the average annual local per capita income.^b The average annual income of Jiangxi's urban residents in 2003 was roughly 6,900 renminbi (*about \$830*);^c for rural households, the figure was around 2,000 renminbi (*about \$240*).^d

Sichuan Province

[108] Sichuan birth planning regulations promulgated in implementation of the 2002 National Law on Population and Birth Planning abolished the requirement that couples obtain permission to have their first child.^a The regulations provide exemptions for residents from Taiwan, Hong Kong, and Macao, as well as returned overseas Chinese.^b Ethnic autonomous prefectures are empowered to promulgate their own regulations, subject to approval by the provincial People's Congress.^c Couples are permitted to have a second child if:

Their first child is handicapped and unable to work.

One parent is a disabled veteran.

Both parents are only children themselves.

The mother is an only child and the father is a rural resident.

The mother or the father is a single child of a military casualty.

The mother is a single child from an under-populated rural area.

They are a rural one-child family in a remote or mountainous region.

A family has several brothers, but only one has reproductive capacity.

[109] Couples who have a second child in contravention of the regulations are required to pay 6-8 times their disposable income in social compensation fees.^a The regulations stipulate different methods for calculating the income of rural and urban residents.^b Unwed couples who have a child are required to pay a social compensation fee of 3-4 times their annual disposable income.^c Couples who meet the criteria for a second birth, but who fail to obtain permission before having the child, must pay a social compensation fee equivalent to their disposable annual income.^d Couples who have a second child in contravention of the birth-spacing regulations would be required to pay a social compensation fee of two times their annual disposable income.^e Persons who did not meet the requirements for a second or third birth, but who nevertheless had a second or third child, would have to pay double the social compensation fee for each additional birth.^f

D. Births in the United States

[110] Couples sometimes seek asylum based on a claimed fear that an 'unauthorized' child born in the United States would – if the child returned to China – prompt their city university, or other work unit to fire one or both spouses from jobs or impose heavy economic penalties for violating the one-child policy.^a Some asylum seekers also claim the existence of an official Chinese government policy mandating sterilization of one partner if a couple has given birth to two children, at least one of whom was born abroad, if the child or children return to China.^b U.S. officials in China are not aware of the alleged official policy, at the national or provincial levels, mandating the sterilization of one partner of couples that have given birth to two children, at least one of whom was born abroad.^c

[111] National Population and Family Planning Commission officials told U.S. Embassy officials in July 2005 that, in accordance with an unpublished 2002 national level 'Regulation on Issues Concerning Births by Students when Overseas,' no action will be taken against students (*who give birth while overseas*) where both parents have resided overseas for at least one year and have two children when they return to China.^a Also under this regulation, reportedly, 'where Chinese returning to China have other offspring living permanently overseas, those offspring will not be counted for birth planning regulation purposes.'^b Unfortunately, when regulations are

unpublished, it is hard for members of the public to know and protect their rights, especially if officials claim laws or regulations are otherwise.^c Shanghai Municipality has published its own parallel regulation, which refers specifically to the unpublished national regulations, and states that the Shanghai regulation conforms to the national regulation's provisions.^d

[112] As to Fujian Province, in response to an inquiry by the U.S. Consulate General in Guangzhou, the Population Family Planning Commission of Fujian Province stated in an October 2006 letter that children born abroad, if not registered as permanent residents of China (*i.e., not entered into the parents' household registration*), are not considered as permanent residents of China, and therefore are not counted against the number of children allowed under China's family planning law.^a The October 6 letter has been translated and is attached as Appendix C.^b

[113] Complications could arise if a Chinese national returns with a U.S. born child who is traveling on a Chinese passport, as many be the case when parents hope to obtain free public education, medical care, and social services for the child in China. China does not recognize dual citizenship, and children without a Chinese household registration (*i.e., who enter and live in China as American citizens rather than as Chinese permanent residents*) are not eligible for free public education and other social benefits available to Chinese permanent residents.^a These benefits are available, but at a higher cost than the parents of permanent resident children pay.^b However, out understanding is that the parents of U.S. born children who choose to register their children as Chinese permanent residents in order to gain free or 'Chinese-cost' educational and other social benefits would not be able to exclude these children from the number of children allowed under Chinese family planning policy, and this could trigger sanctions and economic penalties under the relevant laws and regulations.^c In any case, the parents would be expected to conform to the restrictions in Chinese law and regulations on future offspring.^d American citizen children traveling on American passports are not eligible for free Chinese public education, many attend private schools where parents pay tuition.^e

[114] In an exchange of notes which accompanies the U.S.-China Bilateral Consular Convention signed in 1980, both governments agree that nationals of the sending state who enter the receiving station travel documents issued by the sending state 'will ... be considered nationals of the

sending state' for purposes of consular access and protection while in the receiving state.^a Thus, a person born in the United States to Chinese parents who enters China on a U.S. passport (*with a Chinese visa*) will be regarded as a U.S. citizen for purposes of consular protection.^b

Other Information for Adjudicators

[115] Many factors can come into play in asylum requests, including the treatment of illegal immigrants who are returned by the United States to China, complex issues regarding documentation, possible reasons for the large number of asylum requests from Fujian, and a host of other economic and social factors in today's China.^a There are also issues related to Taiwan, and conditions in Hong Kong and Macau, from which few asylum applications, in fact come.^b The following omnibus section addresses a number of these questions.^c

A. Treatment of Returning Illegal Emigrants from the United States

[116] The Chinese government accepts the repatriation of citizens who have entered other countries or territories illegally.^a In the past several years, hundreds of Chinese illegal immigrants have been returned from the United States, and U.S. Embassy officials have been in contact with scores of them.^b In most cases, returnees are detained long enough once reaching China for relatives to arrange their travel home.^c Fines are rare. U.S. officials in China have not confirmed any cases of abuse of persons returned to China from the United States for illegal entry.^d Persons identified as organizers or enforcers of illegal migrant trafficking are liable to face criminal prosecution in China.^e

B. Documentation

[117] Documentation from China, particularly from Fujian Province, is subject to widespread fabrication and fraud.^a This includes documents that purportedly verify identities, personal histories, births and birth control measures, and notices from public security authorities.^b The existence of this fraud has been established by direct investigation by U.S. consular officers in China. Certificates also may be issued to relatives or friends if they have written authorization from the interested party.^c According to me Chinese official with responsibilities relating to notarial offices in Fujian Province, no reliable documents exist to prove relationships and notaries must do field

EXHIBIT B

[REDACTED]

[REDACTED]

[REDACTED]

From: rich tarzia [<mailto:rtarzia@comcast.net>]

Sent: Tuesday, August 31, 2010 5:59 PM

To: 'Amy.Barcelo@usdoj.gov'

Subject: Tarzia v. Clinton

Ms. Barcelo:

As per our conversation, attached is a more detailed description of my FOIA request. Please contact me if you have any questions. Thanks Rich Tarzia

EXHIBIT C

DEFINITIONS

1. “You,” ”your,” or “Respondent” means U.S. Department of State, Bureau of Democracy, Human Rights and Labor, its trustees, agents, attorneys, servants, and employees, and all persons who have acted or purported to act on its behalf.
2. “Document” means any printed, written, typed, recorded, emails, graphic, photographic, computerized printout, computer program, computer database or other tangible matter from whatever source; whether produced or reproduced or stored on paper, cards, tapes, discs, belts, films, computer storage devices, or any other material or device; whether in draft or otherwise; whether sent or received or neither; including; but not limited to the original or a true copy (if the original is not available) and all non-identical copies (whether different from the originals by reason of any notation made on such copies or otherwise).
3. “Identify” or “identity,” when used with regard to a person, partnership, corporation, or business entity, means to give the name, present or last known address, and if a person, his present or last known employer, the address of the employer and the position and job title of the person.
4. “Identify” or “identity,” when used with regard to a document or thing, means to give the type of document or thing (e.g., letter, memorandum, telegram, chart, report, etc.), the date, author, addressee, file, and/or identifying number and the name and address of its custodian or, if the document or thing no longer exists, the date on which and the reason for which it was destroyed.
5. “Communication” refers to the oral or written transfer of data, facts, ideas, inquiries, opinions, or other information.

6. “Relating to,” “related to, ””related,” ”reflecting,” and “regarding” all mean consisting, comprising, describing, explaining, summarizing, being logically connected to being casually connected to, being chronologically connected to, mentioning or in any way concerning, directly or indirectly.
7. “And” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of this request any information that might otherwise be construed to be outside the scope.
8. The use of singular shall include the plural, the use of the plural shall include the use of the singular.
9. Wherever appropriate in these requests, the masculine form of a word shall be interpreted as the feminine and vice versa.

General information requested under FOIA

1. When was the work and/or research on the 2007 Asylum Profile on China started?
2. When was final version of the 2007 Asylum Profile on China completed?
3. Who is the editor of the Section on Claims Based on Population Policies, which starts on page 22? Where are they currently employed?
4. Identify and provide copies of all documents and/or statements to and/or from the FPBPC and Respondent, received or sent in the last 5 years.

Specific Information Requested under FOIA

Page 22, 1st paragraph

“China’s birth planning policies harshly coercive elements is law and practice.”

1. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.

2. Identify and provide a copy of the source of the information used to make this statement.

Page 22, 1st paragraph

“While central government policy prohibits the use of physical coercion to compel persons to submit to abortion or sterilization, there have been continuing reports of physical coercion to meet birth targets in some areas.”

3. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
4. Identify and provide a copy of the source of the information used to make this statement.
5. Provide copies of the “continuing reports”.

Page 22, 2nd paragraph

“National law purportedly standardizes the implementation of the birth limitation policy, but local enforcement and important aspects of local regulations vary significantly from place to place.”

6. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
7. Identify and Indentify and provide a copy of the source of the information used to make this statement.
8. Indentify and provide copies of the “local regulations”.

Page 22, 2nd paragraph

“The law requires couples who have an unapproved child to pay a “social compensation fee,” which sometimes reaches 10 times a person’s annual disposable income; there are also some benefits for couples who adhere to the birth limitation policy.”

9. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
10. Identify and provide a copy of the source of the information used to make this statement.

Page 22, 2nd paragraph

“Social compensation fees are set and assessed at the local level.”

11. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
12. Identify and provide a copy of the source of the information used to make this statement.

Page 22, 2nd paragraph

“The law requires birth planning officials to obtain court approval before taking “forcible” action, such as detaining family members or confiscating and destroying property of families who refuse to pay social compensation fees, but this requirement is not always followed in practice.”

13. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
14. Identify and provide a copy of the source of the information used to make this statement.

Page 22, 3rd paragraph

“Nevertheless, unpaid “social compensation fees” have sometimes resulted in confiscation or destruction of private property.”

15. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
16. Identify and provide a copy of the source of the information used to make this statement.

Page 22, 3rd paragraph

“There are reports that village officials have expelled women and their families from their homes and then destroyed the houses.”

17. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
18. Identify and provide a copy of the source of the information used to make this statement.
19. Provide copies of the “reports.”

Page 22, 3rd paragraph

“The “social compensation fees” and other penalties often left women with little practical choice but to undergo abortion or sterilization.”

20. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
21. Identify and provide a copy of the source of the information used to make this statement.

Page 23, 1st paragraph

“The implementation of birth planning policy in villages, the situation relevant to most asylum applicants, is the responsibility of local officials.”

22. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
23. Identify and provide a copy of the source of the information used to make this statement.

Page 23, 1st paragraph

“The personalities, interests, and personal connections of these local officials often influence their enforcement of national, provincial, and local laws, regulations, and policies, including birth planning policies, resulting in uneven enforcement, sometimes more strict and sometimes more permissive.”

24. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer..
25. Identify and provide a copy of the source of the information used to make this statement.

Page 23, 3rd paragraph

“State Council Decree 357 provides general guidance to local authorities, and also permits birth planning officials to ask a court to take forcible action against families that refuse to pay social compensation fees.”

26. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.

27. Identify and provide a copy of the source of the information used to make this statement.
28. Provide a copy of "State Council Decree 357".

Page 24, 1st paragraph

"However, U.S. diplomats in China have heard reports that local officials occasionally employ illegal means, such as forcibly performing abortions or sterilizations, in order to demonstrate their resolve to meet birth planning targets and keep their jobs."

29. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
30. Identify and provide a copy of the source of the information used to make this statement.
31. Identify each and every diplomat referred in this statement.
32. State the date on which each of the named diplomats "heard reports."
33. Attach copies of any notes or documents in the State Department's possession that supports this statement.

Page 24, 1st paragraph

"Reports of physical coercion continue to be heard."

34. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
35. Identify and provide a copy of the source of the information used to make this statement.
36. Identify each and every person referred to in this statement that "heard reports".
37. State the date on which each person "heard reports."
38. Attach copies of any notes or documents in the State Department's possession that supports this statement.

Page 24, 2nd paragraph

“China’s birth planning law is most strictly enforced on Han Chinese in urban areas, where the one-child policy is the norm.”

39. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
40. Identify and provide a copy of the source of the information used to make this statement.

Page 24, 2nd paragraph

“Residents of rural area enjoy more flexibility de jure and de facto on having a second child.”

41. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
42. Identify and provide a copy of the source of the information used to make this statement.

Page 25, last paragraph

“The government (whether or not it has actual or sampling data) does not publicize data on forced abortions or forced sterilization, though the press occasionally reports abuses.”

43. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
44. Identify and provide a copy of the source of the information used to make this statement.
45. Provide copies of the press reports that form the basis of this statement.

Page 26, 2nd paragraph

“Local authorities usually at the township or neighborhood committee levels, issue birth permits; birth planning certificates (obtained at marriage and entitling couples to use birth planning services, including birth control).”

46. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
47. Identify and provide a copy of the source of the information used to make this statement.

Page 26, 3rd paragraph

“According to the Fujian Provincial Birth Planning Committee (FPBPC), there have been no cases of forced abortion or sterilization in Fujian in the last 10 years.”

48. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
49. Identify and provide a copy of the source of the information used to make this statement.
50. Identify to whom, when and where this statement was made.
51. Identify the person making this statement and date made.

Page 26, 3rd paragraph

“It is impossible to confirm this claim, and, in 2006, reportedly, there were forced sterilizations in Fujian.”

52. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
53. Identify and provide a copy of the source of the information used to make this statement.
54. Identify and provide a copy of the reports.
55. Identify to whom, when and where these reports were made.

Page 26, 3rd paragraph

“Hundreds of asylum applicants from Fujian claim that forced abortions and sterilization continue to the present day.”

56. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer..
57. Identify and provide a copy of the source of the information used to make this statement.

Page 26, 3rd paragraph

“Local physicians in contact with the U.S. Consulate General in Guangzhou report that they have not seen signs of forced abortions or sterilizations among their patients from Fujian and Guangdong Provinces since the 1980s.”

58. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
59. Identify and provide a copy of the source of the information used to make this statement.
60. Identify and provide the names and addresses of the local physicians that form the basis of this statement.
61. For each physician, state the date on which they reported or stated “that they have not seen signs of forced abortions or sterilizations among their patients from Fujian and Guangdong Provinces since the 1980s”.
62. Identify and provide the names and addresses of the personnel of the U.S. Consulate General in Guangzhou to whom the physicians made these statements.
63. Identify and provide the number of patients the physicians had seen before making these statements.
64. Identify and provide the dates on which the patients were seen by the physicians.

Page 26, 3rd paragraph

“More recently, a hospital director in Changle, Fujian, stated that the hospital would take “measures” (unspecified) to induce some patients to undergo abortions in the name of compliance with the birth planning law.”

65. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
66. Identify and provide a copy of the source of the information used to make this statement.
67. Identify and provide the name and address of the hospital director who made the statement “that the hospital would take “measures” (unspecified) to induce some patients to undergo abortions in the name of compliance with the birth planning law.”
68. Provide the date on which this statement was made.
69. Provide the name and address of the hospital.

Page 26, 3rd paragraph

“Consulate General officials visiting the Fujian have found that coercion through public and other pressure has been used, but they did not find any cases of physical force employed in connection with abortion or sterilization.”

70. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
71. Identify and provide a copy of the source of the information used to make this statement.
72. Identify and provide the names and addresses of the U.S. Consulate General officials and the dates they conducted their visit to Fujian.
73. Identify the places visited and length of each visit.
74. Identify and provide the names of any Chinese Officials who may have accompanied U.S. Consulate General officials during their visit to Fujian.

Page 26, 3rd paragraph

“In interviews with visa applicants from Fujian, representing a wide cross-section of society, Consulate General officers have found that many violators of the one-child policy paid fines but found no evidence of force abortion or property confiscation.”

75. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
76. Identify and provide a copy of the source of the information used to make this statement.
77. Identify and provide the number and nature of the interviews that form the basis of this statement.
78. Identify and provide the questions posed to the interviewees that form the basis of this statement.

Page 28, 1st paragraph

“The media have reported some cases in which a person was punished because his or her relatives either violated birth planning restrictions or had not paid fees for violating birth planning regulations, although these cases have not been independently verified.”

79. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
80. Identify and provide a copy of the source of the information used to make this statement.
81. Identify and provide copies of all media reports that form the basis of this statement.

Page 29, 3rd paragraph

“U.S. officials in China are not aware of the alleged official policy, at the national or provincial levels, mandating the sterilization of one partner of couples that have given birth to two children, at least one of whom was born abroad.”

82. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.

83. Identify and provide a copy of the source of the information used to make this statement.
84. Identify and provide the names, address and positions of the U.S. officials that stated they “are not aware of the alleged official policy, at the national or provincial levels, mandating the sterilization of one partner of couples that have given birth to two children, at least one of whom was born abroad.”
85. Provide the date on which these statements were made.

Page 30, 3rd paragraph

“However, our understanding is that the parents of U.S.-born children who choose to register their children as Chinese permanent residents in order to gain free or “Chinese-cost” educational and other social benefits would be able to exclude these children from the number of children allowed under Chinese family planning policy, and this could trigger sanctions and economic penalties under the relevant laws and regulations.”

86. Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.
87. Identify and provide a copy of the source of the information used to make this statement.
88. Provide the date on which this statement was made.

EXHIBIT D

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RELEASED IN PART
B1, 1.4(B), 1.4(D), B6

D7

Jeffrey J Buczacki 10/11/2005 01:13:06 PM From DB/Inbox: Jeffrey J Buczacki

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TELEGRAM

October 11, 2005

To: SECSTATE WASHDC - PRIORITY
Action: PRM
From: AMEMBASSY BEIJING (BEIJING 16344 - PRIORITY)
TAGS: KHIV, PGOV, SOCI, TBIO, CH
Captions: None
Subject: CHINA POPULATION OFFICIAL'S RESPONSE TO LINYI ABUSES
Ref: A) BEIJING 14769 B) CHENGDU 00558 C) BEIJING 15981

Classified By: Deborah Seligsohn, ESTH Counselor, for reasons: 1.5 (b) and (d)

1. (C) Summary:

[Redacted]

B1

At a national workshop on September 28, NPFPC Minister Zhang Weiqing ordered family planning officials at all levels to make three fundamental changes in implementing family planning policy and respect the rule of law. Zhang also ordered that rule of law should become a major part of job performance and evaluation for all levels of family planning officials. End Summary.

2. (C)

[Redacted]

B1

3. (C)

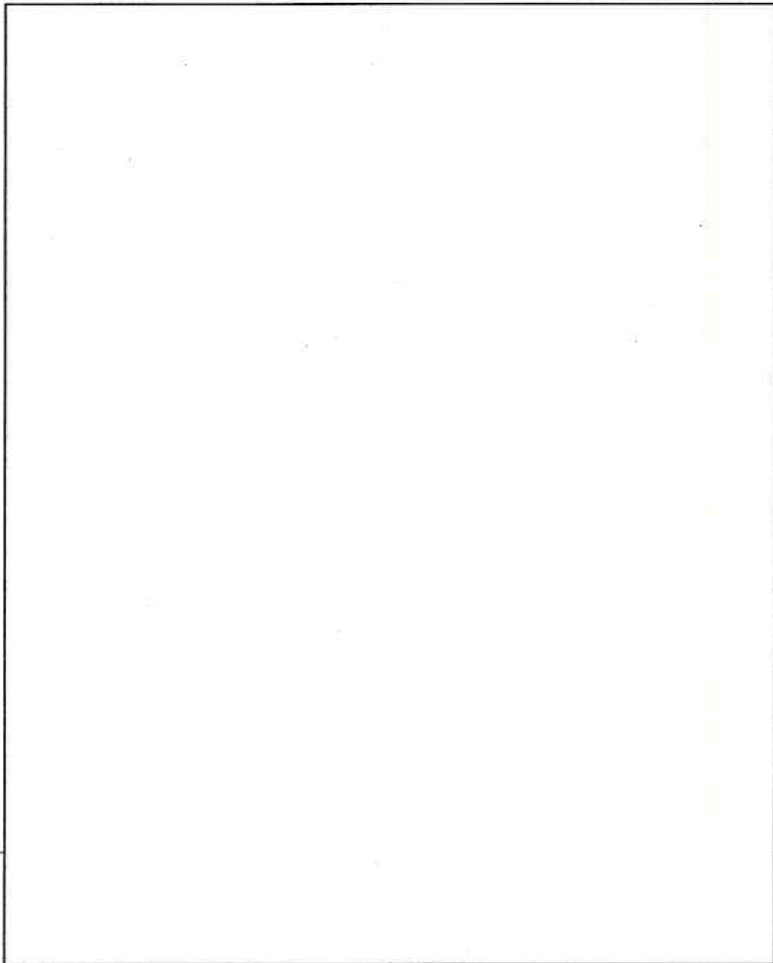
[Redacted]

B1

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B1

Minister Zhang Stresses Rule of Law

7. (U) On September 28 at a national workshop on the Rule of Law in Population and Family Planning held in Changchun, NPFPC Minister Zhang Weiqing ordered all levels of family planning officials to make three basic changes to their implementation of family planning policy. First, the relationship between the people and government must be changed from citizen responsibility-oriented and government power-oriented to citizen's rights-oriented and government responsibility-oriented. Second, the concept of rule of law must be changed from ruling citizens by law to ruling official's power by law. Third, the concept of responsibility must be changed from one-sided stressing of citizen's responsibility to stressing the government's responsibility as well.

8. (U) Minister Zhang stressed the rule of law, and that the use of commando tactics, illegal "study session" detentions, and requiring illegal monetary deposits are not allowed in the implementation of family planning policy. It is also not allowed to implicate family members of family planning violators, unlawful custody, or assaults on the people. Zhang added that responsible persons should be subject to administrative sanctions or legal liabilities for any infringement of people's rights.

9. (U) Zhang also requested that population and family planning authorities at all levels establish a leading group

~~on-rule-of-law-and-that-a-top-official-should-be-responsible~~

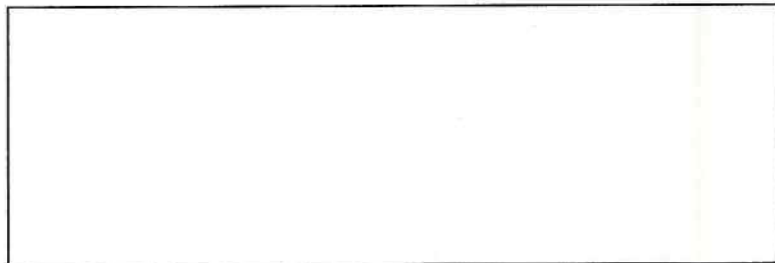
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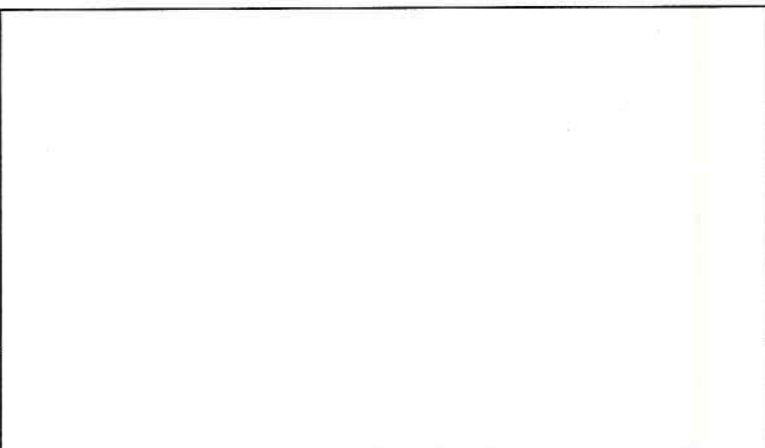
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for the issue. Rule of law should become a major part of the official's job performance and evaluation. The leader of a certain level of government that has abuse problems shall be subject to liabilities, so as to make the rule of law a hard requirement instead of a soft one.



B6

Comment



B1

SEDNEY

Additional Addressees:
None

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STATE FOR PRM/POP - NKENNELLY
STATE ALSO FOR PRM, IO/D, DRL, AND EAP/CM

E.O. 12958: DECL: 10/11/2015
TAGS: KHIV, PGOV, SOCI, TBIO, CH
SUBJECT: CHINA POPULATION OFFICIAL'S RESPONSE TO LINYI
ABUSES

REF: A) BEIJING 14769 B) CHENGDU 00558 C) BEIJING 15981

End Cable Text

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4

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

RICHARD TARZIA,

Plaintiff,

v.

HILLARY CLINTON,
in her capacity as U.S. Secretary of State,

Defendants.

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Civil Action No. 1:10-cv-05654 (FM)

* * * * *

ORDER

UPON CONSIDERATION OF Defendant’s Motion for Summary Judgment, any
opposition thereto, and the entire record herein, it is this _____ day of _____, 2011,

ORDERED that Defendant’s Motion is **DENIED**.

Frank Maas
United States Magistrate Judge