

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

NATIONAL INSTITUTE OF MILITARY JUSTICE)	
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)	
Plaintiff,)	Civil Action No.: 04-0312 (RBW)
)	
v.)	
)	
UNITED STATES DEPARTMENT OF DEFENSE)	
)	
)	
Defendant.)	
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This case arises under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. It was brought by plaintiff, National Institute of Military Justice, who challenges defendant Department of Defense’s withholding of certain requested documents. See Complaint at 3, ¶10. Specifically, plaintiff is challenging defendant’s withholding of internal memoranda and information excluded from release by defendant that relates to the President of the United States’ November 13, 2001, Order on Trials by Military Commission for detainees, who were suspected terrorist combatants for Al Qaeda. Reasonable efforts to process plaintiff’s search have been made to comply with plaintiff’s FOIA requests, as demonstrated by the attached declaration of Stewart Aly, Associate Deputy General Counsel (Legal Counsel) in the Office of the General Counsel of the Department of Defense. See Exhibits 1 and 2 (*Vaughn Index*), attached hereto. As more fully set forth below and in the attachment hereto, defendant has responded fully to plaintiff’s FOIA request and no documents have been unlawfully withheld. Accordingly, it is respectfully requested that

summary judgment be entered in this FOIA case and that it be dismissed from the docket with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's FOIA Request.

By letter dated October 3, 2003, plaintiff submitted a FOIA request to the Department of Defense's Directorate for Freedom of Information and Security Review (DFOISR) requesting:

all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or employee of the United States acting in the course of his or her official duties) regarding the President's November 13, 2001 Military Order, the Secretary's Military Commission Orders, and the Military Commission Instructions. This request includes but is not limited to suggestions or comments on potential, proposed, or actual terms of any of those Orders or Instructions and any similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted.

Complaint at p. 2 and Exhibit 1, hereto, Declaration of Stewart Aly, Associate Deputy General Counsel (Legal Counsel) in the Office of the General Counsel of the Department of Defense ("Aly Decl.") at ¶¶4 & 6. Based on the description of documents sought by the plaintiff, DFOISR determined that it was likely that correspondence about the Commission Orders and Instructions would be in the files of the Secretary's correspondence. Aly Decl. at ¶ 6. In addition, because the Office of Military Commissions has always been a part of the Office of the General Counsel, DFOISR determined that there were likely to be responsive documents in that office. Id. Both offices were searched. Id.

B. Defendant's Response to Plaintiff's FOIA Request.

On November 18, 2003, an interim response was provided to plaintiff by defendant with the production of nine pages of responsive documents in their entirety. Aly Decl. at ¶ 7. This

interim release is therefore not at issue in this law suit, except to the extent that plaintiff may argue that all responsive documents have not been released.

The continuing search for records within the agency produced an additional 191 pages of records and a release of these documents with redactions was made to plaintiff on June 4, 2004, as follows: 24 of these pages contain personal information exempt from disclosure pursuant to FOIA Exemption 6 of the FOIA; 6 pages (two documents) were withheld pursuant to FOIA Exemptions 2, 7(A) and (E); and the remainder were released in their entirety. Aly Decl. at ¶¶ 8 & 9.

An additional document consisting of two pages was released on August 24, 2004, with redactions of personal information pursuant to Exemption 6.

With this filing, an additional release of documents is being made and a *Vaughn Index* is provided for the redactions made pursuant to Exemptions 2, 7(a) & (E), 5 & 6. That *Index* is found at Tab C to the Aly Declaration. Tabs D-F contain partially redacted documents as follows:

Tab D consists of 14 pages of cover letters and facsimile cover sheets that were initially determined to be non-responsive. They are released to plaintiff in their entirety, except for one page that has personal information redacted from it pursuant to Exemption 6. Aly Decl. at ¶ 11. One of the documents included in Tab D is a facsimile cover sheet to a two-page communication between Terry O'Donnell of the law firm of Williams & Connolly LLP and Whit Cobb and General Thomas Hemingway, Deputy General Counsel and attorney with the OMC, respectively. (The cover sheet appears at Tab D to the Aly Declaration and the two-page communication is described in the *Vaughn Index* [Tab C] at p. 4). Although the cover sheet is being released, the

two-page communication is being withheld pursuant to Exemption 5's deliberative process privilege as more fully set forth below and described in the *Vaughn Index* at Tab C.

Tab E contains an email between Professor Ruth Wedgewood and Jennifer Koester, an attorney with the OGC and is redacted to protect personal information and is also protected by deliberative process privilege. (This document is referred to in the *Vaughn Index* as Document 4).

Tab F consists of the first page of a 24-page document containing meeting notes and identified as "MEETING NOTES: DEP SEC DEF AND GENERAL COUNSEL ADVISORY MEETING 7/30/03." (This document is described in detail in the *Vaughn Index* at pp. 6-7 and the first page with the general heading and other information appears at Document 5). The remainder of this document is being withheld pursuant to Exemption 5's deliberative process privilege.

Plaintiff appealed the initial FOIA release and has filed the instant law suit, seeking additional records. Complaint at ¶ 7 and WHEREFORE Clause.

III. ARGUMENT

A. Standard for Summary Judgment

Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. *Id.* at 247. "The burden on the moving party may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party's case." *Sweats Fashions, Inc. v. Pannill Knitting Company, Inc.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987).

Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Thus, to avoid summary judgment, the plaintiff must present some objective evidence that would enable the court to find he is entitled to relief. In Celotex Corp. v. Catrett, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. 477 U.S. 317, 322-23 (1986).

The summary judgment standards set forth above also apply to FOIA cases, which are typically decided on motions for summary judgment.¹ See Cappabianca v. Commissioner, U.S. Customs Serv., 847 F.Supp. 1558, 1562 (M.D. Fla. 1994) ("once documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment") (citing Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993)). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dept. of State, 257 F.3d 828, 833 (D.C. Cir. 2001); Weisberg v. U.S. Dept. of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and the plaintiff with affidavits or declarations and other evidence which show that the documents are exempt from disclosure. Hayden v. National Security Agency Cent. Sec. Serv.,

¹ For purposes of summary judgment, an agency's decision to withhold information from a FOIA requester is subject to de novo review by the courts. Hayden v. National Security Agency Cent. Sec. Serv., 608 F.2d 1381, 1384 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980).

608 F.2d 1381, 1384, 1386 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Church of Scientology v. U.S. Dept. of Army, 611 F.2d 738, 742 (9th Cir. 1980).

Summary judgment may be awarded to an agency in a FOIA case solely on the basis of agency affidavits or declarations if the “affidavits are ‘relatively detailed, non-conclusory, and not impugned by evidence ... of bad faith on the part of the agency.’” Public Citizen, Inc. v. Dept. of State, 100 F.Supp.2d 10, 16 (D.D.C. 2000) (quoting McGhee v. Central Intelligence Agency, 697 F.2d 1095, 1102 (D.C. Cir. 1983); Citizens Commission on Human Rights v. FDA, 45 F.3d 1325, 1329 (9th Cir. 1995); Bowen v. FDA, 925 F.2d 1224, 1227 (9th Cir. 1991). See also Hayden, 608 F.2d at 1387; Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981).

“Summary judgement is available to the defendant in a FOIA case, when the agency proves that it has fully discharged its obligations under FOIA.” Miller v. U.S. Dept. of State, 779 F.2d 1378, 1382 (8th Cir. 1985.) Agencies establish that all of their obligations under the FOIA have been met through declarations and Vaughn indices. The declaration in this matter was provided by an individual familiar with the steps taken by the Department of Defense in response to plaintiff’s FOIA request. Since the declaration in this matter demonstrates that the agency has met its obligations under the FOIA, and the pleadings, supplemented by this declaration, show no genuine issue as to any material fact and the defendant are entitled to judgment as a matter of law, summary judgment should be granted to the defendant. See Perry v. Block, 684 F.2d 121 (D.C. Cir. 1982).

B. Defendant's Searches Were Adequate

1. The Applicable Legal Standard

The defendant in this matter performed adequate searches in response to plaintiff's FOIA request. In responding to a FOIA request, an agency is under a duty to conduct a reasonable search for responsive records. Oglesby, 920 F.2d at 68; Cleary, Gottlieb, Steen & Hamilton v. Dept. of Health, et al., 844 F. Supp. 770, 776 (D.D.C. 1993); Weisberg v. U.S. Dept. of Justice, 705 F.2d 1344, 1352 (D.C. Cir. 1983). The established reasonableness standard by which FOIA searches are judged "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller, 779 F.2d at 1384-85. Thus, "the issue in a FOIA case is not whether the agencies' searches uncovered responsive documents, but rather whether the searches were reasonable." Moore v. Aspin, 916 F.Supp. 32, 35 (D.D.C. 1996); see also Fitzgibon v. U.S. Secret Service, 747 F.Supp. 51, 54 (D.D.C. 1990); Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986).

Because the "reasonableness" standard focuses on the method of the search, not its results, Weisberg, 844 F.Supp. at 777 n.4, an agency demonstrates that it conducted a reasonable search by showing "that it made a good faith effort to conduct a FOIA search for requested records by using methods that can reasonably be expected to produce the information requested." Western Center for Journalism, 116 F. Supp.2d at 9; Oglesby, 920 F.2d at 68.

The search standards established under the FOIA do not require an agency to search every record system, but rather, the agency need only search those systems in which it believes responsive records are likely to be located. Oglesby, 920 F.2d at 68. Even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent. Nation Magazine,

71 F.3d at 892 n.7. Additionally, the mere fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it Maynard v. CIA, 982 F.2d 546, 564 (1st Cir. 1993).

Simply stated, the adequacy of the search is “dependent upon the circumstances of the case.” Truitt v. Dept. of State, 897 F.2d 540, 542 (D.C. Cir. 1990). The fundamental question is not “whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate.” Steinberg v. Dept. of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. Dept. of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

2. Defendant Met Its Search Obligation

As explained in the Aly Declaration, upon receipt of plaintiff’s request, DFOISR determined that there were two offices likely to have responsive documents, i.e., the Office of Military Commissions (“OMC”) which is part of the Office of the General Counsel and the Correspondence and Directives Division, Washington Headquarters Services (“CDD”) which receives correspondence directed to the Secretary of Defense. Aly Decl. at ¶ 6. The OMC was established to draft the Orders and Instructions needed to create, establish and define the procedures for military commissions as directed by the President. This office has grown and evolved as the Orders and Instructions were issued and individual cases have moved closer to the trials for which the commissions were established. At all times since it was created, the OMC has been a part of the Office of the Deputy General Counsel (Legal Counsel). Because the OMC has always been a part of the Office of the General Counsel, DFOISR sent the request to the OGC. Id. DFOISR also forwarded the FOIA request to the Correspondence and Directives Division, Washington Headquarters Services, which receives correspondence directed to the Secretary of Defense, assigns responsibility for preparation of responses and maintains the

records of the Secretary's incoming and outgoing correspondence. Id. Based on the description of documents sought by the plaintiff, DFOISR determined that it was likely that correspondence about the Commission Orders and Instructions would be in the files of the Secretary's correspondence. Id.

In addition to DFOISR efforts to search for responsive records, Mr. Aly personally directed a search of the paper and electronic files of the attorneys and other staff members who were assigned to work on matters related to the subject of the request, using the description of documents sought by the plaintiff in the request. Aly Decl. at ¶ 8. The search terms were those derived from the plaintiff's request but the search was not done by electronic means; instead members reviewed individual documents in their files using the plaintiff's description. Id.

The files of the Office of the Deputy General Counsel (Legal Counsel) were also searched for responsive documents. Aly Decl. at ¶ 8(b). The Deputy General Counsel maintained subject matter files which were searched by attorneys who had also conducted the searches in the Office of Military Commissions. Id. The electronic files in the computer used by the Deputy General Counsel were searched using the same methods and the same search terms used for searches in the Office of Military Commissions. Id. In addition, the master office chronological files of incoming and outgoing correspondence were searched in the same way. Id.

For other offices within the Office of the General Counsel, including the General Counsel's immediate office, whose responsibilities could conceivably relate to the military commissions, Mr. Aly conducted a survey by personally inquiring of the attorneys and managers whether they had any files related to the military commission Orders or Instructions. Aly Decl. at ¶8(c). All of his inquiries resulted in a response that no such files were maintained and that any

ingoing or outgoing correspondence related to the military commissions had been referred to the Deputy General Counsel (Legal Counsel) or the Office of Military Commissions. Id.

A review by Mr. Aly of the records located produced 191 pages of responsive documents. These documents were released to plaintiff in whole or with redactions as described above. As also noted above, fourteen pages of records were initially found to be nonresponsive to plaintiff's request, but have now been processed and are being released with appropriate redactions.

Defendant submits that it conducted an adequate search for records as required by the law.

C. The Department of Defense Properly Withheld Records Pursuant to Exemption's 5 Deliberative Process Privilege.

1. Standards Applicable to Exemption 5, Deliberative Process Privilege.

Exemption (b)(5) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Courts have construed this language to exempt documents that would not ordinarily be available to an agency's opponent in a civil discovery context and to incorporate all evidentiary privileges that would be available in that context. See United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984); FTC v. Grolier, Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987). The deliberative process privilege is incorporated within Exemption 5. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

This Circuit has held that Exemptions 5's "inter-agency or intra-agency" threshold requirement will be satisfied even where no "formal relationship" exists between the agency and the outside reviewer. Formaldehyde Institute v. HHS, 889 F.2d 1118 (D.C. Cir. 1989) (outside scientific journal engaged in the process of reviewing an article submitted to HHS for

publication); see also Public Citizen, Inc. v. United States Dep't of Justice, 111 F.3d 168 (1997)(consultative relationships between former Presidents and agencies under the Presidential Records Act are protected under Exemption 5). Moreover, recommendations of volunteer consultants have been protected under this exemption. See Wu v. Nat'l Endowment for the Humanities, 460 F.2d 1030, 1032 (6th Cir. 1972). As this Circuit has noted, "Congress apparently did not intend 'inter-agency or intra-agency' to be rigidly exclusive terms, but rather to include [nearly any record] that is part of the deliberative process." Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980).

The purpose of the deliberative process privilege is to protect the "quality of agency decisions." Id. The policy underlying this privilege is to encourage open, frank discussions on policy matters to protect against premature disclosure of proposed policies before they become final, and to protect against public confusion by disclosing reasons and rationales that were not in fact the ultimate grounds for the agency's action. See, e.g., Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc), overruled in part on other grounds, Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir.1981) (en banc).

Flowing from the policy considerations is the privilege's protection of the "decision making processes of government agencies." Sears, 421 U.S. at 150. The privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm. Dudman Communications Corp. v. Dept. of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987)("Congress enacted Exemption 5 to protect the executive's deliberative processes – not to protect specific materials."). Greenberg v. Dept. of Treasury, 10 F.

Supp.2d 3, 16, n.19 (D.D.C. 1998); Marzen v. HHS, 825 F.2d 1148, 1155 (7th Cir. 1987) ("[E]xemption protects not only the opinions, comments and recommendations in the draft, but also the process itself."); Pies v. IRS, 668 F.2d 1350, 1353-54 (D.C. Cir. 1981). As the Court in Coastal States held, the privilege protects "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Coastal States, 617 F.2d at 866. Indeed, the mere status of an agency decision within an agency decisionmaking process may be protectible if the release of that information would have the effect of prematurely disclosing "the recommended outcome of the consultative process...as well as the source of any decision." Wolfe v. HHS, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc).

Courts have recognized that agencies are entitled to deference in regard to the way they characterize their deliberative process. See generally Allen v. Wright, 468 U.S. 737 (1984); Women's Equity Action League v. Bell, 743 F.2d 42, 43 (D.C.Cir.1984).

Two fundamental requirements must be met for the deliberative process privilege to be invoked. Mapother v. Dept. of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993). First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." Jordan, 591 F.2d at 774. Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d at 1143-44.

In deciding whether a document should be protected by the privilege, courts look to whether the document is "predecisional," whether it was generated before the adoption of an agency policy, and whether the document is "deliberative," whether it reflects the give-and-take of the consultative process. Coastal States, 617 F.2d at 866-68. The exemption thus covers

recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Id. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that is as yet only a personal position. Id.

To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency; "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." Coastal States, 617 F.2d at 866-68, quoting United States v. Nixon, 418 U.S. 683, 705 (1974). Courts look at whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another. Coastal States, 617 F.2d at 868; Common Cause v. IRS, 646 F.2d 656, 659-660 (D.C. Cir. 1981).

2. The Department of Defense Properly Withheld Documents Pursuant to FOIA Exemption 5.

In this case, the documents withheld pursuant to the deliberative process privilege of Exemption 5 are pre-decisional and deliberative. They were documents that constituted inter-agency or intra-agency records leading up to a final decision, i.e., the development of the final Military Instructions. See generally Formaldehyde Inst. v. HHS., 889 F.2d at 1121. A final decision is not essential for there to be a deliberative process which is protected by Exemption (b)(5). See Access Reports v. Dept. of Justice, 926 F.2d 1192, 1194 (D.C. Cir. 1991)

As explained by the Aly Declaration, the documents listed in the *Vaughn* Index, Exhibit 2, are withheld in full or in part under the deliberative process privilege of Exemption 5 as they record communications either to or from consulting lawyers who were actively participating in providing advice in response to the request from the General Counsel.

With respect to the two documents involving communications between the United States and officials of the government of Great Britain concerning the military commissions and their proceedings with officials of the Government of the United Kingdom, as explained by Mr. Aly, public release of the matters discussed in confidence in these two documents would frustrate the ultimate purpose of the President's Order on which the Military Commissions are based. Aly Decl. at ¶¶ 17, 20. Nationals of many countries are subject to Military Commission proceedings and allies of the United States have an interest in the conduct of the proceedings. *Id.* The Defense Department and other agencies of the United States Government must be able to communicate with these governments in confidence about Military Commissions. *Id.* at ¶ 20. Disclosure of matters raised as the instructions and procedures were in draft would interfere with ongoing and future proceedings. *Id.* If communications between the Government of the United States and another government on matters related to the procedures and conduct of Military Commissions cannot be made in confidence, important matters which should be considered in future proceedings may not come to the attention of the appropriate officials. *Id.* The threat of public scrutiny of communications of this nature could lead the governments involved to conclude that no communication should be made. *Id.*

With regard to Document 5 identified as "MEETING NOTES: DEP SEC DEF AND GENERAL COUNSEL ADVISORY MEETING 7/30/03" and found at Tab F in the redacted form, these are notes taken at a meeting among a group of lawyers who have been asked to serve

as consultants by the General Counsel of the Department of Defense and provide their advice and consult on request on issues such as Military Commission matters. Aly Decl. at ¶ 22. These lawyers have never met as a group to formulate general policy or hold discussions on broad issues. They are consulted as individuals, although on occasion several may meet at one time to give their individual opinions on a specific topic. *Id.* The General Counsel's intent has been to maintain a relationship with these lawyers to benefit from their extensive experience and wisdom. *Id.* They are not paid for their services, but there is an understanding that they will consult and advise on a continuing basis. *Id.* The redacted portions of the notes are described in the *Vaughn Index*, found at Tab C of the Aly Declaration, pp 6-7 and referenced Document. 5. They are 24 pages of notes each page with a running title: "MEETING NOTES: DEP SEC DEF and GENERAL COUNSEL ADVISORY MEETING 7/30/03." The format is a summary of comments made by individuals participating in this meeting and descriptions of two briefings presented to the attendees. The term "DEP SEC DEF" refers to Deputy Secretary of Defense Paul Wolfowitz. The *Vaughn Index* describes that the individual advisers present were: The Honorable William Barr, The Honorable William Coleman, The Honorable Lloyd Cutler, The Honorable Martin Hoffman, The Honorable John Marsh, The Honorable Terrence O'Donnell, The Honorable William Webster and Professor Ruth Wedgwood. See Tab C at pp. 6-7. General Counsel William J. Haynes II and Deputy General Counsel (Legal Counsel) Whit Cobb also participated. *Id.* The *Index* further describes these notes as follows:

Summary of Contents: This document is a summary of a meeting that began about 2:15 and ended shortly after 6 PM on July 30, 2003. It was prepared by a recorder identified as Captain Ronald D. Sullivan.

Pages 1 to 4: Welcoming remarks and general discussion of Military Commissions including responsibilities in the applicable legal regime.

Pages 4 to 9: Briefing on Office of Military Commissions including summary of

questions and comments from individual attendees legal authorities and standards applicable to Military Commissions.

Pages 10 to 16: Briefing titled Prosecution Update including presentation summarizing prosecution effort and strategy; comments from individual attendees addressing various legal authorities and potential choices that could be made.

Pages 16 to 17: General discussion among attendees about matters raised in the briefings.

Pages 17 to 24: Summary of discussion of attendees with Deputy Secretary Wolfowitz. Subjects covered included issues raised during the briefings and options for conducting Military Commission proceedings.

This document contains summaries of deliberations about procedures for the conduct of Military Commissions prior to the finalization of the Military Instructions at issue in this case. *Vaughn Index* at p. 7. The briefings presented to the advisers address prosecution strategy and procedural issues. The session concluded with a discussion containing legal analysis, opinions and recommendations communicated both to senior attorneys in the Department of Defense and directly to a senior official in the Department. The communications are clearly deliberative as they contain opinions and recommendations of individual attendees. *Id.*

D. The Department of Defense Properly Withheld Records Pursuant to FOIA Exemption 6.

1. Exemption 6

Exemption 6 permits the government to withhold all information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute an unwarranted invasion of personal privacy.” *See* 5 U.S.C. § 552(b)(6).

The threshold issue to be determined in the application of Exemption 6 was firmly established in U.S. Dept. of State v. Washington Post Co., 456 U.S. 595 (1982). The Supreme Court made clear that all information that “applies to a particular individual” meets the threshold requirement for protection under Exemption 6. *Id.* at 602. The materials withheld in this matter are part of a law enforcement file and are identifiable by an individual’s name or other personal

identifier and apply to a particular individual. Therefore, these documents meet the threshold requirement for protection under Exemption 6. See Washington Post Co., 456 U.S. at 602.

“The next step under Exemption 6 involves identifying the relevant privacy interests in non-disclosure and the public interests in disclosure, and determining ‘whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy.’” Reed v. National Labor Relations Board, et al., 927 F.2d 1249, 1251 (D.C. Cir. 1991) (quoting National Ass’n of Retired Federal Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990)). “‘The phrase ‘clearly unwarranted invasion of personal privacy’ enunciates a policy that will involve a balancing of interests between the protection of an individual’s private affairs from unnecessary public scrutiny, and the preservation of the public’s right to governmental information.’” Dept. of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

2. The DoD Properly Applied Exemption 6.

The Defense Department applied Exemption 6 to withhold personal information on twenty eight pages of records. In the letter of March 3, 2003, from 2nd Lt. Iverson, a portion is devoted to the writer’s qualifications and experience in support of his request to work with the commissions. Aly Decl. at ¶ 14. Accordingly, this information is personal information and not responsive to plaintiff’s request and is therefore properly withheld.

In addition to the withholding from the letter of March 3, 2003, twenty-three pages of email documents have been released with redactions for personal addresses and one other document contains a home address which was redacted. Aly Decl. at ¶ 15. As explained by Mr. Aly:

Under long standing Defense Department policy, personal email addresses are classified as home addresses and are not released under the FOIA to protect the

privacy of military personnel, Defense Department employees and private citizens who have occasion to correspond with the Department.

Id.

In applying Exemption 6 to this information, the Defense Department properly balanced the individuals' right to privacy against any public interest in shedding light on DoD's performance of its statutory duties. As explained by Mr. Aly at ¶ 15 of his declaration:

In applying Exemption 6 to this information, I considered both the public and the privacy interests at stake. I determined that the individuals who provided comments on this matter could be identified by name, as the public interest in knowing the source of comments is an important one. Revealing home addresses and personal email addresses, on the other hand, adds little to the public knowledge and could subject the individual to unwanted mail, emails or even harassment. On this basis I decided that the balance of interests favors withholding the information. On all of the documents released in response to the plaintiff's request, the writer, sender and recipient are clearly identified.

Balancing these interest weighs heavily in the direction of protecting the individual's privacy interest, particularly in light of the fact that the writer, sender and recipient are all clearly identified.

E. Other Exemptions Asserted by the Department of Defense.

As explained in the declaration of Mr. Aly, the Department of Defense also invokes Exemption 2, 7(A) and 7(E) and believes that those exemptions also support the withholding of the two documents containing communications between Department of Defense officials and officials of the Government of the United Kingdom. See Aly Decl. at ¶ 17(a) & (b) & ¶¶ 19-20; see also reference in the *Vaughn Index* at Tab C to Documents 1 & 2.

CONCLUSION

The defendant has demonstrated that a adequate search was conducted for responsive documents and no documents were improperly withheld from plaintiff. Accordingly, the Court should grant defendant's motion for summary judgment.

Respectfully submitted,

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

NATIONAL INSTITUTE OF MILITARY JUSTICE)	
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)	
Plaintiff,)	Civil Action No.: 04-0312 (RBW)
)	
v.)	
)	
UNITED STATES DEPARTMENT OF DEFENSE)	
)	
)	
Defendant.)	
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STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. By letter dated October 3, 2003, plaintiff submitted a FOIA request to the Department of Defense’s Directorate for Freedom of Information and Security Review (DFOISR) requesting:

all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or employee of the United States acting in the course of his or her official duties) regarding the President’s November 13, 2001 Military Order, the Secretary’s Military Commission Orders, and the Military Commission Instructions. This request includes but is not limited to suggestions or comments on potential, proposed, or actual terms of any of those Orders or Instructions and any similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted.

Complaint at p. 2 and Exhibit 1, hereto, Declaration of Stewart Aly, Associate Deputy General Counsel (Legal Counsel) in the Office of the General Counsel of the Department of Defense (“Aly Decl.”) at ¶¶4 & 6.

2. Based on the description of documents sought by the plaintiff, DFOISR determined that it was likely that correspondence about the Commission Orders and Instructions would be in the files of the Secretary’s correspondence. Aly Decl. at ¶ 6.

3. DFOISR also determined that there were likely to be responsive documents in that office in the Office of the General Counsel. Id.

4. Both of the above-identified offices were searched. Id.

5. On November 18, 2003, an interim response was provided to plaintiff by defendant with the production of nine pages of responsive documents in their entirety. Aly Decl. at ¶ 7.

6. The continuing search for records within the agency produced an additional 191 pages of records and a release of these documents with redactions was made to plaintiff on June 4, 2004, as follows: 24 of these pages contain personal information exempt from disclosure pursuant to FOIA Exemption 6 of the FOIA; 6 pages (two documents) were withheld pursuant to FOIA Exemptions 2, 7(A) and (E); and the remainder were released in their entirety. Aly Decl. at ¶¶ 8 & 9.

7. An additional document consisting of two pages was released on August 24, 2004, with redactions of personal information pursuant Exemption 6 and with this filing, an additional release of documents is being made and a *Vaughn Index* is provided for the redaction made pursuant to Exemptions 2, 7(a) & (E), 5 & 6, Tab C-F to the Aly Declaration.

8. Tab D consists of 14 pages of cover letters and facsimile cover sheets that were initially determined to be non-responsive. They are released to plaintiff in their entirety, except for one page that has personal information redacted from it pursuant to Exemption 6. Aly Decl. at ¶ 11. One of the documents included in Tab D is a facsimile cover sheet to a two-page communication between Terry O'Donnell of the law firm of Williams & Connolly LLP and Whit Cobb and General Thomas Hemingway, Deputy General Counsel and attorney with the OMC, respectively. (The cover sheet appears at Tab D to the Aly Declaration and the two-page communication is described in the *Vaughn Index* [Tab C] at p. 4). Although the cover sheet is being released, the two-page communication is being withheld pursuant to Exemption 5's

deliberative process privilege as more fully set forth below and described in the *Vaughn Index* at Tab C.

9. Tab E contains an email between Professor Ruth Wedgewood and Jennifer Koester, an attorney with the OGC and is redacted to protect personal information and is also protected by deliberative process privilege. (This document is referred to in the *Vaughn Index* as Document 4).

10. Tab F consists of the first page of a 24-page document containing meeting notes and identified as "MEETING NOTES: DEP SEC DEF AND GENERAL COUNSEL ADVISORY MEETING 7/30/03." (This document is described in detail in the *Vaughn Index* at pp. 6-7 and the first page with the general heading and other information appears at Document 5). The remainder of this document is being withheld pursuant to Exemption 5's deliberative process privilege.

Respectfully submitted,

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