IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INSTITUTE OF MILITARY JUSTICE, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	Civil Action No. 04-0312 (RBW)

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S SECOND CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant has still failed to demonstrate that the disputed documents in this FOIA action fall within the asserted exemptions or that its search for responsive document has been adequate. In addition, defendant's assertion that plaintiff is the cause of the delays and pettifogging that have tainted defendant's handling of this matter is an astonishing attempt to evade responsibility.

I. DEFENDANT STILL FAILS TO DEMONSTRATE THAT EXEMPTION FIVE APPLIES TO DOCUMENTS SUPPLIED BY OUTSIDE LAWYERS.

Plaintiff's opening memorandum demonstrated several reasons why the documents submitted by outside lawyers, who are merely members of the public, do not fall within exemption 5:

- Communications from private citizens do not ordinarily fall within the exemption for inter- and intra-agency documents.
- The private attorneys do not fall within the "consultant corollary" exception to the general rule because:

- According to Secretary Rumsfeld, they volunteered because of their patriotism.
- They did not function as agency personnel.
- They did not bring expertise that was unavailable within the government.
- They were commenting on a rulemaking process.
- There is no reason to believe that disclosure of these documents would inhibit frank and honest communication from similarly situated outsiders.
- DOD has not established that the documents from the outsiders were furnished in confidence.
- DOD has released documents containing the views of other outsiders that are indistinguishable from the documents that are being withheld.

DOD's principal response is to attempt to show that the outside lawyers (1) were engaged in an ongoing consultancy role with DOD, (2) had an expectation of confidentiality, and (3) had special expertise that was otherwise unavailable to DOD. Defendant asserts that these factors -- taken together -- establish that the outside attorneys were the sort of consultants whose communications with an agency fall within exemption 5 under the relevant caselaw.[1] Defendant attempts to support these arguments with the declaration of yet another DOD official -- Karen Hecker. Ms. Hecker is the fourth declarant offered by DOD to establish the applicability of the claimed exemptions, joining Mr. Aly, Ms. Ricci and Mr. Cobb.

[1] *See Public Citizen, Inc. v. D.O.J.,* 111 F.3d 168 (D.C. Cir. 1997); *Formaldehyde Inst. v. HHS,* 889 F.2d 1118 (D.C. Cir. 1989); *Ryan v. D.O.J.,* 617 F.2d 781 (D.C. Cir. 1980); and *Wu v. Nat'l Endowment for Humanities,* 460 F.2d 1030 (5th Cir. 1972).

A. DOD Has Not Established That There Was A "Continuing Relationship."

Ms. Hecker asserts that the General Counsel sought the views of the outside attorneys "on a continuing basis"; the "General Counsel's intent has been to maintain a relationship with these lawyers"; and that "there is an understanding that they will consult and advise on a continuing basis on a variety of topics." (*Id* ¶ 4.)[2]

These assertions are inadmissible hearsay. Ms. Hecker's "areas of responsibility include a number of statutes relating to the management and release of information by the Department of Defense. . . ." (Hecker Decl. ¶ 1.) She does not assert that she had any involvement in the contacts with outside attorneys. She "assumed responsibility for this case after Christine Ricci left our office to return to the private sector." (*Id.*) Ms. Ricci executed a declaration in support of DOD's second motion for summary judgment on March 9, 2005, so Ms. Hecker appears to have had no involvement with this case prior to that date. How can she have personal knowledge of the circumstances of the General Counsel's contacts with the outside lawyers in late 2001 and early 2002 and the "understandings" at that time? How can she testify as to the General Counsel's "intent"? Furthermore, what is the basis for the wholly conclusory assertion -- made for the first time in DOD's third round of declarations -- that the outside attorneys have advised "on a continuing basis on a variety of topics"?

Declarations supporting and opposing motions for summary judgment must be "made on personal knowledge"; must "set forth such facts as would be admissible in evidence"; and must "show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). *See, e.g., Londrigan v. Fed. Bureau of Investigation,* 670 F.2d

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[2] This is supposedly in contrast to Messrs. Halperin, Casey and Rivkin, who according to Ms. Hecker, "are not consulted with on a continuing basis." (Hecker Decl. ¶ 5.)

1164, 1174 (D.C. Cir. 1981); *Judicial Watch, Inc. v. U.S. Dep't of Commerce,* 224 F.R.D. 261, 265 (D.D.C. 2004) ("[h]earsay statements for which no hearsay exceptions would apply" are inadmissible at the summary judgment stage). Ms. Hecker's declaration satisfies none of these requirements.

Although courts have found government officials competent to assert FOIA and Privacy Act exemptions based on their review of the disputed documents and familiarity with agency practice, *see Londrigan*, 670 F.2d at 1174, an affiant cannot "possibly have personal knowledge of any assumptions" made by persons with whom she has had no contact. *Id.* at 1175. Ms. Hecker has not stated an adequate basis for personal knowledge regarding the General Counsel's "intent" to "maintain a relationship" with the outside lawyers or any "understanding" that the outside lawyers "will consult and advise on a continuing basis on a variety of topics." (Hecker Decl. ¶ 4.) Her duties as an FOIA official do not provide her with the requisite personal knowledge to testify to subjective "intentions" and "understandings" that purportedly were formed several years before her involvement with this matter.

In addition to being incompetent and inadmissible hearsay, Ms. Hecker's attempt to portray the outside lawyers as having a continuing relationship is also in conflict with the description provided by Mr. Paul W. Cobb, Jr., one of DOD's earlier declarants in support of its pending motion for summary judgment. Unlike Ms. Hecker, who had no apparent connection with developing the rules and procedures for the military commissions (or any apparent connection with this suit until quite recently), Mr. Cobb was the Deputy General Counsel at the relevant time and was responsible for implementing the President's Military Order. (Cobb Decl. ¶¶ 1, 4.) His description of the relationship between DOD and the outside lawyers provides no support for Ms. Hecker's assertion of a continuing relationship on a wide variety of issues and is

indeed contrary to the picture Ms. Hecker attempts to paint of a continuing relationship. Mr. Cobb says that the General Counsel asked the outside attorneys to consult "on matters relating to Military Commissions." (Cobb Decl. ¶ 6.) "The subject of these consultations included the Orders and Instructions for implementation of the President's Military Order, and other subjects related to Military Commissions as well." (*Id.*) He makes no reference to consultations on other matters. He also says that the outside lawyers were "not a formal group" and "[t]he list of individuals changed from time to time." (*Id.*) This description flatly contradicts Ms. Hecker's assertion of a continuing relationship.

B. DOD Has Not Established That There Was An Expectation Of Confidentiality.

Ms. Hecker also asserts that there was an "understanding and expectation" that the comments of the outside lawyers "would be kept in confidence." (Hecker Decl. 4.) Mr. Cobb made the same assertion in his declaration in support of DOD's second motion for summary judgment. (Cobb Decl. ¶ 6.) Ms. Hecker -- who has failed to qualify herself as a competent witness as to "understandings" and "expectations" on the part of either DOD or the outside attorneys -- adds nothing to Mr. Cobb's statement that "[t]he consultations were provided in confidence to the Defense Department, and there was an understanding that the contents of the consultations would not be released publicly." (Cobb Decl. ¶ 6.)

Plaintiff's opening brief demonstrated that Mr. Cobb's conclusory assertion that there was an understanding of confidentiality was insufficient to carry DOD's burden under FOIA's *de novo* standard of review.[3] We noted that the record is silent on the following issues:

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[3] *See* Plaintiff's Mem. in Opp. to Def's Second Motion for Summary Judgment and in Support of Plt's Second Cross-Motion for Summary Judgment at 26.

- What is the source of the "understanding" that Mr. Cobb asserts?
- When the DOD General Counsel asked the outside lawyers for their views, did he tell them that they would be held in confidence?
- Did the outside lawyers request confidentiality at the time they submitted their views?
- In connection with this suit, did DOD ask Messrs. Coleman, Cutler, Webster, Bell, Hoffman, *et al.* whether they wanted confidentiality? (DOD put this question to one former official who had commented on the proposed instructions, and he responded that he saw no need for confidentiality. (*See* Halperin Decl. ¶ 9.))
- If so, what were their responses?

Id.

These questions are still unanswered, and Ms. Hecker's declaration fails to address them. Indeed, the available evidence demonstrates that when DOD asked the outside lawyers for their views, there was no mention of confidentiality. Defendant has released the letters soliciting comments from three of the outside lawyers -- Ms. Wedgwood, Mr. Hoffman and Mr. O'Donnell -- and these letters say nothing at all about confidentiality. *See* Tab D to Aly Decl. For all these reasons, DOD has failed to carry its burden of proving that there was any expectation of confidentiality.

C. DOD Has Not Established That The Outside Attorneys Had Special Expertise That Was Otherwise Unavailable To DOD.

Defendant's memorandum also stresses that the outside attorneys brought special expertise that was needed by DOD to implement the President's Military Commission Order. The evidentiary support for this assertion is said to be found in paragraphs 13 and 14 of the Ricci Declaration which purportedly "addressed the uniqueness of these individuals' input." Def. Mem. at 7. Those paragraphs, with one exception, provide only vague generalities about the previous government service of the outside attorneys. *See* Ricci Dec. ¶ 13 ("DOD sought the

opinions and recommendations of these outside consultants because their previous experience in the government and/or expertise made them uniquely qualified to provide advice to the General Counsel's office on the Military Commission procedures."); ¶ 14 (same, verbatim). Ms. Ricci does not cite a single specific issue on which the expertise of the outside lawyers was unique or unavailable elsewhere in the vast resources of the Department of Defense, the Department of State and other agencies of the government with expertise in these matters. Indeed, at Secretary Rumsfeld's press conference, the General Counsel hastened to supplement the Secretary's remarks by saying that he "reached out" not only to the outside lawyers, but also to "the experts within the building -- the Judge Advocates General and the general counsel of the military department[s] [who] were very important in the department of these procedures. . . . And we also, of course, consulted with the other agencies." Plt. Ex. A at 8.

The only specific example of "special expertise" or "unique qualifications" cited by Ms. Ricci is that "one consultant was an Assistant Trial Counsel at the Nuremberg International War Trials, and, as such, possessed valuable insight and experience with prosecuting international war criminals that would have been helpful to DOD as it set out to design a system to prosecute enemy combatants." (Ricci Dec. ¶ 14.) This refers to Mr. Bernard Meltzer. *See* Second *Vaughn* Index at 17. Mr. Meltzer, a retired professor of law at the University of Chicago, has written extensively on the public record about the Nuremberg trials.[4]

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[4] *See* Bernard D. Meltzer, *Tribute: Robert H. Jackson: Nuremberg's Architect and Advocate,* 68 Alb. L. Rev. 55 (2004); Bernard L. Meltzer, *The Nuremberg Trial: A Prosecutor's Perspective,* 4 J. Genocide Res. (Dec. 2002), *available at* http://www.law.uchicago.edu/faculty/meltzer/resources/nuremberg_5-12-00_final.doc; Bernard L. Meltzer, *"War Crimes": The Nuremberg Trial and the Tribunal for the Former Yugoslavia* (The Seegers Lecture), 30 Val. U.L. Rev. 895 (1995-1996); Bernard L. Meltzer, *Remembering Nuremberg,* U. Chi. L. Sch., Occasional Papers, No. 34 (1995); Bernard L. Meltzer, Comments in Symposium, *1945-1995: Critical Perspectives of the Nuremberg Trials and State Accountability,* 12 N.Y.L. Sch. J. Hum. (continued…)

The suggestion that he needed a cloak of confidentiality to share his experiences and insights is facially dubious. But if DOD is going to press that argument, it bears the burden of establishing that what Mr. Meltzer said in the withheld documents (Nos. 19, 20) is qualitatively different from what he has published in his numerous articles about Nuremberg. DOD has not even attempted to carry that burden.

While the outside lawyers were no doubt helpful to DOD in developing the instructions and orders to implement the President's Military Commission Order, it is also clear that they contributed something else to DOD's work -- respectability. The commissions established under that order were -- and continue to be -- enormously controversial, as the Court is well aware from cases pending in this District. It plainly was politically advantageous for Secretary Rumsfeld to be able to say -- as he did with obvious enthusiasm at his press conference -- that the rules for the commissions had the support of lawyers like William Coleman, Lloyd Cutler, Griffin Bell, William Webster and the others. If in fact confidentiality was as important to these individuals and to DOD as is argued in this case, the Secretary never would have identified them and their contributions would have remained in true anonymity. Instead their participation was trumpeted by Secretary Rumsfeld to the world. Political support in the public arena, however, is not the sort of contribution by an outside consultant that cases like *Public Citizen, Ryan, Wu* and *Formaldehyde Institute* recognize as warranting the application of exemption 5.

Finally we note that Mr. Cutler wrote a forward to NIMJ's *Annotated Guide to Procedures for Trials for Military Commissions of Certain Non-United States Citizens in the*

Rts. 453, 504-15 (1995); Bernard L. Meltzer, Comment, *A Note on Some Aspects of the Nuremberg Debate,* 14 U. Chi. L. Rev. 455 (1946).

War on Terrorism at ix-x (Lexis Nexis 2002) that bears on the issues in this case.[5] He acknowledged that "I was one of those asked by Secretary of Defense Donald H. Rumsfeld and the Department's General Counsel, William J. Haynes II, to advise on the drafting of [the] regulations [to implement the President's Order]." *Id.* at x. He then wrote:

> I believe that the regulations as issued are a substantial improvement over those in effect during World War II. They go a long way toward assuring that the trials will be full and fair, as the Uniform Code of Military Justice requires. The democratic world is under attack by non-governmental groups who are able and willing to commit terrorist acts of mass destruction. ***We need to show the world that the American judicial system – including both its military and civilian components – can and will do justice in the novel circumstances that now confront us.***
>
> I am please to salute the National Institute of Military Justice and those who have contributed to this volume. The book will make it easier for all concerned ***to understand the meaning and context of the ground rules for military commissions.*** The adversarial process is at the heart of our system of justice, and the Annotated Guide will help ***ensure that the lawyers and others who will have a part in conducting and explaining these proceedings do the kind of top-flight work that it needed to foster public confidence, both here and abroad, in the American judicial system.***

Id. (emphasis added).

These are not the words of a man who expected his contributions to the drafting of the regulations to be kept secret. Release of the comments of Mr. Cutler and the other outside lawyers on the draft regulations -- as in ordinary notice-and-comment proceedings -- would add to public understanding of "the meaning and context of the ground rules for military commissions"; "help ensure that the lawyers and others who will have a part in conducting and explaining these proceedings do the kind of top-flight work that is needed to foster public

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[5] NIMJ filed its FOIA request to obtain the comments of the outside lawyers and other members of the public as part of its effort to gather the "legislative history" of the military commission regulations for inclusion in subsequent editions of this publication.

confidence, both here and abroad, in the American judicial system"; and "show the world" that the regulations for the commissions were the product of an open and fair process. *Id.* And these, of course, are among the goals of FOIA.

II. DEFENDANT HAS NOT ESTABLISHED THAT THE FOREIGN GOVERNMENT DOCUMENTS MEET THE REQUIREMENTS OF 10 U.S.C. § 130c.

In its second motion for summary judgment, DOD asserted for the first time that unclassified letters from the British and Canadian governments fall within 10 U.S.C. § 130c and therefore are exempt under FOIA exemption 3. In response, plaintiff pointed out that DOD had failed in numerous respects to satisfy the strict requirements of that statute. Although DOD now claims that it has met those requirements, it still falls short.

Most correspondence from foreign governments on matters of military affairs and foreign policy will be classified on national security grounds. Section 130c is designed to deal with special circumstances where correspondence has not been classified but release to the public would still be damaging to foreign relations. Because of the obvious potential for abuse of a procedure that circumvents the presumptive reliance on the classification system, § 130c is narrowly circumscribed and can be invoked only when several strict conditions have been met. DOD has failed to demonstrate that it has complied with all those conditions.

A. DOD Has Failed To Demonstrate Full Compliance With § 130c(b).

In order to be eligible for withholding under § 130c(b), information must meet each of the requirements of the statute. First, the information at issue must have been provided by a foreign government. *See* § 130c(b)(1). There is no dispute that this requirement is satisfied here. Second, the statute requires that the foreign government must make a written representation that it is withholding the information from public disclosure. *See* § 130c(b)(2). Third, § 130c(b)(3) requires that at least one of the following three conditions must be met:

> (A) The foreign government or international organization requests, in writing, that the information be withheld.
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> (B) The information was provided or made available to the United States Government on the condition that it not be released to the public.
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> (C) The information is an item of information, or is in a category of information, that the national security official concerned has specified in regulations prescribed under subsection (f) as being information the release of which would have an adverse effect of the ability of the United States Government to obtain the same or similar information in the future.

§ 130c(b)(3).

The requirement of a written representation from the foreign government is thus critical to DOD's assertion of § 130c. Such a writing is required to satisfy § 130c(b)(2). It is also required in this case to satisfy § 130c(b)(3)(A), because, as explained below, DOD cannot satisfy clauses (B) or (C).

1. DOD Cannot Satisfy § 130c(b)(3)(B) or (C).

DOD asserts that the information was initially provided to DOD "on the condition that it not be released to the public," thereby satisfying the requirement of § 130c(b)(3)(B). Def. Mem. at 12-13. The record does not support this assertion. DOD asserts that "there are representations on some of the communications . . . that the content of the communications should be withheld from the public." *Id.* at 12; *see* Hecker Decl. ¶ 7 ("Some of the documents contain markings indicating their confidentiality."). The Second *Vaughn* Index does not assert that ***any*** of the contested documents from the British or Canadian governments are marked as confidential. *See* descriptions of Documents 1, 75, 77, 79, 80, 82, 83, 86, 87. The only document said to bear a confidential marking is a letter from the British Secretary of State for Foreign and Commonwealth Affairs to the U.S. Secretary of State (Document 76), and plaintiff does not seek release of that document.

DOD also asserts that there are "inferences" in some of the documents "that the content of the communications should be withheld from the public." Def. Mem. at 12. The evidentiary support for this assertion is said to be found in ¶ 19 of the Ricci Declaration and ¶ 7 of the Hecker Declaration. Neither of these cited paragraphs says anything at all about "inferences." Aside from asserting that some of the documents contain confidentiality markings -- an assertion that the Second *Vaughn* Index supports for only one document that plaintiff does not seek -- paragraph 7 of the Hecker declaration relies entirely on the recently received representations from the British and Canadian governments. Those recent representations, however, cannot prove that the documents were provided on the condition that they not be released to the public ***at the time they were sent***, which is what is required to satisfy § 130c(b)(3)(B). To the extent that paragraph 19 of the Ricci Declaration suggests that the content of the communications by itself indicates that they were provided in confidence, it fails to address the contrary evidence in the record that the British government had been very public in its disagreements with the United States over the military commissions and suspected terrorists detainees. *See* Plt. Mem. at 29-31. For all of these reasons, it is clear that defendant has not carried its burden of establishing the applicability of § 130c(b)(3)(B).[6]

2. DOD Must Produce The Purported Recently Received Writings.

Because DOD cannot satisfy § 130c(b)(3)(B) and does not even attempt to satisfy § 130(b)(3)(C), compliance with § 130(b)(3)(A) depends on written requests from the British and Canadian governments that the information be withheld. Furthermore, § 130c(b)(2) requires a written representation from those governments that they are withholding the information. Yet, in

[6] DOD does not assert that it has satisfied § 130(b)(3)(C). That subparagraph requires compliance with regulations implementing the statute, and DOD has not disputed plaintiff's observation that DOD has never promulgated such regulations.

its initial assertion of this statute, DOD did not purport to have any writing from the British or Canadian governments either representing that these governments were withholding the information or requesting that the DOD documents be withheld. Ms. Hecker now avers that "we have since received written communications from the foreign governments" that "make clear that the foreign governments are withholding this information from public disclosure and that they are asking the Department of Defense also not to release the information to the public." (Hecker Decl. ¶ 7.)

DOD inexplicably fails to provide these purported written communications. If defendant is going to rely on them, defendant should be required to show them to plaintiff and the Court. Indeed, in the one judicial opinion on § 130c that it identifies, DOD produced the letter from a foreign organization (the International Committee of the Red Cross) stating that its communications with DOD were provided on the condition that the information not be released to the public and that ICRC was itself withholding the information from public disclosure. *See Gerstein v. U.S. Dept. of Defense,* No. C-03-5193-JF, slip op. at 7 (N.D. Cal., Dec. 21, 2004) (Def. Attachment 8). Ms. Hecker provides no reason why DOD cannot or should not follow the same procedure here.[7]

B. The "National Security Official" Specified By the Statute Has Not Made Any Of The Required Determinations.

Even if the requisite written representations and requests from the originating foreign governments have been belatedly supplied -- a point that will not be proven until DOD

[7] *Gerstein* appears to be the only written decision discussing § 130c. It is not, however, available on either Westlaw or Lexis. DOD does not explain why it failed to bring this decision to the attention of the Court or plaintiff in its opening memorandum. Its failure to do so may be related to the fact that *Gerstein* plainly features the importance of a written representation to support the invocation of § 130c, and DOD did not have such a writing in this case at the time it filed its opening memorandum.

produces the purported writings -- defendant has still failed to comply with all the requirements of § 130c. The statute can be invoked "only if the national security official concerned" makes the "determinations" that are required by the statute. § 130c(b). The national security official is defined as the Secretary of Defense. *See* § 130c(h)(1)(A). Ms. Hecker avers that her predecessor, Ms. Ricci, was the appropriate official to make these determinations as an "Initial Denial Authority" and that Ms. Ricci "properly exercised the authority provided to the Secretary of Defense under this statutory provision." (Hecker Decl. ¶ 6.)

There are two problems with this argument. First, it is clear from Ms. Hecker's Declaration that the written representations from British and the Canadian government were received ***after*** Ms. Ricci executed her declaration on March 9, 2005. *See* Hecker Decl. ¶ 7; Def. Mem. at 14 ("these foreign governments have only recently responded that this information should be held in confidence"). How then could Ms. Ricci make the requisite determinations, as alleged by Ms. Hecker, when it appears that there were no written representations from the foreign governments at the time Ms. Ricci asserted § 130c on March 9, 2005?

Second, DOD has not demonstrated that Ms. Ricci had the delegated authority from the Secretary of Defense to make the determinations required by the statute. DOD's FOIA regulations define an "Initial Denial Authority" as "[a]n official who has been granted authority by the head of a DOD component to withhold records under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure." DOD 5400.7-R, C1.4.5. Ms. Ricci may well have been an "Initial Denial Authority" for purposes of FOIA, but that does not mean that she had any of the authority conferred on the Secretary to make the various determinations required by § 130c. DOD's memorandum tacitly admits this deficiency when it weakly asserts that the Secretary "in essence" delegated his authority under § 130c. Def. Mem.

at 11. Furthermore, defendant has not disputed plaintiff's observation that DOD has not promulgated any regulations under § 130c, even though the statute plainly contemplates that specific implementing regulations will be promulgated. *See* § 130c(g). If there are no regulations implementing § 130c, there can be no regulations delegating the Secretary's authority under the statute.

C. DOD Has Failed To Comply With § 130c(d)(3).

Even if the requisite written representations from the British and Canadian governments have been received, and even if the proper "national security official" has made the requisite determinations under § 130c(b), DOD has failed to comply with the statute because it has failed to specify a date certain after which the information may not be withheld, as required by § 130c(d)(3).[8] The information at issue here is subject to subsection (d)(3) because no date was specified in the foreign government's request for confidentiality and the information came into the possession of the U.S. government after the date of the enactment of § 130c. In those circumstances the national security official, after considering the request of the foreign government, "shall designate a later date as the date after which the information is not to be

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[8] This subsection provides:

> (3) Information referred to in paragraph (1) or (2)(C) may be withheld under this section in the case of a request for disclosure only if, upon the notification of each government and international organization concerned in accordance with the regulations prescribed under subsection (g)(2), any such government or organization requests in writing that the information not be disclosed for an additional period stated in the request of that government or organization. After the national security official concerned considers the request of the foreign government or international organization, ***the official shall designate a later date as the date after which the information is not to be withheld under this section.*** The later date may be extended in accordance with a later request of any such foreign government or international organization under this paragraph. (Emphasis added.)

withheld under this section." 10 U.S.C. § 130c(d)(3). Ms. Hecker admits that no such date has been set. Instead, she avers that the British government has requested that the information be withheld until "a date which will be a matter for further consultation between the two governments." (Hecker Decl. ¶ 7.) Mr. Hecker makes no representation as to any date being specified in the written communication from the Canadian government. (*Id.*) However, she asserts that "there is clearly a present understanding by the United Kingdom and Canada that the information will not be released to the public in the foreseeable future." *Id.; see also* Def. Mem. at 14 (same). These statements are a brazen attempt to evade the clear requirements of the statute. The failure to set a date certain plainly violates § 130c(d)(3). This blatant disregard for statutory requirements voids DOD's invocation of § 130c and FOIA exemption 3.

D. DOD's Decision Not To Classify The Foreign Government Documents At The Time They Were Received Is An Admission That The Consequences Of Disclosure Now Asserted Are Unfounded Exaggerations.

DOD has failed to address the question that looms over its assertion of § 130c like the proverbial "elephant in the living room." Ms. Hecker asserts that public disclosure of the correspondence from the British and Canadian governments would adversely affect "the ability of the United States government to obtain similar information in the future" and "to engage in candid and frank discussions regarding the types of sensitive matters." If this is true, why were the documents not classified when they were received by DOD's General Counsel and his staff? At the relevant time period, Executive Order 12958 ***mandated*** that a "confidential" classification -- the lowest level of classification -- "shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that

the original classification authority is able to identify or describe." E.O. 12958 § 1.3(a)(3).[9] "National security" is defined as "the national defense or foreign relations of the United States." *Id.* § 1.1(a). Furthermore, the Executive Order required that "[f]oreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information."

If, as Ms. Hecker asserts, disclosure of these documents would impair the ability of the United States government to obtain similar information in the future or engage in candid and frank discussion with two important allies on sensitive matters, the documents clearly should have been classified when they were received. In the absence of any showing to the contrary, the DOD General Counsel and his staff must be presumed to know and strictly follow the classification requirements. The fact that they did not classify the correspondence from the British and Canadian government when it was received is an admission that they did not believe that public disclosure could be reasonably be expected to cause damage to relations with those governments. The assertions of Ms. Ricci and Ms. Hecker three years after the fact should be dismissed as litigation-driven, *post hoc* exaggeration. Furthermore, the fact that the British and Canadian communications have never been classified should assure the Court that no harm to the national security will occur if the Court orders their disclosure.

E. DOD Has Not Established That § 130c Applies To Documents *From* the U.S. Government.

Plaintiff's opening memorandum argued that § 130c applies only to documents received from foreign governments and not to documents from the U.S. government. DOD now

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[9] E.O. 12598 was amended by E.O. 13292 on March 25, 2003.

contends that the statute also applies to U.S. government documents when they reveal information received from foreign governments. For the reasons articulated by Judge Hellerstein, and particularly his analogy to the attorney-client privilege,[10] plaintiff acknowledges that § 130c may apply to U.S. government documents when they reveal information received by a foreign government. However, DOD has not demonstrated that this general proposition applies to the disputed documents that went from the U.S. government to the British government. (Documents 2, 78, 81 and 85.) The Second *Vaughn* Index does not establish that these documents reveal information that was received in confidence from the British government. To the extent that the descriptions of these documents make such assertions, they are wholly conclusory and fail to take into account the facts that (1) none of the documents to the DOD from the British government are asserted to have been marked confidential, and (2) the disagreement between the British and U.S. governments over the military commissions and the detainees was the subject of extensive public pronouncements by the British Attorney General, the very same official to whom Documents 2, 81 and 85 are addressed.

III. DEFENDANT STILL HAS NOT ESTABLISHED THAT ITS SEARCH FOR RESPONSIVE RECORDS HAS BEEN ADEQUATE.

Plaintiff's opening memorandum demonstrated that DOD's search for responsive records is still inadequate. In particular, plaintiff questioned the absence of any documents from outsiders concerning the development of the President's November 13, 2001 Military Order. DOD has responded with the Declaration of Lawrence D. Horner, the Chief of the Correspondence Control Division (CCD). He avers that the database of incoming and outgoing official correspondence for the Secretary and Deputy Secretary of Defense were searched with

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[10] *See American Civil Liberties Union v. Dep't of Defense,* No. 04-CV-4151 (S.D.N.Y.) (May 31, 2005 Hearing Transcript) (Defs.' Attachment 7 at 5).

appropriate key words and that "hit" documents were forwarded to the FOIA Division on October 27, 2003. Mr. Horner's declaration raises the following issues:

> 1. Does the database of official correspondence contain memos from DOD personnel, like the General Counsel and his staff, who may have forwarded to the Secretary comments from outsiders on the proposed Presidential Military Order?
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> 2. At the time CCD completed its work on October 27, 2003, DOD was still applying its "narrow construction" to plaintiff's request. *See* Def. Mem. at 3. Was the database ever queried after DOD realized its "construction" was overly narrow? It appears from Mr. Horner's declaration that no searches were made after that date.
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> 3. Have all the documents that were forwarded from CCD to the FOIA Division been accounted for in the Second *Vaughn* Index? Although DOD's memorandum asserts that Ms. Hecker's declaration "augments" the earlier declarations on the issue of the adequacy of the search (Def. Mem. at 15), Ms Hecker's declaration in fact says not a word about the search issue.

It is therefore apparent that defendant has not met its burden of demonstrating the adequacy of it search. Contrary to the assertion in DOD's brief, the newly submitted declarations still fail to satisfy that burden.[11]

IV. DEFENDANT'S LATEST SUBMISSION CONFIRMS DEFENDANT'S CAVALIER APPROACH TO THIS CASE.

Plaintiff's opening memorandum demonstrated that defendant's handling of this FOIA action has been tainted by bad faith and/or incompetence, and consequently the Court should apply its *de novo* review of defendant's representations with an extra measure of rigor. In response, defendant does not dispute that it delayed for months in identifying the documents at the core of this case -- the letters and memoranda provided to DOD by the outside attorneys.

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[11] The parties' dispute over "reasonable segregability" appears to turn on the issue of whether the views of the outside attorneys fall within exemption 5. If they do not, then there will be many segregable portions of the documents written by DOD officials that will have to be segregated from the work product of those officials (which plaintiff does not seek) and released.

(Documents 3, 4, 11, 13-21.) Instead DOD blames ***plaintiff*** for the delay. The fact that defendant makes such a baseless assertion underlines defendant's deplorable handling of this matter.

DOD chides plaintiff for making its request in general terms rather than explicitly asking for the comments of the outside lawyers. (Def. Opp. at 2.) Defendant contends that it interpreted plaintiff's request "narrowly." (*Id.* at 3.) It is inconceivable that even under a "narrow construction" any reasonable person could have concluded that the documents provided by the outside attorneys were not responsive to plaintiff's initial request.[12] But even if there was any confusion during the administrative processing of plaintiff's request, defendant's most appalling conduct came ***after*** this suit was filed, when there was no confusion whatsoever that plaintiff was seeking documents supplied by the outside attorneys. On June 16, 2004, plaintiff's counsel wrote to defendant's counsel and pointed out that the Secretary of Defense had identified the outside attorneys and their role at a press conference, but that DOD had not released any documents from any of these attorneys. (Plt. Exhibit B.) As of that date, DOD was clearly on notice that these documents were at issue. Yet when it filed its first motion for summary

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[12] Plaintiff's October 3, 2003, letter was written in perfectly plain English. It requested:

> 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.

judgment on September 30, 2004 -- impliedly representing that it had made an adequate search for the documents by then clearly at issue -- DOD identified only three written communications from outside lawyers. After plaintiff's opposition pointed out the grossly inadequate search for responsive documents, defendant withdrew its first motion for summary judgment. Only in the *Vaughn* index accompanying defendant's second motion for summary judgment filed on March 9, 2005, did DOD finally acknowledge the existence of twelve documents from the outside attorneys. This is not a case like those cited at page 4 of DOD's memorandum where an agency belatedly finds responsive documents or decides to release documents that were previously withheld.[13] Instead this case involves the willful refusal to acknowledge the existence of plainly responsive documents and to account for them in a *Vaughn* index.

DOD's assertion of FOIA exemption 3 is further evidence of DOD's slip-shod approach to this case. This claim was not made until defendant's second motion for summary judgment. In response, plaintiff pointed out that defendant had failed in numerous respects to show that the strict requirements of § 130c had been satisfied. Indeed, the assertion of § 130c in the absence of the statutorily required writings from the British and Canadian governments reveals a shockingly casual and irresponsible disregard for the statute. Now in its latest set of papers -- in effect its third-bite at the apple -- DOD finally attempts to make the required showings. As demonstrated above, DOD has still failed to satisfy the requirements of § 130c, but DOD's tardiness in even attempting to comply with the requirements of the statute further underlines its disregard for the law. The repeated lessons of this case are that DOD ignores the

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[13] *See Public Citizen v. Dep't of State,* 276 F.3d 634 (D.C. Cir. 2002); *Miller v. United States Dep't of State,* 779 F.2d 1378 (8th Cir. 1985); *Guttman v. United States Dep't of Justice,* 238 F. Supp. 2d 284 (D.D.C. 2003).

requirements of FOIA for as long as it can, and only when challenged makes any effort to comply. This clear pattern of disregard for the law makes it appropriate for the Court to apply the statutorily required *de novo* review with special scrutiny.

CONCLUSION

For the reasons stated above, as well as those set forth in plaintiff's opening memorandum, DOD's motion for summary judgment should be denied, and plaintiff's cross-motion for summary judgment should be granted.

Respectfully submitted,

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