UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INSTITUTE OF MILITARY JUSTICE,	:	
	:	
Plaintiff,	:	**ECF**
	:	
v.	:	Civil Action No. 04-312-RBW
	:	
U.S. DEPARTMENT OF DEFENSE,	:	
	:	
Defendant.		

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

Defendant Department of Defense ("DoD") herein replies to plaintiff's opposition to defendant's motion for summary judgment and opposes plaintiff's cross motion for summary judgment (collectively "Plaintiff's Memorandum"). To date, defendant has released over 1,000 pages of records to plaintiff. Plaintiff's Memorandum at p. 6. At issue here are additional records withheld pursuant to Exemptions 3 and 5.[1]

Plaintiff makes four primary arguments to the Court: I. That DoD's handling of this FOIA case has been tainted by incompetence, inconsistency and/or bad faith (Id. at pp. 10-17); II. That Exemption 5 does not protect the communications from private citizens from disclosure (Id. at pp. 17-29); III. That Exemption 3 and 10 U.S.C. § 130c do not protect correspondence between agency officials and representatives of the British and Canadian governments (Id. at pp. 29-37); and IV. That DoD's search for responsive documents continues to be inadequate. Id. at pp. 37-38.

[1] Plaintiff does not seek disclosure of any Exemption 6 (privacy records) and does not object to 35 other withheld documents. Plaintiff's Memorandum at p. 2 and n. 7, Documents 8, 10, 37-58, 60, 61, 62, 65-73, 76. Thus, plaintiff objects to all other withholdings.

Defendant responds to each of plaintiff's arguments as follows:

I. There has been No Bad Faith, Inconsistency or Incompetence In the Handling of this Law Suit or Plaintiff's FOIA Request.

On pages 10-17 of Plaintiff's Memorandum, plaintiff argues that this litigation has been tainted by incompetence, inconsistency and/or bad faith. Defendant denies these assertions and requests that the Court reject plaintiff's assertions outright.

As an initial matter, defendant notes that plaintiff, when making its initial FOIA request in October 2003, knew exactly what records, in primary part, it was seeking. However, instead of being forthright with DoD in its request or attempting to clarify the records sought when it received what it considered an inadequate response, plaintiff filed the instant law suit on February 26, 2004. Docket Entry No. 1. Plaintiff clarified its request in a letter sent to defendant's counsel in June 2004 when it explained that it sought, in part, communications from certain distinguished lawyers identified by Secretary Rumsfeld at a March 21, 2002, press conference who had assisted DoD without compensation. See Plaintiff's Memorandum at pp. 3-4, see also id. at Exhibit B (Letter to defendant's counsel, dated June 16, 2004).[2] These individuals included Griffin Bell, William Coleman, Lloyd Cutler, Mark Hoffman, Bernard

[2] Without commenting on the motivation of plaintiff for writing the letter referred to in Plaintiff's Memorandum and provided at Exhibit B, thereto, defendant notes, with regard to the letter from defendant's counsel provided at Exhibit C, that letter was written to plaintiff's counsel in the hopes of furthering a stalled litigation. A mutually agreeable course of action for this litigation was proposed wherein a declaration and Vaughn Index on the subject would be forthcoming. Plaintiff has filed the correspondence with the Court as if it were to replace or influence the Court's view of defendant's arguments and cited it here and at p. 18. Defendant submits that filing correspondence between counsel is not argument and to file it with the Court could have a chilling effect on a party's attempt to communicate openly and freely with opposing counsel to further the progress of litigation without judicial intervention; it is not an admission for the Court to rely on. Defendant respectfully requests that the Court not rely on correspondence between counsel as argument in this case.

Meltzer, Newton Minow, Terrence O'Donnell, William Webster, and Ruth Wedgwood. See Plaintiff's Memorandum at pp. 3-4; see also p. 11. It certainly would have made matters a lot simpler during the processing stages of plaintiff's FOIA request if plaintiff had been more forthcoming in its request to DoD, rather than cloaking it in such general terms that it ended up being narrowly construed.[3]

Because defendant did not interpret plaintiff's request to include the communications plaintiff believed to be responsive until after this litigation commenced, documents were not immediately found. Moreover, as plaintiff correctly points out, defendant voluntarily withdrew its first motion for summary judgment and performed a new search with new search criteria in order to insure all responsive documents were found. Id. at p. 6; see also Declaration of Christine Ricci in Support of Defendant's Motion for Summary Judgment (found at Docket #38, but attached hereto as Att. 2, for the Court's convenience) and Declaration of Karen L. Hecker, Associate Deputy General Counsel (Legal Counsel), Office of the General Counsel, DoD

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[3] Plaintiff's October 3, 2003, reads as follows:

> 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.

(Attachment 4, hereto).[4] This conduct and willingness to put forth extraordinary efforts to find documents and process them, should not be rewarded by labels, such as bad faith, inconsistency or incompetence.

To the extent that plaintiff complains that because documents previously withheld were subsequently disclosed and therefore bad faith is evidenced, under FOIA caselaw, where an agency subsequently discloses documents that were initially withheld, the particular actions of the agency do not constitute bad faith. Gutman v. DOJ, 238 F. Supp. 2d 284 (D.D.C. 2003) (citing Public Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002)). Nor is there bad faith where an agency mistakenly withheld those documents. Miller v. United States Department of State, 779 F.2d 1378, 1386 (8th Cir. 1985). Inferring bad faith in such actions would create a disincentive for agencies to disclose documents after initially withholding them and penalize those agencies that rectified their mistakes. Public Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002). The facts of this case strongly resemble those of Gutman and Miller as an agency is being accused of bad faith because of initial non-disclosure. Gutman v. DOJ, 238 F. Supp. 2d 284 (D.D.C. 2003); Miller v. United States Department of State, 779 F.2d 1378, 1386 (8th Cir. 1985). Thus, the Court should not infer bad faith here.

In sum, defendant believes it has put forth extraordinary efforts to respond adequately and completely to plaintiff's request. See e.g., Attachment 2 (Ricci Declaration), ¶¶ 3-10 . To the extent that plaintiff believes that incompetence, inconsistency or bad faith are involved, defendant denies that these factors played any role in its ability to respond to plaintiff's FOIA

[4] For the Court's convenience, defendant is also attaching the *Vaughn* Index discussed in the Ricci Declaration. See Attachment 3, hereto.

request.

II. Exemption 5 Protects the Communications Withheld Because the Individuals Served as Consultants to DoD.

Plaintiff argues that Exemption 5 does not protect the communications of the group of private lawyers singled out by the Secretary of Defense and his General Counsel. Plaintiff's Memorandum at 17-29. Plaintiff argues that these individuals are only private attorneys, not DoD officials or experts and "communications between agencies and [these] outside parties are not protected under Exemption 5." Id. at p. 18 (Plaintiff has added emphasis in this quote from Ctr for Int'l Entl. Law v. Office of the U.S. Trade Representative, 237 F.Supp.2d 17, 25 (D.D.C. 2002)). Plaintiff bases its argument on two points: that the comments were from private individuals and that these individuals were commenting on agency rule-making. See id. at pp. 19-20.

This Circuit has recognized that lawyers as well as doctors and other expert advisers can serve as consultants. Public Citizen, Inc. v. Dept. of Justice, 111 F.3d 168, 171 (D.C. Cir 1997). In the instant case, when creating the Military Commission procedures, the General Counsel of the Department of Defense sought the opinions and recommendations of several distinguished advisors and former high ranking government officials. See Ricci Declaration (attached hereto as Att. 2) at ¶¶ 13-14; Cobb Declaration (Def.'s Opening Brief, Tab 12-Docket # 36) at ¶ 6; Hecker Declaration (attached hereto at Att. 4), ¶ 4. The Military Commission procedures were only one of the areas in which these unique individuals have been consulted. Id. As explained by Ms. Hecker, "[t]he General Counsel's intent has been to maintain a relationship with these lawyers to benefit from their extensive experience and wisdom." Id. The Department of Defense's FOIA Guide at p. 36, contemplates the use of individual consultants

such as the individuals consulted here would be protected as part of the deliberative process. See Attachment 5, hereto (Excerpt from the DoD 5400.7-R, DoD FOIA Program, September 1998 at § C3.2.1.5.1.2). The DoD could not have benefitted from the particular expertise of the individuals – who have hundreds of years of government service and expertise in military justice, law, and international relations – without consulting these outside experts. No one can reasonably argue that these individuals do not qualify as experts.

Plaintiff argues, relying on Secretary Rumsfeld's statement at the press conference that the private attorneys "just volunteered," that these individuals cannot now be considered "consultants" whose views were solicited. Plaintiff's Memorandum at p. 20. Consultants do not have to be paid to provide particular expertise. Wu v. Nat'l Endowment for the Humanities, 460 F.2d 1030, 1032 (6th Cir. 1972). Moreover and notwithstanding the literal language of Secretary Rumsfeld's remarks, it is clear that the individuals were asked to participate in the deliberative process of developing the policies and instructions at issue in this law suit. Indeed, at another point in plaintiff's argument, plaintiff notes that the Secretary stated that "We reached out . . . to those people [and others who were] very important in the development of these procedures. . . ." Plaintiff's Memorandum at p. 22. Suffice it to say that "the government may have 'a special need for the opinions and recommendations of temporary consultants . . ,'" Hoover v. Dept. of Interior, 611 F.2d 1132, 1138 (5th Cir. 1980), and the work of outside consultants or experts in the deliberative process is contemplated by the DoD FOIA guide, even if the government did not employ the experts. See Attachment 5 & Texas v. I.C.C., 889 F.2d 59, 61 (5th Cir. 1989); see also Formaldehyde Institute v. Dept. of Health and Human Services, 889 F.2d 1118, 1123 (D.C. Cir. 1989) (criticizing the District Court for focusing on the absence of any formal relationship

between the outside consultant and the agency in determining the applicability of exemption 5). To the extent that plaintiff argues that the DoD declarations do not describe the "special need" not filled by government attorneys [Pl Mem. at 23], defendant refers the Court to paragraphs 13 and 14 of the Ricci Declaration which addresses the uniqueness of these individuals' input.

Plaintiff also argues that the communications between these individuals and DoD should not be protected because other communications, such as those with Morton Halperin, Lee Casey, and David Rivkin, were released and because the agency has not established that the others agreed to provide their comments on a confidential basis. Plaintiff's Memorandum at pp. 14-16, 25-27. Whether Halperin, Casey or Rivkin communications have or have not been released is not the issue here. The private lawyers who were consulted because of their special expertise were asked for their views and comments under the assurance that those views would be considered confidential. See Declarations of Aly, Ricci, Cobb, Hecker. As Mr. Halperin explains, he did not believe that his communications with DoD would be held in confidence, and the DoD official caller, as reflected by Mr. Halperin, did not believe so either. See Plaintiff's Memorandum at Tab B. As noted in the Hecker Declaration, Messrs. Halperin, Casey or Rivkin were not individuals who were consulted on a continuing basis. Hecker Declaration at ¶ 5.

Plaintiff's reliance on Army Times Publishing Co. v. Dep't of the Air Force, 998 F.2d 1067 (D.C. Cir. 1993), is misplaced. In that case, plaintiff sought the aggregate results of telephone surveys with military personnel about working conditions. Id. at 1069. Some of the results had been voluntarily released and plaintiff argued that information not released was the same type of record, but unfavorable to the Air Force. Id. at 1070. Plaintiff also asserted that selection of the materials to be released was "totally self-serving and unrelated to the purposes of

Exemption 5." Id. at 1071. The instant case may be easily distinguished from Army Times Publishing Co. The Air Force's affidavits were lacking in specificity. Id. at 1071. In fact, in "many of the entries in the *Vaughn* index there were no description of the listed document whatsoever." Id. Moreover, the District Court failed to make a finding on segregability when it appeared that the same factual material may have been in both the released and the withheld records. In the instant case, the declarations have established that the information from the individuals consulted was not provided with the same understandings as that of individuals, such as Mr. Halperin. Hecker Declaration at ¶¶ 4-5. Moreover, withheld documents are not "plainly factual" as they were in Army Times Publishing Co., See 998 F.2d at 1071.

Furthermore, DoD has explained that the protected material emanated from individuals considered to have unique expertise by the Secretary and the General Counsel, that "[t]hese communications and consultations were provided in confidence to the DoD. . .," and that "[t]he public disclosure of these materials would discourage the frank, open discussions on these issues by these individuals." Hecker Declaration at ¶ 4. As noted above, the communications by Morton Halperin, Lee Casey and David Rivkin were released as they were not communications covered by the expectation that they would be kept in confidence. Hecker Declaration at ¶ 5. Thus, this case does not reflect that concern expressed in Army Times Publishing Co., that the "warts" were being protected and the "wonders" were being made public. See Army Times Publishing Co., 988 F.2d at 1072.

With regard to plaintiff's argument that the agency was engaged in a form of rule-making that required notice and comment and its view that that was precisely what the individuals consulted were doing, defendant submits that this argument has no merit. It is true that "[i]t is

necessary in assessing a FOIA claim to understand 'the function of the documents in issue in the context of the administrative process which generated them.'" Lead Industries Ass'n, Inc. v. Occupational Safety and Health Administration, 610 F.2d 70, 80 (2nd Cir. 1979) (internal citations omitted). "Whether a particular document is exempt under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process." Lead Industries Ass'n, Inc. v. Occupational Safety and Health Administration, 610 F.2d 70, 80 (2nd Cir. 1979). In the instant case, the documents prepared by the individuals consulted by the DoD and its General Counsel served to assist the Department of Defense in implementing the President's Military Order. Plaintiff concedes that they were not part of an APA rule-making process. Plaintiff's Memorandum at 25. These individuals provided unique views and policy recommendations that the DoD relied upon in formulating its policies and instructions. See Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 903 (D. D.C. 1980) . "In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions." Ryan v. Dept. of Justice, 617 F.2d 781, 789-90 (D.C. Cir 1980).

Finally, plaintiff relies heavily on the District Court (Judge Friedman's) opinion in Ctr. for Int'l Envtl. Law, 237 F.Supp. 2d 17, and its references to Klamath to argue that defendant's reliance on the deliberative process privilege and the Ryan case (and other pre-Klamath cases, such as Wu, supra) are limited in light of Klamath. Plaintiff's Memorandum at pp. 17-19.

However, plaintiff's argument fails.[5] Ryan and the other cases cited by defendant are still good law. See e.g., Klamath, 532 U.S. at 12 n. 4. The import of the Klamath case is that the Supreme Court has concluded that communications from an "interested party" who is seeking a Government benefit are not protected as an intra-agency record. No such claim can be made here. See id. at 12.

Moreover, as noted by another District Judge (Judge Bates), letters of advice to the Pardon Attorney (regarding pardon requests between 1960 to 1989) from judges and special prosecutors were protected by the deliberative process privilege, notwithstanding the fact that the authors were not employees of an "agency." See Lardner v. U.S. Dep't of Justice, 2005 WL 758267, *13-15 (D.D.C. March 31, 2005) (Attachment 5, hereto). As Judge Bates in the Lardner case concluded:

> The Supreme Court in Klamath expressly declined to overrule Ryan, and it is certainly not the province of this Court to do so. It may well be that the D.C. Circuit will read Klamath as an instruction to narrow its view of "intra-agency" communications. However, "district judges ... are obligated to follow controlling circuit precedent until either [the D.C. Circuit], sitting en banc, or the Supreme Court, overrule it." United States v. Torres, 115 F.3d 1033, 1035 (D.C.Cir.1997). Until that time, Ryan remains good law, and under Ryan, the recommendation letters [from judges and special prosecutors] at issue qualify as intra-agency documents and therefore were properly withheld under Exemption 5.

Id. at 14 (footnotes omitted).[6] Since the communications at issue in Lardner were written

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[5]Note that Ctr. for Int'l Envtl. Law involved communications between the United States and Chile in the course of treaty negotiations. Id. at 27-29. Exemption 5 has not been asserted in this case to protect such communications. See infra at III.

[6]Other cases since Klamath have reaffirmed the role of outside consultants in the deliberative process. See, e.g., Physician's Committee for Responsible Medicine v. NIH, 326 F. Supp.2d 19, 28 (D.D.C. 2004) (explaining that documents produced by outside consultants are intra-agency records when the documents play the same role in the agency's deliberative process as would documents prepared by the agency's own personnel).

between 1960 and 1989, it is fair to speculate that the judges and special prosecutors, like the individuals consulted in the instant case, are no longer in their former positions. Yet, Judge Bates concluded that they filled the role of consulting experts whose communications were protected by the deliberative process privilege. Defendant urges this Court to do the same.

III. Exemption 3 and 10 U.S.C. § 130c, Protect Certain Correspondence Between Agency Officials and Representatives of the British and Canadian governments.

At pages 31-32 of Plaintiff's Memorandum, plaintiff agrees that 10 U.S.C. § 130c satisfies the requirements of 5 U.S.C. § 552(b)(3)(B), i.e., Exemption 3, but argues that defendant has failed to demonstrate that the British and Canadian correspondence meets the requirements of §130c. Plaintiff has recognized that there is a dearth of cases construing the provisions of the statute. Id. at p. 31.

In the Ricci Declaration, defendant asserts that Documents 1, 2, and 75-87, have been withheld based on Exemption 3(B) and 10 U.S.C. § 130c. Plaintiff is correct that there is no discussion concerning the "national security official's" actions in the application of the statute. Because of this, defendant attaches the Declaration of Karen Hecker to fill this gap. See Attachment 4. As noted in Ms. Hecker's declaration, Ms. Ricci made the determination with regard to the withholdings. Hecker Declaration at ¶ 6. Ms. Ricci was acting in the capacity of an Initial Denial Authority ("IDA") when responding to the FOIA request. Id. The IDA is an "official who has been granted authority by the head of a DoD component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure." DoD 5400.7-R, C1.4.5. Therefore, since 10 U.S.C. § 130c is a statutory exemption described under Exemption 3 of the FOIA, the "national security official" described in that statute, namely the Secretary of Defense, has, in essence, delegated his authority to the

IDAs under this DoD FOIA regulation.

In analyzing whether to protect the records under the statute, 10 U.S.C. § 130c(b) provides that: (1) the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government ; (2) The foreign government is withholding the information from public disclosure (relying for that determination on the written representation of the foreign government); and (3) any of the following conditions are met:

(A) The foreign government . . . requests, in writing, that the information be withheld.

(B) The information was provided or made available to the United States Government on the condition that it not be released to the public.

(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 on the ability of the United States Government to obtain the same or similar information in the future.

10 U.S.C. § 130c(b).

With regard to the three-pronged test of 10 U.S.C. § 130c(b), defendant submits that this test has been met. First, there is little doubt that the communications are from officials of a foreign government. Secondly, there are representations on some of the communications and inferences in others that the content of the communications should be withheld from the public. See Ricci Declaration at ¶ 19; see also Hecker Declaration at ¶ 7. Some of the documents contain markings indicating their confidentiality. Id. Furthermore, DoD has received written communications from the foreign governments, indicating that they are withholding this information from public disclosure in their own countries and have asked that this information not be released to the public. Id.; see also ¶ 7. Thus, the third prong of 10 U.S.C. § 130c(b) is also satisfied because there is a request in writing and the information at issue was provided "on

the condition that it not be released to the public." 10 U.S.C. § 130c(b)(3)(A) & (B); see Hecker Decl. at ¶¶ 7-8.[7]

Because DoD meets the requirements of 10 U.S.C. § 130c(b), Exemption 3(B) applies regardless of whether the communication is to or from the foreign government. Section (b)(1) provides that information "produced in cooperation with" a foreign government may be protected. Plaintiff reads the statute in an overly narrow manner, contending that the only protection afforded is for communications from a foreign government only. Plaintiff's Memorandum at pp. 33-34. Any communications to a foreign government, plaintiff argues, would not be protected, even if these communications would clearly reveal the nature of the foreign government's original communications. Id. At least one Court has ruled to the contrary. ACLU v. DoD, C.A. No. 04 CV 4151, (S.D.N.Y.). In ACLU, Judge Hellerstein was asked by defendant, DoD, to rule that certain communications from DoD to the International Committee of the Red Cross (ICRC) were properly withheld pursuant to 10 U.S.C. § 130c, since the communications would reveal the concerns expressed by the ICRC in its communications to DoD. See Attachment 7, hereto (May 31, 2005, Hearing Transcript, ACLU v. DoD) p. 6-7. The judge agreed and found that communications from DoD to the ICRC could be protected. Id. at p. 16.[8] Suffice it to say, it would defeat the purpose of this statutory exemption if only

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[7] In Gerstein v. DoD, C.A. C-03-5193-JF (N.D. Cal. December 21, 2004), the District Court concluded that a communication from a foreign organization, the International Committee of the Red Cross (ICRC), met the requirements of § 130c(b)(2) and § 130c(b)(3)(A) & (B) with regard to communications from it to DoD concerning detainees at Guantanamo Bay. See Attachment 8, p. 8.

[8] Defendant has attached the transcript of the hearing for the Court's convenience. Attachment 7. The documents under review were referred to as Documents 13 & 49 and described at p. 6, lines 9-11 as being "responses of the Department of Defense" to the foreign

communications from foreign governments were protected. It is the information communicated by the foreign governments which is to be protected, and any communications to these governments which would reveal such information should clearly be likewise protected.

Plaintiff also notes that there are temporal limitations on the withholdings to be dictated by the foreign governments. Plaintiff's Memorandum at p. 33. Because these governments have only recently responded that this information should be held in confidence, there is clearly a present understanding that the information will not be released to the public in the foreseeable future. See Hecker Declaration at ¶ 7.

IV. DoD's Search for Records was Adequate.

On pages 37 and 38 of Plaintiff's Memorandum, plaintiff argues that defendant's search for records was inadequate and suggests that the search was "perfunctory" citing Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999). Plaintiff can hardly call DoD's search for records as "perfunctory." See Attachment 2 (Ricci Declaration) at ¶¶ 3-10; see also two additional declaration prepared by Ms. Ricci in December 2004 and February 2005, in support of extensions of time in connection with the search for documents. Dockets ## 28 & 32.

Plaintiff argues that DoD "has turned a blind eye to obvious leads." Plaintiff's Memorandum at p. 37. For instance, plaintiff relies on the fact that no documents were identified or released concerning the Presidential Order, only documents relating to the DoD's implementing orders and instructions. In this regard, plaintiff states that "[i]t is unlikely that the President issued his Order without input from the Secretary of Defense, and . . . comments from

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organization. The judge's ruling is at p. 16, lines 14-17 and 21-25. Judge Hellerstein clearly ruled that documents emanating from the DoD were properly exempt under 10 U.S.C. § 130c.

outsiders . . .” Id. at p. 37. Because the search did not turn up more records, plaintiff believes it was inadequate.

Plaintiff also notes that “draft instructions” sent to a number of outside consultants that were “clearly within the scope of plaintiff’s request” were not accounted for in defendant’s *Vaughn* index. Id. at pp. 37-38.[9] Finally, plaintiff asserts that there were no records identified or release made concerning a “meeting with Wolfowitz at 5 pm” that was referenced by Professor Ruth Wedgwood in her e-mail to a staff person on November 25, 2003. Plaintiff assumes that a meeting took place on that day and that minutes were generated because there was a later meeting and a memorandum reflecting the discussion at that meeting. Id. at p. 38.[10]

Although plaintiff’s request was originally interpreted narrowly, it was broadened to encompass every record keeping system that would plausibly have records. See Ricci Declaration at ¶¶ 3-7 & 9- 10. Plaintiff initially attempted to cast doubt on the veracity of the declaration of Stewart Aly and does the same with regard to the declaration of Christine Ricci. Because of this continuing assertion that the searches conducted were inadequate, defendant augments Mr. Aly and Ms. Ricci’s Declarations with the Hecker Declaration at Attachment 4, the Cobb Declaration [Docket 36 at Tab 12 at ¶¶ 8-9], and the Declaration of Lawrence D. Horner, Chief of the Correspondence Control Division (CCD), Executive Services and

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[9] To the extent that these accounted for “draft instructions” were part of in a deliberative process leading to final instructions, they are protected by the deliberative process privilege. See, e.g., Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F.Supp.2d 19, 36 (D.D.C. 2000); Marzen v. HHS, 825 F.2d 1148, 1154-55 (7th Cir. 1987).

[10] After another review of the unredacted record, Ms. Hecker notes that the document was nonresponsive to plaintiff’s FOIA request and should not have been released as one. Hecker Declaration at ¶ 3.

Communications Directorate, Washington Headquarters Services (since November 2002). Attachment 6, hereto. Mr. Horner explains the search criteria in the CCD. See Attachment 6. These declarants clearly established that defendant's search for records was made in good faith, was thorough and was complete. Although plaintiff has attempted to disparage Mr. Aly and Ms. Ricci's veracity, it cannot cast doubt on three other declarants, one of which no longer even works for the defendant. Moreover, the case law has made clear that the fundamental question is not "whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Steinberg v. United States Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); see Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (same); Nation Magazine v. United States Customs Serv., 71 F.3d 885, 892 n. 7 (D.C. Cir. 1995) (explaining that "there is no requirement that an agency [locate] all responsive documents").

V. All Segregable Records have been Released.

The agency has again reviewed the records that plaintiff has identified as ones that should have had information segregated and released. See Hecker Declaration at ¶ 9. As stated by Ms. Hecker:

> I have reviewed the documents that Plaintiff has contended would contain "reasonably segregable" information. Following that review, I have concluded that no additional nonexempt information can be segregated and released.
>
> a. Fourteen of the documents (entries 5-7, 9, 12, 29, 30-36 and 59 on the Second *Vaughn* index) are memoranda drafted by DoD personnel and include the comments of the distinguished advisors and former high ranking government officials referenced in paragraph 4 above. Plaintiff is not seeking release of the parts of the documents that contain the work product of DoD officials but are [sic] seeking the parts that reflect statements made by the outside attorneys. The DoD

considers these comments to be exempt from disclosure and therefore there is no information that can be segregated and produced.

b. Entry 74 is a 24-page summary of a meeting held on July 30, 2003 between the General Counsel of the Department of Defense, attorneys on his staff and the outside lawyers referred to in paragraph 4 above. In the latter part of the meeting, they were joined by the Deputy Secretary of Defense. Plaintiff contends that much of the discussion appears to be factual reports and thus non-deliberative. I have reviewed this document and have concluded that the only additional nonexempt information that can be produced is two additional pages that reflect the beginning and ending time of the portion of the meeting attended by the Deputy Secretary of Defense. Those pages are attached to this declaration. The remainder of the document includes discussions on proposed commission procedures, prosecution strategy and legal opinions and is therefore withheld as deliberative.

Id.

VI. CONCLUSION

For the foregoing reasons and the reasons set forth in defendant's opening brief and supporting documents, it is respectfully requested that plaintiff's cross motion for summary judgment be denied and defendant's motion for summary judgment be granted.

Respectfully submitted,

_____
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United States Attorney

_____
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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing reply has been filed and served electronically to:

MARK H. LYNCH
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on 18th day of July 2005.

_____

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