UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendant.	)	Case No. 1:11-cv-02261(JDB)

DEFENDANT'S COMBINED REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, AND MEMORANDUM IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Defendant United States Department of Homeland Security ("DHS") respectfully submits this combined Reply in support of its Motion for Summary Judgment and in Opposition to Plaintiff Electronic Privacy Information Center's ("EPIC's") Cross-Motion for Summary Judgment.

INTRODUCTION

In its opposition to defendant's summary judgment motion, EPIC does not challenge the adequacy of DHS's search for documents. Nor does it dispute that DHS properly withheld records under Exemptions 4, 5, 6 and 7 of the Freedom of Information Act (FOIA). Instead, EPIC challenges the sufficiency of DHS's Vaughn Index, arguing that it does not reasonably describe the documents that were released to EPIC only with minor redactions. However, because EPIC does not challenge the exemptions claimed or even assert it lacks sufficient knowledge of the documents to test the accurateness of the withholdings, it is not entitled to a

supplemental Vaughn. And in any event, the DHS Vaughn Index is sufficient, as it provides a detailed description of the information withheld and the reasons for withholding them.

EPIC's only other challenge concerns the segregability analysis of seven (out of 42) documents from the United States Secret Service ("USSS"), which is without merit. See Pl. Br. At 9-10. The USSS has met its segregability obligation because it analyzed these seven documents and found that the non-exempt information is inextricably intertwined with exempt information. The USSS concluded that redacting these documents would leave only boilerplate contractual language, sentence fragments, street addresses, and the like, which have minimal or no information content.

Finally, EPIC's request for attorney's fees and costs is premature, as the Court has not ruled on the merits of the DHS's withholdings. For these reasons, DHS's motion for summary judgment should be granted, and EPIC's motion for summary judgment be denied.[1]

ARGUMENT

I. EPIC IS NOT ENTITLED TO A SUPPLMENTAL VAUGHN INDEX

a. EPIC Does Not Challenge the FOIA Exemptions Claimed.

At the outset, Defendant should be granted summary judgment on all issues except for those expressly contested by EPIC in its opposition brief. See Franklin v. Potter, 600 F. Supp. 2d 38, 60 (D.D.C. 2009) (treating defendant's argument in summary judgment motion as conceded where plaintiff failed to address it in plaintiff's response); Hopkins v. Women's Div., General Bd. of Global Ministries, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well understood in this

[1] In its "Statement of Genuine Issues in Opposition to Defendant's Statement of Material Facts," EPIC claims that "DHS failed to note a third interim document production, dated May 31, 2012." EPIC failed to mention, however, that Defendant Counsel informed EPIC on August 1, 2012 that the May 31st production was reproduced in the USSS July 2nd and July 9th productions. As a result, Defendant would not mention that production in its declarations and brief, and that EPIC should act as though that production never occurred. See attached email from Jean-Michel Voltaire to Ms. Ginger McCall, dated August 1, 2012.

Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."), aff'd, 98 F. App'x 8 (D.C. Cir. 2004); Bancoult v. McNamara, 227 F. Supp. 2d 144, 149 (D.D.C. 2002) ("[I]f the opposing party files a responsive memorandum, but fails to address certain arguments made by the moving party, the court may treat those arguments as conceded, even when the result is dismissal of the entire case." (citation omitted)).

In its opening brief, DHS moved for summary judgment on the sufficiency of the scope of its search for responsive documents, and on all withholdings made by DHS and USSS. EPIC's opposition brief does not contest the scope of the agency's search, nor does it dispute the appropriateness of the DHS' and USSS' withholdings under Exemption 4, 5, 6 and 7. Thus, EPIC has conceded any arguments as to the adequacy of the search and all withholdings that it chose not to challenge. Summary judgment should accordingly be granted to Defendant on all of the conceded issues.

b. **Because EPIC Does Not Challenge the FOIA Exemptions Claimed, It Is Not Entitled to a Supplemental Vaughn Index.**

The D.C. Circuit requires the filing of a Vaughn Index in FOIA litigation "'to permit adequate adversary testing of the agency's claimed right to an exemption,' and enable 'the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves . . . .'" King v. United States Department of Justice, 830 F.2d 210, 218-19 (D.C. Cir. 1987) (citations omitted). "Thus, when an agency seeks to withhold information, it must provide 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply."' Id. at 219. "Vaughn indexes serve as a means to the resolution of a FOIA case rather than as ends in themselves, and the resolution

of a FOIA case does not necessarily require an agency's submission of a Vaughn Index." Maine v. U.S. Dep't of Interior, 124 F.Supp. 2d 728, 737 (D. Me. 2000) vacated on other grounds, 2001 WL 98373 (D. Me. 2001); see also Minier v. CIA, 88 F.3d 796, 804 (9th Cir.1996); Brown v. Federal Bureau of Investigation, 658 F.2d 71, 74 (2d Cir.1981).

Because EPIC has chosen not to challenge the agency's FOIA exemptions claimed, its reliance on Vaughn v. Rosen for a supplemental Vaughn is misplaced. In Vaughn, the government submitted an affidavit that contained only a general description of the documents withheld. 484 F.2d 820, 823-24 (D. C. Cir. 1997). The requester explained it was unable to respond to the government's claim of FOIA exemptions because he did not know enough about the documents to be able to determine whether the government's position was accurate. Id. The Court responded by instructing the government to generate "a relatively detailed analysis in manageable segnments" of the documents in question. Id. at 826.

The facts in this case are different from those in Vaughn. Unlike the requester in Vaughn, EPIC has the documents in question, albeit in redacted format, and does not claim it is unable to determine the soundness of the FOIA exemptions. In fact, having the documents in its possession together with the DHS Vaughn Index and its accompanying declaration, EPIC was able to determine that it would not challenge the appropriateness of the exemptions. Having made that decision, EPIC is not entitled to a supplemental Vaughn Index. '"[I]t is the function, not the form, of the index that is important."' Judicial Watch, Inc. v. Food & Drug Admin., 449 F.2d 141, 146 (D.C.Cir. 2006) (quoting Keys v. Department of Justice, 830 F.2d 337, 349 (D.C.Cir.1987)). The function of a *Vaughn* index is essentially to "enable[ ] the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court." Keys, 830 F.2d at 349.

c. **DHS' Vaughn Index Clearly Describes and Justifies the Bases of the Relevant FOIA Exemptions Claimed.**

In any event, the DHS Vaughn Index is sufficient, as it provides a detailed description of the information withheld and the reasons for withholding them. No set formula governs the sufficiency of a Vaughn Index and the key question in determining the sufficiency of an index is whether it allows for meaningful challenge by a FOIA plaintiff and *de novo* review by the district court of an agency's claim of exemption. See Gallant v. NLRB, 26 F.3d 168, 173 (D.C. Cir. 1994); see also Hinton v. DOJ, 844 F.2d 126, 129 (3rd Cir. 1988). The level of specificity required in an agency's description of documents and explanation of the applicability of exemptions will vary depending on the nature of the information, the length of the document, and the exemption claimed. See Church of Scientology Intern v. DOJ, 30 F.3d 224, 234, 237 n. 21 (5th Cir. 1994). In determining the required specificity of a Vaughn Index, a court should keep in mind that, despite a defendant's burden of proof with regards to the FOIA exemptions, the government is "not required to provide so much detail that the exempt material would be effectively disclosed." Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 777 (D.C. Cir. 2002).

EPIC erroneously argues that the DHS Vaughn Index lacks sufficient document descriptions to justify the agency's withholdings. Pl. Br. At 9-10. This argument is easily refuted by the detailed information provided in the DHS Vaughn Index. This Index sufficiently described the information being redacted pursuant to respective exemptions claimed, and explained why the information is protected from disclosure. See DHS Vaughn Index at 1-23. Because most of the documents were released to EPIC with minor redactions, the released portion of the document supplements the Vaughn index, so that "[t]he released content of the

documents served to illuminate the nature of the redacted material." See Judicial Watch, 449 F.3d at 145.

Nonetheless, after EPIC challenged the sufficiency of the documents' description in the DHS Vaughn Index, DHS conducted an additional review of the Index and the documents withheld. See James Holzer Suppl. Decl. ¶ 3-4. The DHS found that the original Index was sufficient but could be made more clear. Id. ¶ 4. As a result, DHS has updated the Vaughn Index by (1) reorganizing it with numbered documents and simpler category headings; (2) providing more detailed descriptions of certain documents whose titles did not plainly describe the content of the document; (3) providing more detailed justification for the three draft documents that were withheld in full; and (4) explaining in greater detail the commercial information redacted. Id. ¶ 4. This Updated Vaughn Index contains a more detailed description of the records and a plain statement of the exemptions relied upon to withhold each record. This is all that could arguably be required.[2]

II. USSS RELEASED ALL REASONABLY SEGREGABLE INFORMATION

USSS conducted a sufficient segregability analysis and released all reasonably segregable materials. FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5

[2] DHS applied Exemption (b)(6) to 31 documents by redacting the names and personal identifiable information of its law enforcement personnel to prevent unwarranted invasion of their privacy. It asserted Exemption (b)(4) to four documents by redacting commercial information, such as contract pricing and other financial information related to general and administrative rates, labor hours, and rates that it obtained from private companies during a competitive bidding process. It applied Exemption (b)(7)(E) to nine documents by deleting law enforcement techniques and procedures, including passwords to its law enforcement databases to prevent unauthorized access to intelligence information and protect its investigative efforts. It applied Exemption (b)(7)(C) to ten documents by redacting information about third parties in its law enforcement documents to prevent unwarranted invasion of their personal privacy. It withheld three draft, pre-decisional documents in their entirety under Exemption (b)(5), the deliberative process privilege, to protect internal agency deliberative process and encourage open, frank discussions on matters of policy within the agency. EPIC has not challenged the lawfulness of these specific withholdings.

U.S.C.§ 552(b). This provision requires the government to apply FOIA exemptions to specific segments of information within a record. See Mo. Coal. For the Env't Found v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1211-12 (8th Circ. 2008). The D.C. Circuit has held that to be reasonably segregable, the segments of information, if disclosed, must have some meaning. Mead Data Ctr., Inc. v. U.S. Dep't of the Air Force , 566 F.2d 242, 261 n.55 (D.C.Cir. 1977) (observing that a "court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases or even sentences which taken separately or together have minimal or no information content"). The question of segregability is context-specific based on the nature of the document in question, Mead Data, 566 F.2d at 261 and factual material that is "inextricably intertwined with exempted portions" of the documents need not be disclosed. Johnson, 310 F.3d at 776.

EPIC's argument that the Secret Service has failed to provide non-exempt, segregable information with regard to seven documents the agency withheld in full is without merit. Pl. Br. At 12-14. The challenged documents are numbered 4-6, 10, 12, 13, and 16, and consist of mostly contracts pertaining to sensitive software utilized in protective intelligence operations and criminal investigations. See Brady J. Mills Decl. ¶¶ 6-28. They are withheld in full pursuant to several FOIA exemptions. Id. The USSS has conducted a detailed segregability analysis of these documents and concluded that they cannot be segregated. See Brady J. Mills Decl. ¶ 4. In his declaration, Mr. Mills explains, document-by-document, what the contents include and why they could not be produced. For example, he asserts that: "Pieces of information, such as standardized clausal language, sentence fragments, basic information such as street address and order number, and a few generalized sentences regarding period of performance, could be segregated and released. However, such bits of information have minimal or no value, either

separately or take together. Segregated from the remainder of the contract, these few sentences and sentence fragments, form information, and generic contract language have no informational context and are nonsensical without that context." Id. ¶¶ 7-28. Thus, the USSS properly concluded that no further information could be released without compromising information exempt under claimed exemptions.

III. PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES AND COSTS SHOULD BE DENIED AS PREMATURE.

In addition to the above challenges, EPIC also asks the Court, in its summary judgment brief, to rule that it is both eligible for and entitled to attorney's fees and costs. Pl.'s Mem. at 14-23. EPIC's motion for attorney's fees is premature to say the least, as it has been made prior to the Court's resolution of the merits. As such, the Court should defer consideration of attorney's fees and costs until after it resolves the merits of the case. At that time, the Court can consider these issues if the parties are unable to resolve the question of fees and costs through negotiation.

"An 'award of attorney's fees is uniquely separable from the cause of action' that is settled by a court's judgment on the merits[.]" FCC v. League of Women Voters of Cal., 468 U.S. 364, 373 n.10 (1984) (finding motion for attorney's fees did not affect the finality of a judgment for appellate purposes) (correction marks omitted) (quoting White v. N.H. Dep't of Emp't Sec., 455 U.S. 445, 451-52 (1982)). Indeed, in White, the Supreme Court -- in interpreting a "prevailing party" fee statute similar to FOIA -- specifically held that applications for attorney's fees are collateral to the substantive issues of a plaintiff's cause of action, which is decided by a final appealable judgment by a District Court. White, 455 U.S. at 451-52.

The collateral nature of attorney's fee requests is further reinforced by both the Federal Rules of Civil Procedure and the Local Rules of this Court. See Fed. R. Civ. P. 54(d)(2)(B)(i) (requiring that a motion for attorney's fees be made "no later than 14 days after the entry of

judgment"); 54(d)(2)(B)(ii) (requiring that a motion for attorney's fees "specify the judgment and the statute, rule, or other grounds entitling the movant to the award"); Local Civ. R. 54.1(a) (requiring that a bill of costs be filed "within 21 days after entry of judgment"); 54.2(a) ("In any case in which a party may be entitled to an attorney's fee from another party, the court may, at the time of entry of final judgment, enter an order directing the parties to confer and to attempt to reach agreement on fee issues.") (emphasis added for all preceding citations). In particular, Local Rule 54.2(a) clearly contemplates that the parties should be given an opportunity to negotiate and resolve fee disputes after entry of judgment, without the Court's intervention.

By its request for the Court to adjudicate the issues of its eligibility for, and entitlement to, attorney's fees, EPIC presumptively asks the Court to adjudicate an issue that the parties may be able to resolve between themselves. The United States and its agencies frequently settle fee disputes in FOIA cases – typically after the entry of judgment – and there is simply no need for the Court to rule on the issues of eligibility and entitlement for fees at this early stage.

Consequently, and not surprisingly, courts in this Circuit have consistently applied the understanding that issues of attorney's fees are collateral to judgments on the substantive merits of claims. See, e.g., Ellipso, Inc. v. Mann, 253 F.R.D. 1, 2 (D.D.C. 2008). FOIA cases, including those litigated after the OPEN Government Act of 2009, are no different. In the normal course of events, in a FOIA case or otherwise, a motion for fees and costs is made after the entry of judgment. See, e.g., Davy v. C.I.A., 550 F.3d 1155, 1158 (D.C. Cir. 2008) ("After the agency filed a superseding motion for summary judgment [in a FOIA case], the district court granted the agency's motion. Davy thereafter timely filed a motion for attorney's fees under 5 U.S.C. § 552(a)(4)(E)."); N.Y.C. Apparel F.Z.E. v. U.S. Customs & Border Protection Bureau,

563 F. Supp. 2d 217, 219-20 (D.D.C. 2008) (describing FOIA plaintiff's motion for attorney's fees filed after the court ruled on summary judgment).

As such, courts in this Circuit have repeatedly found that a request for attorneys' fees under FOIA, when made at the merits stage, is premature. Indeed, one such case involved the very same parties litigating here, in virtually the same posture, i.e., where the plaintiff, EPIC, claimed eligibility for fees purely based on the timing of the release of records relative to its filing suit. See Elec. Privacy Info. Ctr. v. DHS, 760 F. Supp. 2d 4, 9 n.5 (D.D.C. 2011) ("In its cross-motion [for summary judgment], the plaintiff also moves the court for an award of attorney's fees. . . . The court agrees with DHS that resolution of this issue is premature . . .") (internal citations omitted); Quick v. U.S. Dept. of Commerce, Nat'l Inst. of Standards & Tech., 775 F. Supp. 2d 174, 183 (D.D.C. 2011) (finding summary judgment motion for attorneys' fees premature where plaintiff sought judgment that he be "deemed to have 'substantially prevailed' . . . because [the agency] produced records responsive to his request after the commencement of the instant action"); see also Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 37 n. 18 (D.C. Cir. 1998) 164 F.3d 20, 37 n.18 (D.C. Cir. 1998) (finding "discussion of attorney's fees is premature" when substantive issues remained in FOIA case); Hussain v. U.S. Dep't of Homeland Sec., 674 F. Supp. 2d 260, 272-73 (D.D.C. 2009) ("In light of the Court's conclusion that, at this stage, final judgment is not appropriate for either party, and because plaintiff has not articulated any need for an interim award of fees, the Court concludes that plaintiff's attorneys' fees motion is premature."); Wheeler v. Exec. Office of U.S. Attorneys, No. 05-1133, 2008 WL 178451, *7 (D.D.C. Jan. 17, 2008) (finding that request for attorney's fees was premature when substantive issues remained in FOIA case).

Moreover, EPIC's fee petition is premature because the record does not contain sufficient information to justify an award of fees. In support of its argument for eligibility for attorneys' fees, EPIC asserts, based entirely on the fact that it obtained its responsive documents subsequent to its filing suit, that its litigation created a "voluntary or unilateral change in position by the agency." 5 U.S.C. § 552(a)(4)(E)(ii). Pl.'s Mem. at 15. Yet, to prevail under this "catalyst theory," a plaintiff must show "something more than post hoc, ergo propter hoc" -- i.e., that the release came after the institution of the lawsuit. See Church of Scientology of Cal. v. Harris, 653 F.2d 584, 588 (D.C. Cir. 1981). "Instead, the party seeking such fees in the absence of a court order must show that prosecution of the action could reasonably be regarded as necessary to obtain the information and that a causal nexus exists between that action and the agency's surrender of the information." Id. (citations omitted). Thus, the simple chain of events recited by EPIC in its brief does not make it eligible for fees.

Additionally, in order to establish its entitlement to fees, EPIC must further show that the balance of four factors – "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents" – tip in its favor. Davy, 550 F.3d at 1159. Although EPIC argues in its brief that these factors have been met, an evaluation of the first and fourth factors – the public benefit derived from the case and the reasonableness of DHS's withholdings – will necessarily depend on how the Court resolves the merits of the instant summary judgment motion. See id (stating that the "Court will not assess [attorney's] fees when the agency has demonstrated that it had a lawful right to withhold disclosure.")

Accordingly, DHS asks that the Court deny EPIC's request for judgment on the issues of eligibility and entitlement to fees and costs as premature.[3]

CONCLUSION

The Court should grant Defendant's Motion for Summary Judgment and deny Plaintiff's Cross-Motion for Summary Judgment.

Date: October 26, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General
Civil Division

JOHN R. TYLER
Assistant Branch Director
Federal Programs Branch

/s/ Jean-Michel Voltaire
JEAN-MICHEL VOLTAIRE (NY Bar)
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20530
Tel.: 202-616-8211
Fax: 202-616-8460

[3] To the extent that the Court agrees with EPIC that the issues of eligibility and/or entitlement to attorneys' fees are ripe for review now, DHS respectfully requests that the Court issue an Order for full briefing on the merits of EPIC's requests for fees and costs. DHS is prepared to present evidence on the issue of EPIC's eligibility and entitlement, including, inter alia, a complete chronology of DHS's search efforts prior to and subsequent to EPIC's institution of litigation, and would do so expeditiously if the Court so ordered.