UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Plaintiff,	)	
v.	)	Civil Action No.: 11-00945 (ABJ)
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

EPIC, in its opposition and cross-motion for summary judgment, raises three claims, all of which lack merit. It first challenges DHS's withholding of three records under Exemption 5, arguing that they are not intra-agency communications and contain factual information that falls outside of the scope of the deliberative process privilege. Opp. at 5-14. But the authors of these records acted as consultants to DHS, rendering their communications intra-agency. And to the extent that the records contain "purely" factual information, that information is inextricably intertwined with the opinions and deliberations of DHS and its consultants that are reflected in the records.

Next, EPIC, although not purporting to challenge DHS's invocation of Exemption 4, asserts that records provided to DHS by Rapiscan cannot constitute confidential commercial information because that information is publicly available. Opp. at 14-17. But, as shown below, the public records culled by EPIC do not contain the same information withheld by DHS.

Finally, EPIC argues that it should be awarded litigation fees and costs by virtue of DHS's release of four records after this suit was filed. Opp. at 17-21. But EPIC is not eligible for or entitled to a fee award. It has not prevailed on a "non insubstantial" claim. Nor has it shown that the post-filing release of records has benefitted the public or that DHS has acted unreasonably.

1. *DHS has properly invoked Exemption 5.*

DHS is withholding three records, two in full and one in part, under Exemption 5 as records protected by the deliberative process privilege. *Vaughn* Index, Record Nos. 5, 8, 17 (Dkt. 9-2); Def.'s Mot. Summ. J (MSJ) at 18-22. EPIC argues that Exemption 5 is inapplicable because the records are not intra-agency documents and contain unprotected factual information. It is wrong on both counts.

a. The documents prepared by Rapiscan and NEU are intra-agency records.

Exemption 5 protects "intra-agency" documents "which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption's scope extends, as EPIC acknowledges, to documents prepared by outside consultants working for or on behalf of an agency. Opp. at 5; Def.'s MSJ at 19. EPIC, however, argues, citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), that Rapiscan and NEU were not "neutral" consultants but rather "self-advocates" hoping to sometime in the future to sell explosives detection systems to the government. Opp. at 6-8. This argument misunderstands *Klamath* as well as the nature of the work done for DHS by Rapiscan and NEU.[1]

[1] Only two of three records withheld under Exemption 5 were prepared by Rapiscan or NEU. *Vaughn* Index, Record Nos. 5 & 8. The third record is a set of briefing materials prepared by DHS in evaluating Rapiscan's proposal, and is therefore intra-agency per se. *Id.*, Record No. 17.

Klamath arose from competition among several parties over water rights in a sparsely hydrated region. The Department of Interior sought to develop a long range plan for water use within the Klamath Irrigation Project, which uses water from the Klamath River Basin to irrigate territory in Oregon and California. 532 U.S. at 5. DOI asked the Klamath Tribe and three other Basin Tribes – all users of water from the project – to consult on the plan's development. *Id*. At about the same time, the Bureau of Indian Affairs, a DOI sub-agency, filed claims on behalf of the Klamath Tribe in an Oregon state court adjudication intended to allocate water rights. *Id.* BIA, under federal statute, is charged with administering land and water held in trust for Indian tribes and, in that capacity, consulted with the Klamath Tribe to determine the scope of the claims to be submitted by BIA for the Tribe's benefit. *Id*. at 5-6.

An association of water users, most of whom received water from the Klamath Irrigation Project and whose interests were adverse to the tribal interests due to the scarcity of water, filed FOIA requests seeking access to communications between DOI and the Basin Tribes, including documents prepared by the Tribes. *Id*. at 6. DOI withheld the documents, invoking Exemption 5 to protect the records as reflecting government deliberations. *Id*.

Although acknowledging that Exemption 5 can apply to records prepared by consultants to an agency, the Court held that such records would not be considered "intra-agency" when the consultant is acting as a "self-advocate at the expense of others seeking benefits inadequate to satisfy everyone." *Id*. at 12. That was the case with respect to DOI's development of a water use plan and BIA's advocacy of the Klamath Tribe's water rights claims in the Oregon state court proceeding. As the Court explained, the Basin Tribes who had consulted with DOI were "obviously in competition with non-tribal claimants, including those irrigators represented by [the FOIA requester] * * *, the water being inadequate to satisfy the combined demand." *Id.* at

13. Similarly, in the state court proceeding, BIA's decision "to support a claim by the [Klamath] Tribe that is necessarily adverse to the interests of competitors" rendered the Tribe's position "a far cry from the position of the paid consultant." *Id*. at 14-15.

That adversary context – the touchstone of whether a consultant's records should be considered intra-agency[2] – is absent here. DHS created the Prototype and Techology for Improvised Explosives Device Detection Program to advance the state of the art in explosives and suicide bomber detection systems. Undisputed Fact No. 2.[3] Through a public announcement, it invited interested parties to submit proposals to fulfill that goal and awarded development contracts to Rapiscan and NEU. *Id*. Over the course of the contracts, Rapiscan and NEU consulted with DHS officials concerning the progress of development so as to allow DHS officials to make informed decisions on how to best develop a viable system. *See* BAA 05-03 (Def.'s MSJ Ex. 1) (requiring contractors to submit monthly and quarterly progress reports on, *inter alia*, "technical progress achieved against goals" and "difficulties encountered"). At bottom, the records prepared by Rapiscan and NEU for DHS played essentially the same part in DHS's deliberations as records prepared by DHS personnel may have done. *See Klamath*, 532 U.S. at 10.

EPIC argues that Rapiscan and NEU cannot be considered disinterested consultants because they were engaged in marketing efforts to the public and private sectors. Opp. at 7-8. This position, if correct, would render the retained consultant exception meaningless. It is hard to conceive of any consultants hired by a federal agency who do not engage in ongoing business

[2] *See Citizens for Responsibility and Ethics in Wash. (CREW) v. DHS*, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (upholding Exemption 5 claim with respect to contractor documents in the absence of evidence that contractor acted in an adversarial capacity).

[3] In response to DHS's Statement of Material Facts Not in Genuine Dispute (Dkt. 9), EPIC disputes a single fact – that DHS reviewed the withheld records after this action was filed in order to determine whether additional records could be released so as to narrow the issues for judicial review. Pl.'s Response to Def.'s Statement of Facts Not in Genuine Dispute (Dkt. 10-3).

development efforts, if they want to remain in business. Rather, as the Supreme Court noted in *Klamath*, an outside consultant need not be "devoid of a definite point of view when the agency contracts for its services" to have its records deemed intra-agency. *Klamath*, 532 U.S. at 10. So long as the consultant is obliged to "truth and offering its sense of what good judgment calls for," it "functions just as an employee would be expected to do." *Id.* at 11. Such was Rapiscan and NEU's role as contractors under the PTIEDD Program, and nothing in the record suggests otherwise.

Finally, EPIC's attempt to analogize Rapiscan and NEU to the doctor in *Physicians Committee for Responsible Medicine v. NIH*, 326 F. Supp. 2d 19 (D.D.C. 2004), misses the mark. *See* Opp. at 7-8. At issue in *Physicians Committee* was whether portions of a grant application, for which the submitting doctor was awarded a five-year grant, could be withheld under Exemption 5. The court held no, finding that the doctor was not acting on the government's behalf when he submitted the application and that the research performed under that grant was a purely personal pursuit. *Physicians Committee*, 326 F. Supp. 2d at 28, 29; *Physicians Committee for Responsible Medicane v. NIH*, No. 01-2666, slip op. at 1-2 (D.D.C. Feb. 4, 2004) (attached hereto as Ex. 1). Here, in contrast, the withheld records were created *after* the contracts were awarded to Rapiscan and NEU, and for the purpose of advising DHS on the progress of development and the myriad decisions to be made in proceeding with subsequent development phases.

b. The withheld records were part of DHS's deliberative process.

EPIC argues that the three records are improperly withheld as deliberative process records because they contain factual information rather than opinions, recommendations or deliberations. Opp. at 9-12. EPIC reads the deliberative process privilege far too formalistically.

"To establish that it withheld documents pursuant to the deliberative process privilege, the agency must only identify what deliberative process is involved, and the role played by the documents in issue in the course of that process." *CREW*, 514 F. Supp. 2d at 45. Thus, the scope of the privilege does not turn on whether the contents of a record are labeled "factual" or "deliberative," but rather on whether the record reflects an agency's deliberative process. *Nat'l Wildlife Fed. v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988); *see Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1997) (cautioning "against reflexive fact/opinion characterization as the way to decide the full range of Exemption 5 cases"). At any rate, even "purely" factual information is protected by the deliberative process privilege when it "is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations" or when it "may so expose the deliberative process within an agency that the material is appropriately held privileged." *CREW*, 514 F. Supp. 2d at 46; *Judicial Watch, Inc. v. Dep't of Treasury*, --- F. Supp. 2d ---, 2011 WL 2678930, at *10 (D.D.C. July 11, 2011) (citing cases).

The deliberative process at issue here is DHS's deliberations with respect to the development of prototype explosive detection systems under the Rapiscan and NEU contracts. Medina Decl., ¶ 22 (Dkt. 9-2). The withheld records set forth assessments and recommendations by these contractors and DHS for developing the systems. More specifically, Record No. 5, an e-mail from a NEU official to his DHS counterpart, outlines "options related to potential test methodology and technology choices to be made, as well as the progression to develop concepts of operations for equipment once selected . . . for Phase II of the BomDetec program." *Vaughn* Index, Record No. 5. Record No. 8, minutes of a meeting between Rapiscan and DHS officials, similarly provides "an outline of options for moving forward with the system design, internal

discussions about decisions needed to be made related to a variety of deployment . . . scenarios, and the types of software that may need to be produced to manage the system effectively." *Id.*, Record No. 8. Record No. 17, internal briefing materials prepared by DHS in evaluating the Rapiscan proposal, summarizes DHS's own assessment of the "strengths and weaknesses of the prototype system and items for [DHS] to consider before moving with further development." *Id.*, Record No. 17.

Simply put, these records set forth DHS's deliberations about whether to proceed with Rapiscan's proposal, and the contractors' advice to DHS concerning the ongoing development of the prototype systems. To the extent that these records identify facts, they do so in the context of recommendations and assessments provided to DHS decision-makers. These facts are as fully protected by the deliberative process privilege as the accompanying opinions. *CREW*, 514 F. Supp. 2d at 46 (finding reports, timelines, and list of matters developed as part of FEMA's ongoing response to Hurricane Katrina protected); *Bloomberg, L.P. v. SEC*, 357 F. Supp. 2d 156, 169 (D.D.C. 2004) (finding exempt documents that distilled facts from meetings reflecting impressions of agency officials); *Nat'l Wildlife Fed.*, 861 F.2d at 1121.[4]

2. *DHS has properly invoked Exemption 4.*

DHS is withholding nine records, five in full and four in part, under Exemption 4, as confidential commercial information. *Vaughn* Index, Record Nos. 6-10, 12, 15-17. As explained in its motion for summary judgment, DHS withheld the records on two independent grounds: release would (1) cause substantial competitive harm to Rapiscan and (2) impair DHS's research and development efforts. Def.'s MSJ at 13-18; *see Nat'l Parks and*

[4] Defendant believes that the record adequately demonstrates that Record Nos. 5, 8 and 17 are properly withheld as deliberative process materials under Exemption 5. But if the Court finds the record to be insufficient in that regard, Defendant is willing to submit the records for in camera inspection under 5 U.S.C. § 552(a)(4)(B).

Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (holding that commercial information qualifies as confidential if disclosure would likely "cause substantial harm to the competitive position" of the person from whom it was obtained, or "impair the Government's ability to obtain necessary information in the future").

EPIC takes issue with the first ground, but ignores the second. Thus, the Court can grant summary judgment in DHS's favor with respect to Exemption 4 based on the second ground alone. *Bancoult v. McNamara*, 227 F. Supp. 2d 144, 149 (D.D.C. 2002) ("if 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").

DHS is equally entitled to summary judgment on the first ground. EPIC argues that the withheld Rapiscan commercial information is publicly available and therefore not confidential, offering as support promotional materials and a price list obtained from a New York state government website. Opp. at 15-17 & Exs. 3-5. But EPIC is wrong, as explained by Peter Kant, Executive Vice President at Rapiscan. *See* Declaration of Peter Kant (Kant Decl.) (attached as Ex. 2 hereto).

EPIC's Exhibit 3 is a marketing sheet about the Rapiscan Secure 1000. Dkt. 11-6. This document reflects certain generic performance information, for example, stating that the Secure 1000 has a scan rate of "*[l]ess than 7 seconds per view*." *Id.*; Kant Decl., ¶ 4. The withheld information, in contrast, discloses the precise scan rate that Rapiscan has achieved for purposes of the DHS effort. Kant Decl., ¶ 4. That precise rate is highly sensitive competitive information that competitors could use to try to undercut Rapiscan's advantage with respect to scan time. *Id.*

EPIC's Exhibit 4 is a 2009 commercial price list for several Rapiscan products, including the Secure 1000, under a contract with New York State. Dkt. 11-7; Kant Decl., ¶ 5. EPIC mistakenly argues that this price list demonstrates that EPIC does not treat its "unit pricing as confidential information. Opp. at 16. This list, which was made public by the state rather than Rapiscan, simply shows the pricing set by a state contract. Kant Decl., ¶ 5. Rapiscan's pricing, however, is very specific to each procurement. As Mr. Kant avers:

> For any given acquisition, Rapiscan must make competitive business decisions regarding the price that it needs to offer to best enhance its chances of receiving an award. Those judgments are procurement specific. Thus, while the standard commercial price list contained in Exhibit 4 may not be sensitive, the pricing that Rapiscan proposes in a given DHS procurement certainly is, and Rapiscan goes to great lengths to ensure that such information is kept confidential.

Id.

EPIC's Exhibit 5 is an item from Bloomberg Businessweek that provides an overview of available passenger screening systems. Dkt. 11-8. This information is highly generic and does not include any of the information withheld or any other confidential or competitively sensitive information. Kant Decl., ¶ 6.

In short, the publicly available documents cited by EPIC do not contain the same type of information withheld here, and in no way do they undercut the confidential nature of that information.[5]

3. *EPIC is not entitled to attorney's fees or litigation costs.*

FOIA provides that courts may assess reasonable attorney's fees and litigation costs incurred in any case "in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). Courts have interpreted FOIA's fee provision to require a two-step inquiry. One

[5] EPIC submits publicly available information about another Rapiscan product, the WaveScan 200. Dkt. 11-9 & 11-10. The WaveScan 200 was not part of the PTIEDD Program and no information concerning it has been withheld. Kant Decl., ¶ 7.

must first determine whether the requester is eligible for fees, and, only if so, whether the requester is entitled to them. *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 524 (D.C. Cir. 2011). EPIC's claim for fees and costs should be rejected on both grounds. To date, EPIC is not a substantially prevailing party. Even if it were, it is not entitled to fees because DHS's withholding decisions had a reasonable basis in law.

No court order or judicially enforceable agreement has been entered in this action with respect to any of EPIC's claims. Thus, EPIC may only be deemed a substantially prevailing party if it can show "a voluntary or unilateral change in position by [DHS], *if* [EPIC's] claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii) (emphasis added). Here, the only post-filing action cited by EPIC is DHS's release of four NEU records withheld under Exemption 4. Opp. at 18. Most of the releasable records sought by EPIC were released before it filed suit. Undisputed Fact Nos. 12-13 (explaining that pre-suit DHS released 15 pages of records in full, 158 pages in part, and withheld 20 records). On August 15, 2011, after EPIC filed suit, DHS, after conferring with NEU, released four additional records which had been withheld as NEU's confidential commercial information. Undisputed Fact No. 14; Opp. at 18; Aug. 15, 2011 Release Letter (attached hereto as Ex. 3). Nothing in the record or EPIC's assertions suggest that these latter records have provided any vital information to the public. *See* Opp. at 19-20 (asserting that this suit has provided substantial benefit to the public but citing only to media articles about body scanner issue published before filing of suit). *See Hersh & Hersh v. HHS*, No. C 06-4234, 2008 WL 2725497, at *2 (N.D. Cal. July 10, 2008) (requester's claim was not "not insubstantial" where small amount of information was released post-filing, none of which was critically important to public); *Dasta v. Lappin*, 657 F. Supp. 2d 29, 33 (D.D.C. 2009)

(finding that requester was not a substantially prevailing party based on absence of public benefit from records released).[6]

EPIC's litigation position further underscores the absence of a not insubstantial claim. EPIC has confined its challenge to three records withheld under Exemption 5, and, sub silentio, taken issue with the Rapiscan records withheld under Exemption 4. EPIC does not contest the adequacy of the DHS's search or the withholdings under Exemptions 3 and 6. Measured against these facts, EPIC's claim with respect to the released NEU records should not be considered "not insubstantial." *Hersh & Hersh*, 2008 WL 2725497, at *2 (noting as factor in denying fees and costs to requester that summary judgment had been granted in agency's favor on majority of claims).

Even if EPIC is eligible to recover fees and costs by virtue of DHS's post-filing release of NEU records, EPIC is not entitled to such a recovery. A court considers at least four criteria in determining fee entitlement: "(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." *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2009). Both the absence of public benefit and the reasonableness of DHS's withholding of NEU records cut against a fee award.

As explained above, EPIC has not demonstrated any benefit accruing to the public as a result of DHS's post-filing release of records. Furthermore, DHS's position was reasonable. The reasonableness factor considers whether an agency has taken a position with a "reasonable basis in law" and whether it has been "recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *Davy*, 550 F.3d at 1162 (internal citations omitted). DHS's

[6] Notably, EPIC's website does not discuss these records or mention their release. www.epic.org/privacy/airtravel/backscatter (last visited Oct. 7, 2011)

decision not to release certain NEU records without first consulting NEU was reasonably grounded in the law. Exemption 4 is intended to protect the interests of both the government and submitters of information. *Nat'l Parks*, 498 F.2d at 767-70. When presented with a request for commercial information that may be confidential, FOIA guidelines advise that the submitter should be notified by the agency and given an opportunity to weigh in prior to release. See FOIA Update, Vol. XIV, No. 2 at 7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking") (Spring 1993).[7] Indeed, failure to do so may subject an agency to suit by a submitter to prevent the release of information. *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987). Finally, there is no evidence to suggest that DHS acted obdurately or in bad faith. EPIC therefore is not entitled to fees.[8]

CONCLUSION

For the reasons stated herein and in the Motion for Summary Judgment, the Court should grant summary judgment in Defendant's favor.

Respectfully submitted,

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Chief, Civil Division

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Assistant United States Attorney

[7] Available at www.justice.gov/oip/foia_updates/Vol_XIV_2/page4.htm.

[8] EPIC argues that DHS has failed to release segregable information from the records withheld under Exemptions 4 and 5. Opp. at 13, 17. But the record shows otherwise. DHS has narrowly applied various exemptions, resulting in the partial release of a number of records. It has also re-reviewed the records to ensure that all reasonably segregable information has been released. Def.'s MSJ at 24-25. EPIC need not engage in a further review when doing so would only result in the release of disjointed words, phrases or sentences that convey minimal information. *Mead Data Central, Inc. v. Dep't of Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977).

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Plaintiff,	)	
v.	)	Civil Action No.: 11-00945 (ABJ)
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Per Local Civil Rule 7(h), Defendant submits this Response to Plaintiff's Statement of Material Genuine Facts Not in Genuine Dispute.

1. Not disputed.
2. Not a fact but a legal characterization.
3. Not disputed.
4. Not disputed.
5. Not a fact but a legal characterization.
6. Not disputed.
7. Not disputed.
8. Disputed that Defendant competed its search on August 15, 2011. Not disputed that Defendant released four records on that date.
9. Not disputed.
10. Not disputed.

Respectfully submitted,

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Physicians Committee for Responsible Medicine,	:	
Plaintiff,	:	
v.	:	Civil Action No. **01-2666** (RBW)
National Institutes of Health,	:	
Defendant.	:	

MEMORANDUM OPINION

This action concerns a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2000), request. Currently before the Court are the parties' cross-motions for summary judgment. Because the Court concludes that further information from the agency is required before the Court can make an intelligent decision whether to order disclosure of the information sought, plaintiff's motion for summary judgment will be granted in part and denied in part, and defendant's motion for summary judgment will be denied without prejudice.

I. Factual Background

Plaintiff, Physicians Committee for Responsible Medicine ("PCRM"), is a "nonprofit, health advocacy organization devoted to ethical and effective medical research." Compl. ¶ 3.[1] The FOIA request at issue concerns a grant application submitted by Dr. Michael Podell in response to the National Institute of Drug Abuse's

[1]References to " Compl." are to the amended complaint filed by PCRM on February 15, 2002.

("NIDA") request for applications (RFA). The RFA at issue, RFA DA-00-005, was entitled "Basic Behavioral, Cognitive and Neurological Research: Applications to HIV/AIDS and Drug Abuse," and sought applications regarding "the development of research to understand the relationship between drug abuse and addiction, impulsive and risk-taking behaviors . . . and decision-making processes that can lead to contracting HIV . . . ." Id. ¶ 6. In his grant application, Dr. Podell proposed to study the "combined effects of methamphetamine and HIV." Id. ¶ 7. However, in lieu of studying human patients, he proposed to administer methamphetamine to cats and infect them with the Feline Immunodeficiency Virus ("FIV"). Id. ¶ 7. Dr. Podell's grant application was approved by NIDA for a project entitled "A Feline Model of NeuroAIDS and Drug Abuse." Id. ¶ 8. "He was awarded $1.68 million in a five-year grant . . . [that] is fully funded by the federal government." Id.

On November 16, 2000, the PCRM submitted its FOIA request to the National Institutes of Health ("NIH") requesting a copy of the grant application submitted by Dr. Podell in response to RFA DA-00-005. Id. ¶ 6. On January 25, 2001, the NIDA responded to the PCRM's request by providing a redacted copy of the grant application. Id. ¶ 9. The NIDA's response failed to indicate where the PCRM should submit an appeal of its decision to produce only the redacted copy of the application. Id. ¶ 10. On March 21, 2001, the PCRM contacted now-deceased NIDA FOIA Officer John Nagy by telephone, who advised the PCRM that it should direct its appeal to him. Id. ¶ 10. In addition, Mr. Nagy informed the PCRM that the redactions to the application were based upon FOIA exemption (b)(4), although the agency's initial response did not

indicate any justification for the redactions. Id.[2]

By letter dated April 6, 2001, the PCRM appealed the NIDA's response to its FOIA request. Id. ¶ 11. In its April 6 letter, the PCRM argued that the following information had been improperly withheld:

> 5) Grant Application at pages 39 through 55, 'Research Plan': Information has been redacted from each of these pages, including tables, charts, figures, text, titles, labels, descriptions, dosage amounts, etc. PCRM appeals the redaction of each and every piece of information from these pages.[3]

Defendant's Motion for Summary Judgment ("Def.'s Mot."), Ex. 1, Declaration of Darlene Christian, Freedom of Information Officer for the Public Health Service, Department of Health and Human Services ("Christian Decl."), Attachment ("Attach.") D, PCRM's FOIA Appeal dated April 6, 2001. The PCRM's appeal was forwarded to the NIH for a response to which the NIH failed to file a timely response. Id. ¶¶ 11-12. Plaintiff then filed this lawsuit on December 27, 2001. Id. ¶ 12. Shortly thereafter, on January 8, 2002, the NIH responded to the PCRM's appeal by providing another copy of Dr. Podell's grant application, which contained essentially the same redactions as the

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[2] Pursuant to Exemption (b)(4), the FOIA does not apply to "trade secrets and commercial or financial information obtained from a person and privileged and confidential." Compl. ¶ 5; 5 U.S.C. § 552(b)(4). Plaintiff also states that the NIH has invoked exemption (b)(6), which provides that the FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Id.; 5 U.S.C. § 552(b)(6). However, "[p]laintiff is no longer seeking access to any information redacted . . . for which exemption 6 was invoked . . . ." Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Opp'n") at 1 n.2.

[3] In plaintiff's cross-motion for summary judgment, it states that the only redacted pages at issue are pages 39-46 and 48-51. Pl.'s Opp'n at 1 n.2. Plaintiff represents that as a result of "recent events that have been reported in various newspapers and journals, [p]laintiff is no longer seeking access to any information redacted from pages 28 and 29 of the subject grant application, for which exemption 6 was invoked by NIH . . . . ." Id.

copy of the application that had been provided previously by the NIDA. Id. ¶ 13.[4] These redactions are contained on pages 28 through 51 of the application, and, according to plaintiff, include information regarding available resources, Dr. Podell's choice of felines for his study, and the experiment's methodology. Id. ¶ 14.[5] Defendant contends that it properly withheld the information pursuant to the FOIA and that plaintiff may not have exhausted its administrative remedies.[6]

II. Analysis

The court may grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 321-23 (1986). In resolving a motion for summary judgment, all reasonable inferences that may be drawn from the facts before the court must be drawn in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In determining whether summary judgment in a FOIA case is appropriate, the Court must conduct a de novo review of the record. 5 U.S.C. § 552(a)(4)(B). The defendant agency has the burden of justifying the withholding of requested documents. Department of Justice v. Reporters Comm. for

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[4]The NIH's FOIA Officer, Susan Cornell, responded to the PCRM's April 6, 2001, letter by a letter dated January 8, 2002, in which she acknowledged that the redaction of some of the items listed as 1-6 in plaintiff's letter were made in error, and a properly redacted copy of the expunged records was provided to plaintiff. Christian Decl. ¶ 13.

[5]Beginning on June 12, 2002, published reports indicated that Dr. Podell would be leaving the Ohio State University, the entity associated with the research project, and that he would be working at a private veterinary practice. Plaintiff's Statement of Undisputed Facts ("Pl.'s Stmt.") ¶¶ 16-18.

[6]Defendant also contends that the Department of Health and Human Services is the proper defendant in this action because only cabinet-level agencies are proper defendants in FOIA actions. Therefore, defendant argues that HHS should be the sole defendant in this case. Plaintiff does not oppose this substitution. Pl.'s Opp'n at 1 n.1. Accordingly, the Court will grant plaintiff permission to amend the complaint to name the proper defendant. See Fed. R. Civ. P. 15(b)(3).

Freedom of the Press, 489 U.S. 749, 755 (1989); Beck v. Dep't of Justice, 997 F.2d 1489, 1491 (D.C. Cir. 1993) (citations omitted).

Currently, the only issue remaining for the Court to address is whether or not the defendant properly invoked Exemptions 4 and 5 as justification for the redactions contained on pages 39-46 and 48-51 of Dr. Podell's grant application.[7] Plaintiff's Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Opp'n") at 1 n.2; Defendant's Reply in Support of its Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment ("Def.'s Reply") at 1; Plaintiff's Reply to Defendant's Opposition to Plaintiff's Cross-Motion for Summary Judgment ("Pl.'s Reply") at 1 n.1. Plaintiff argues that the defendant has failed to submit a sufficient Vaughn index[8] and that it is entitled to discovery if the Court concludes that summary judgment in its favor is not warranted. Pl.'s Opp'n at 6, 20. Because the Court agrees that the Vaughn index is inadequate, it concludes that it is premature to address the merits of the defendant's claimed exemptions and will order the defendant to submit a more detailed index.

A. Sufficiency of the Vaughn Index

The Vaughn index is a method designed by the courts whereby non-disclosing parties in FOIA cases can present their reasons to the courts for not providing information that has been requested. With this information, courts are able to evaluate

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[7]Plaintiff has attached the entire redacted copy of the grant application as exhibit 2 of its cross-motion for summary judgment and opposition to defendant's summary judgment motion.

[8]See Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973).

the legitimacy of the withholding of information without having to physically examine each of the documents on which withheld information is contained. Vaughn. v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980). However, the Vaughn court concluded that in order for courts to make their de novo decisions regarding an agency's claimed exemptions, agencies must provide a detailed index specifically identifying which portions of the withheld documents are exempt and which portions are non-exempt. This type of indexing allows a court to "objectively weigh the merits and requirements of each contention, evaluate the contentions of the parties in light of all applicable law, and rule in accord with the dominant interest of either confidentiality or public access." Mead Data Central, Inc. v. United States Dep't. of the Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977). To be adequate, a Vaughn index (1) "should be contained in one document . . ."; (2) it "must adequately describe each withheld document or deletion from a released document," and (3) it "must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant." Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979).

Here, defendant's Vaughn index[9] justifies the redactions on pages 29-46 and 48-51 as "[d]escriptions of unpublished novel research protocols and methodology." Defendant's Notice of Errata, Vaughn Itemization ("Def.'s Vaughn Index"). In addition, as support for these redactions, defendant has submitted the declaration of Darlene

[9]On June 27, 2002, defendant filed a Notice of Errata and attached a revised Vaughn Index, which corrects "two inadvertent errors" in the prior Vaughn index submitted with defendant's motion for summary judgment. The Court's references to the defendant's Vaughn index are to the index that was filed with the Notice of Errata.

Christian, Freedom of Information Officer for the Public Health Service, Department of Health and Human Services. Ms. Christian's declaration explains that the redactions contain "novel protocols or methodology, and research results that are not yet published." Christian Decl. ¶ 21. The basis for each of the redactions is that the "withheld information could reveal confidential commercial information obtained from a person . . . ." Def.'s Vaughn Index.

Plaintiff contends that defendant's Vaughn index is "'patently inadequate' . . . to permit this Court to make a reasoned judgment as to whether the exemptions were properly claimed and denies PCRM the ability to participate meaningfully in the adjudicatory process." Pl.'s Opp'n at 8 (citation omitted). The Court agrees. The defendant's vague description of the material as "[d]escriptions of unpublished novel research protocols and methodology" are not "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." Id.; see also Quinon v. Federal Bureau of Investigation, 86 F.3d 1222, 1228-1229 (D.C. Cir. 1996) (holding that the defendant's Vaughn index was insufficient because the affidavits filed by the Federal Bureau of Investigation failed to supply facts, describe, or characterize information contained within 61 of 77 pages of investigatory files that were withheld from the plaintiff); Allen v. Central Intelligence Agency, 636 F.2d 1287, 1287 (D.C. Cir. 1980) (holding agency's Vaughn index was insufficient, in part, because basic information, such as the "'identity of the original classifi(er)' [and] 'the date or event for declassification or review'" was omitted from the affidavits); Campaign for Responsible Transplantation v. United States Food & Drug Admin., 219 F. Supp. 2d 106, 112 (D.D.C. 2002) (holding that agency's Vaughn index was insufficient because "[t]he

description, reason for withholding, and cross-references do not provide enough information to give this court and the requestor a clear indication of the justification for each exemption.") (citation omitted).

Notably, the index fails to adequately specify the exemptions relied on to protect the information. For all of the material at issue, the agency states that it is withholding the information because it "could reveal confidential commercial information obtained from a person. 5 U.S.C. § 552(b)(4) and 5 U.S.C. § 552(b)(5)." This description is patently inadequate as "[t]he Vaughn index must explain specifically which of the nine statutory exemptions to FOIA's general rule of disclosure supports the agency's decision to withhold a requested document or to delete information from a released document." Founding Church of Scientology, 603 F.2d at 947. The agency relies on Exemption 5, which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . [,]" 5 U.S.C. § 55(b)(5). However, there is no information contained in the Vaughn index explaining why the documents here would fall within Exemption 5's protection. The Vaughn index merely describes all of the information as "confidential commercial information . . . ." The Christian declaration does nothing to shed light on this issue as she merely notes that "Federal Rule of Civil Procedure 26(c)(7) allows a court to issue a protective order in civil discovery mandating that a 'trade secret or other confidential research . . . or commercial information not be revealed or be revealed only in a designated way.'" Christian Decl. ¶ 22 (citation omitted). While the declaration states that the redacted information "would be shielded under Fed. R. Civ. P. 26(c)(7) as 'confidential research information' . . . [,]" the declaration fails to explain why the document at issue qualifies

as an "inter-agency or intra-agency memorandum[ ] or letter[ ] . . . ." See Campaign for Responsible Transplantation, 219 F. Supp. 2d at 115 (holding that Vaughn index was inadequate where it failed to distinguish which portions of the information were trade secrets as opposed to confidential information because "the differentiation between the two [was] crucial, since each category has a different legal standard.").

In sum, the Court concludes that the defendant's Vaughn index is not sufficient to permit the Court to discern the basis for the agency's claimed exemptions. The index does not provide even basic information, such as the topic of the research protocols, the dates the various research protocols occurred, or who performed the research. See, e.g., Campaign for Responsible Transplantation, 219 F. Supp. 2d at 114 (holding that the agency's Vaughn index, which contained "descriptions of the documents [that] [gave] only the subject heading or title and provide[d] no other information[,]" was insufficient to permit the Court to determine the validity of the agency's claimed exemptions); Animal Legal Defense Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 301 (D.D.C. 1999) (holding that agency's declaration and Vaughn index were inadequate. "[N]othing in [the agency's] declaration or the Vaughn index provides dates or indicates the titles and positions of the documents' authors and recipients, much less describes in any way the subject matter of each document."). The agency's vague descriptions, which merely mirror the statutory language, do not suffice as detailed descriptions of the withheld information.

Plaintiff argues that the inadequacy of defendant's Vaughn index compels disclosure of the information withheld. Pl.'s Opp'n at 8. Plaintiff relies on Coastal States, 617 F.2d at 861, for this conclusion. In Coastal States, the Court stated that its

decision to require disclosure of the documents at issue were in several instances not based "on a conclusion . . . that the documents are not exempt as a matter of law, but that the agency has failed to supply [the Court] with even the minimal information necessary to make a determination." Id. However, in Coastal States, the Court was able to determine whether many of the agency's claimed exemptions were well-founded. Id. Here, because the same justification is provided for each of the redactions at issue, the Court is unable to address in any way the validity of the claimed exemptions.

Furthermore, mandating release of the information in this situation is not obligatory. Rather, "the district court 'should first offer the agency the opportunity to demonstrate, through detailed affidavits and oral testimony, that the withheld information is clearly exempt and contains no segregable, nonexempt portions." Spirko v. United States Postal Serv., 147 F.3d 992, 997 (D.C. Cir. 1998) (citation omitted); see also Campaign for Responsible Transplantation, 219 F. Supp. 2d at 116 ("Rather than rule on the basis of inadequate Vaughn indices, the court order[ed] [the agency] to submit new representative Vaughn indices with proper detailed document descriptions and reasons for withholding that illuminate the contents of the documents and the reasons for nondisclosure.") (citation omitted); Animal Legal Defense Fund, Inc., 44 F. Supp. 2d at 304 (denying FOIA requestor's request for in camera review of withheld documents and requiring agency to produce an adequate Vaughn index. "By permitting the [agency] to submit a more detailed affidavit and Vaughn index in order to comply with the law of this Circuit, the Court advances several salutary interests."). In this case, the Court will permit the agency to further detail the justifications for the

redactions at issue.

Because the Court is cognizant of the length of time that this matter has been pending, it will only grant a limited amount of time for the agency to provide further affidavits or a newly drafted Vaughn index to justify the withholding of the information requested by plaintiff. The Court will then address the validity of the agency's claimed exemptions forthwith. However, if these additional materials do not provide sufficient information to enable the Court to address the validity of the claimed exemptions, the Court will order disclosure of the redacted information to the plaintiff.

SO ORDERED on this 4th day of February, 2004.

REGGIE B. WALTON
United States District Judge

EXHIBIT 2

DECLARATION OF PETER KANT

Pursuant to 28 U.S.C. § 1746, I, Peter Kant, hereby declare as follows:

1. I am currently employed by Rapiscan Systems, Inc. ("Rapiscan"). I have been employed by Rapiscan for over seven years, and am currently Executive Vice President. My responsibilities include oversight of all federal government sales. In this role I have firsthand knowledge regarding Rapiscan's contract with the Department of Homeland Security ("DHS") on the Prototypes and Technology for Improvised Explosives Device Detection ("PTIEDD") Program. I have personal knowledge of the facts stated herein, and if called as a witness in any proceeding, would be competent to testify to the following facts.

2. This declaration is being provided at the request of the Department of Justice for use in litigation under the Freedom of Information Act ("FOIA") against DHS involving, in part, information that Rapiscan provided to the government under the PTIEDD Program and which is highly confidential and competitively sensitive.

3. I have reviewed the September 22, 2011 Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment filed by the Electronic Privacy Information Center's ("EPIC"), including the exhibits attached thereto. In this filing, EPIC argued that the Government is improperly withholding information about Rapiscan that is already publicly available. In support of this position, EPIC's filing included five exhibits (Exhibits 3-7) showing publicly available Rapiscan information. As discussed below, the information in these exhibits is not the same type of information at issue in this litigation.

4. In Exhibit 3, EPIC attached publicly available marketing information about the Rapiscan Secure 1000. This document reflects certain generic performance information, as compared with very specific performance information contained in the documents that are the subject of this litigation. For example, Exhibit 3 shows that the Secure 1000 has a scan rate of *"[l]ess than* 7 seconds per view." (Italics added). However, the information that EPIC seeks from DHS discloses the precise scan rate that Rapiscan has achieved for purposes of the DHS effort. The precise rate is highly sensitive competitive information that Rapiscan does not release publicly. Competitors could use this information to try to undercut Rapiscan's advantage vis-à-vis scan time. Similarly, Exhibit 3 shows that the Secure 1000 has an emission per scan of "*[l]ess than* 10 microRem." (Italics added). Again, this is a generic standard, as opposed to the precise emissions rate contained in the documents at issue in this litigation.

5. In Exhibit 4, EPIC attached a December 2009 commercial price list for several Rapiscan products (including the Secure 1000) under a contract with the State of New York. EPIC mistakenly relies on this price list to argue that Rapiscan does not treat its "unit pricing" as confidential information. However, EPIC's reliance on this document reflects a fundamental lack of understanding regarding the nature of the pricing information at issue in this litigation. Exhibit 4 reflects the fact that single unit commercially offered systems with pricing set by a state-wide (in this case, New York State) contract are made public by those entities. The pricing

information in Exhibit 4 reflects the standard commercial pricing, but does not show the specific pricing that Rapiscan offered to DHS. Indeed, pricing is very specific to each procurement. For any given acquisition, Rapiscan must make competitive business decisions regarding the price that it needs to offer to best enhance its chances of receiving an award. Those judgments are procurement specific. Thus, while the standard commercial price list contained in Exhibit 4 may not be sensitive, the pricing that Rapiscan proposes in a given DHS procurement certainly is, and Rapiscan goes to great lengths to ensure that such information is kept confidential. EPIC is seeking pricing information that Rapiscan does not make publicly available.

6. In Exhibit 5, EPIC attached a piece from the Bloomberg Businessweek that provides an overview of available passenger screening systems. This information is highly generic and does not include any confidential or competitively sensitive information such as the information subject to this litigation.

7. In Exhibits 6 and 7, EPIC attached documents pertaining to Rapiscan's discontinued WaveScan 200. In particular, Exhibit 6 is a marketing specification sheet for the Rapiscan WaveScan 200, and Exhibit 7 is a Bloomberg Businessweek piece that provides high-level information about the WaveScan 200. However, the WaveScan was not part of the PTIEDD Program, and bears no relationship to the information at issue in this litigation. In fact, Rapiscan no longer even offers the WaveScan 200 for sale. That system has been discontinued. In any case, as with the specification sheets for the Secure 1000, the information in Exhibits 6 and 7 is generic and does not contain the type of competitively sensitive information that is at issue here.

I declare under penalty of perjury that the foregoing is true and correct.

Peter Kant

Executed: October 5, 2011

EXHIBIT 3

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

August 15, 2011

Ginger McCall
EPIC
1718 Connecticut Avenue N.W.
Washington, D.C. 20009

Re: **DHS/OS/PRIV 11-0214, S&T 10-0003.55**

Dear Ms. McCall:

This is an amended final response to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated November 24, 2010, and received by this office on December 14, 2010. You were seeking documents concerning the development and deployment of body scanner (or Whole Body Imaging, Advanced Imaging Technology, Millimeter Wave or Backscatter) technology by law enforcement agencies in surface transit and in street roaming vans. You specifically requested all contracts, proposals, and communications with the manufacturers of the "Z Backscatter Vans" or similar technology. We sent you a response letter dated February 12, 2011, however after further reviews we have determined that some documents that were originally withheld will be released to you. These documents include deliverables related to the contract and communications with the manufacturers of the "Z Backscatter Vans" or similar technology.

After further reviews of the DHS Science and Technology Directorate (S&T) Explosives Division's responsive records, I have determined that 151 pages of the records are releasable in their entirety, and 21 pages are partially releasable, pursuant to Title 5 U.S.C. § 552 FOIA Exemption (b)(6). Please note that enclosure three was previously mailed to you with financial information withheld, however, the enclosed document now includes that financial information.

Enclosed are 172 pages with certain information withheld as described below.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The types of documents and/or information that we have withheld consist of telephone numbers, signatures, and email addresses. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. 6 CFR § 5.11. In this instance you will not be charged. If you need to contact our office again about this matter, please refer to **DHS/OS/PRIV 11-0214, S&T 10-0003.55.**

Sincerely,

Marshall Caggiano
Attorney/Advisor
Science and Technology Directorate

Enclosures:
1) BomDetec, Phase IA Report, October 31, 2008
2) Northeastern UniversityBomDetec Technical Concept Paper
3) Notice to Proceed, Contract and Statement of Work
4) Kickoff Meeting Slides for BomDetec, August 16, 2006