UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff,

v.

TRANSPORTATION SECURITY ADMINISTRATION, *et al.*,

Defendants.

Civil Action No. 03-1846 (CKK)

MEMORANDUM OPINION
(August 2, 2004)

Currently pending before the Court is Defendants' Motion for Summary Judgment, which Plaintiff opposes. After reviewing Defendants' Motion, Plaintiff's Opposition, Defendants' Reply, the submitted exhibits and the relevant law, the Court shall grant Defendants' Motion in part and deny it in part, finding that while Defendants properly concluded that the requested documents are covered by a Freedom of Information Act ("FOIA") exemption, Defendants' representations regarding the availability of reasonably segregable non-exempt information in these documents was deficient and that Defendants must revisit the segregability analysis.

I: BACKGROUND

Plaintiff is an organization that tracks issues relating to privacy and civil liberties. Compl. ¶ 3. Plaintiff initially filed a FOIA request with the Transportation Security Administration ("TSA") on August 22, 2003, seeking two types of documents related to the Computer Assisted Passenger Prescreening System ("CAPPS II"): any Capital Asset Plan and Business Case materials that TSA had submitted to the Office of Management and Budget

("OMB"), and any Privacy Impact Assessments[1] that had been prepared for the CAPPS II project. Defs.' Decl. of Patricia M. Riep-Dice[2] ("Riep-Dice Decl.") Ex. A-2 (Copy of Plaintiff's FOIA Request). Plaintiff subsequently filed the above-captioned action in this court on September 4, 2003. Named as Defendants were TSA and the Department of Homeland Security ("DHS"). Compl. at 1. Plaintiff moved for a temporary restraining order so that it could analyze the documents and prepare comments to meet the September 30, 2003, deadline for public comments that had been set by TSA in its August 1, 2003, Privacy Act notice for CAPPS II.[3] Pl.'s Mot. for TRO at 1. Subsequently, the parties reached an agreement that resulted in the withdrawal of that motion.

The following material facts are undisputed unless otherwise noted. On October 9, 2003, Plaintiff amended its Complaint against TSA and DHS, and now seeks only the Privacy Impact

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[1] Sec. 208 (B)(1)(a) of the E-Government Act of 2002, Pub. L. No. 107-347 (Dec. 17, 2002), which became effective on April 17, 2003, requires federal agencies to conduct a privacy impact assessment when developing or procuring information technology or initiating a new collection of information that is based on "information in an identifiable form." E-Government Act of 2002 § 208(B)(1)(a). The assessment must address what information is to be collected under the system, why the information is being collected, the intended use of the information, with whom the information will be shared, how individuals can consent to the use of their information, how the information will be secured, and whether a system of records is being created under the Privacy Act. *Id.* § 208 (B)(2)(b)(ii).

The E-Government Act also states that a federal agency "shall . . . if practicable, after completion of the review [by the agency's Chief Information Officer or equivalent official], make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means. *Id.* § 208 (B)(1)(b)(ii-iii).

[2] Declarant is the Associate Director of the Freedom of Information Act and Privacy Act Division of TSA within DHS.

[3] The Privacy Act of 1974, as amended, requires federal agencies to publish a notice in the Federal Register notifying the public about various aspects of each "systems of record" they maintain. 5 U.S.C. § 552a(e)(4). TSA published an "interim final" Privacy Act notice on August 1, 2003, for CAPPS II. Privacy Act Notice, 68 Fed. Reg. 45265 (Aug. 1, 2003).

Assessments relating to CAPPS II. Defs.' Statement of Material Facts ("Defs.' St.") ¶ 1. Defendants have searched the six offices that were likely to contain Privacy Impact Assessments relating to CAPPS II, and found five documents consisting of four versions of draft Privacy Impact Assessments. *Id.* ¶¶ 2-3. These four versions are dated November 7, 2002, April 17, 2003, July 29, 2003, and July 30, 2003. *Id.* citing Defs.' Decl. of Barbara Huie[4] ("Huie Decl.") ¶ 9.

On September 25, 2003, Defendant TSA responded to Plaintiff's FOIA request, stating that the draft Privacy Impact Assessments would not be provided to Plaintiff but instead would be withheld in full under Exemption 5 of FOIA, which permits agencies to withhold material that is predecisional and part of an agency's deliberative process. Defs.' St. ¶ 4; Riep-Dice Decl. Ex. A-4 (Copy of TSA's Response to Plaintiff's FOIA Request).

Pursuant to Exemption 5, Defendants maintain that the drafts are "predecisional" in that none has been finalized. Huie Decl. ¶ 12; Riep-Dice Decl. ¶ 33; Riep-Dice Decl. Ex. A-1 at 1-3 (*Vaughn* Index: Documents Withheld in Response to FOIA Request). Defendants also contend that the documents are "deliberative because they reflect the give-and-take of review, comment, pass-back, and revision," because they "do not represent the approved final agency decisions on the Privacy Impact Assessment or CAPPS II" and "because the underlying system is still evolving and no final decisions on the program's scope, use, architecture or application" had been made. Defs.' Mem. at 10; Riep-Dice Decl. ¶ 33; *see also* Huie Decl. ¶ 14; Riep-Dice Decl. Ex. A-1 at 1-3 (*Vaughn* Index: Documents Withheld in Response to FOIA Request). Defendants

[4] Declarant is the Privacy Officer and Director for Community and Stakeholder Issues for the Office of National Risk Assessment of TSA within DHS.

further explain that the documents are being withheld in full because there was no way to segregate proposed policy material from "purely factual" material in a way that would not expose the deliberative process. Huie Decl. ¶ 14; Riep-Dice Decl. ¶¶ 24, 26, 28, 30.

Plaintiff disputes Defendants' conclusion that the documents are entirely predecisional. Pl.'s St. of Genuine Issues ¶¶ 5-7. Plaintiff cites the TSA's publication of an August 1, 2003, Privacy Act notice on CAPPS II, which was published in the Federal Register as an "interim final" notice with request for comments, as evidence that some aspects of the systems's "scope, use, architecture and application" have in fact been decided. *Id.* ¶ 6, Pl.'s Ex. C (Privacy Act Notice, 68 Fed. Reg. 45265 (Aug. 1, 2003)). The Privacy Act Notice describes several aspects of CAPPS II, including the purpose of the system, how the proposed system will be used, the categories of records that may be in the system (*e.g.,* passenger names, date of birth, home phone number and address, and travel itinerary), safeguards in the system, how data will be retained and disposed of, how individuals can access their records in the system, and how they can contest the records. Pl.'s Ex. C. The notice was published as "interim final," with an effective date of August 1, 2003, but it also described CAPPS II as a "proposed" system, requested further comments on the Privacy Act materials, and promised to publish a final Privacy Act notice before the system was implemented. *Id.*

Plaintiff also disputes Defendants' conclusion that the facts are "inextricably intertwined with policy-making processes" and that any attempt to segregate purely factual material from the predecisional, deliberative material would result in improperly exposing the deliberative process, which Exemption 5 of the FOIA is supposed to protect. Pl.'s St. of Genuine Issues ¶ 7, Pl.'s Opp'n to Def.'s Mot. for Summary Judgment ("Pl.'s Opp'n") at 10-11.

Defendants argue that there are no material facts in dispute and that, because they have met the statutory requirements for withholding the requested information, they are entitled to judgment as a matter of law. Defs.' Mem. of P. & A. in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Mem."). Specifically, Defendants argue they have met the FOIA requirements to: (1) conduct an adequate search for the requested information; (2) ensure that any information withheld from release falls within a FOIA exemption; and (3) provide to a requestor any information that can reasonably be segregated from the exempt information. *Id.* at 4-5. Since Plaintiff contests only that Defendants have failed to meet legal requirements (2) and (3), the Court will limit its review to Defendants' compliance with those two requirements.[5] Pl.'s Opp'n.

II: LEGAL STANDARD

Under the summary judgment standard, Defendants, as the moving parties, bear the "initial responsibility of informing the district court of the basis for [their] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [they] believe[] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c). Plaintiff, in response to Defendants' motion, must "go beyond the pleadings and by [its] own affidavits, or by deposition, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal citations omitted). The Court is to draw all inferences from the supporting records submitted in favor of the party opposing the summary judgment motion. However, mere allegations or denials

[5] Neither party has provided the Court with a supplemental briefing or any other updates since January 23, 2004.

in the non-moving party's pleadings are insufficient to defeat an otherwise proper motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Furthermore, the existence of a factual dispute, by itself, is not sufficient to bar summary judgment, *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986); rather, the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law," *id.* at 251.

Generally, when summary judgment is requested in a FOIA matter, the agency bears the burden of showing that a FOIA exemption applies. *Smith v. United States Dep't of Justice,* 251 F.3d 1047, 1050 (D.C. Cir. 2001). To satisfy this burden, the agency may provide a plaintiff "with a *Vaughn* index, which must adequately describe each withheld document, state which exemption the agency claims for each withheld document, and explain the exemption's relevance." *Johnson v. Executive Office for United States Attorneys*, 310 F.3d 771, 774 (D.C. Cir. 2002). Moreover, the agency must detail what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document. *Mead Data Cent. Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). Any non-exempt information that is reasonably segregable from the requested records must be disclosed. *Oglesby v. United States Dep't of the Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996). In addition, district courts are required to consider segregability issues even when the parties have not specifically raised such claims. *Trans-Pacific Policing Agreement v. United States Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999). Courts must "accord substantial weight" to an agency's affidavit regarding FOIA exemptions. 5 U.S.C. § 552(a)(4)(B) (2004).

III: DISCUSSION

Exemption 5 of the Freedom of Information Act exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption has been construed to incorporate the deliberative process privilege. *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-50 (1975); *EPA v. Mink*, 410 U.S. 73, 88-89 (1973); *Wolfe v. United States Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc); *Mapother v. United States Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

Case law regarding this privilege emphasizes that this exemption is based on the policy of facilitating a "frank exchange of ideas and opinions" within agencies in order to ensure that "the quality of administrative decisions" does not suffer. *Dudman Communications Corp. v. Dep't. of the Air Force,* 815 F.2d 1565, 1567 (D.C. Cir. 1987). "Exemption five is intended to protect the deliberative process of government and not just deliberative material." *Mead Data Cent.*, 566 F.2d at 256. Courts have understood that federal agencies will function best if they are not forced to "operate in a fishbowl." *Id.* The privilege also helps "protect against premature disclosure of proposed policies before they have been finally formulated or adopted," and to "protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F. 2d 854, 866 (D.C. Cir. 1980). However, the disclosure goal of FOIA would be gutted if every intra- or inter-agency communication was protected by Exemption 5. "[T]he 'deliberative process' privilege must be construed as narrowly as is consistent with efficient government operation."

Wolfe, 839 F.2d at 773 (citation and internal quotation marks omitted).

For material to be protected from disclosure by the deliberative process privilege, it must be both predecisional and deliberative. *See Jordan v. United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978). Defendants maintain that the draft Privacy Impact Assessments were properly withheld under Exemption 5 because they are drafts and have not been finalized (*i.e.*, predecisional) and that the drafts reflect internal discussions and proposals (*i.e.*, deliberative) that would cause public confusion and disrupt the policy-making process if they were released. Defs.' Mem. at 10-11. Defendants also argue that they evaluated the material to see whether it contained non-exempt information that could be reasonably segregated and provided to Plaintiff. *Id.* at 12-13. Defendants contend that any such information cannot be segregated, and so the documents must be withheld in their entirety. *Id.* The Court now considers whether Defendants properly invoked the deliberative process privilege and whether Defendants properly concluded that the documents did not contain reasonably segregable, non-exempt information.

A. Are the Documents "Deliberative"?

In deciding whether a document is "deliberative," a court assesses whether "it reflects the give-and-take of the consultative process." *Coastal States Gas Corp.*, 617 F. 2d at 866. "The exemption . . . covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* A court also weighs "whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another." *Id.*

Defendants argue that the draft Privacy Impact Assessments are indeed deliberative.

Defs.' Mem. at 10. As evidence, Defendants describe the first two versions (November 7, 2002, and April 17, 2003) as drafts showing the preliminary opinions of TSA staff about the development of the CAPPS II program and what information should be contained in a Privacy Impact Assessment. Riep-Dice Decl. Ex. A-1 (*Vaughn* Index). The July 29, 2003, and July 30, 2003, versions include a "revised overview of the system, privacy management process, and information to be collected, along with discussions of the intended uses of the information, sharing of the information, notices and security." Riep-Dice Decl. ¶¶ 27, 29. The latter is "a recommendation of what the final text should be," but "further changes [to the document] are contemplated" as it is under review by DHS. *Id.*

Plaintiff has not argued that the withheld documents are not deliberative in nature. Indeed, Plaintiff acknowledges that "invocation of the deliberative process privilege is likely appropriate with respect to *some* portion of the information withheld." Pl.'s Opp'n at 7 (emphasis in original). The Court finds that Defendants' affidavits suffice to explain why Defendants believe the documents are deliberative in nature, in that they "provide specific information sufficient to place the documents within the exemption category, . . . this information is not contradicted in the record, and . . . there is no evidence in the record of agency bad faith." *Quinon v. Federal Bureau of Investigation,* 86 F.3d 1222, 1227 (D.C. Cir. 1996) (quoting *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)). Accordingly, the Court finds that Defendants have met the FOIA requirement to demonstrate, through affidavits, that the withheld documents are deliberative in nature, meeting one test for invoking Exemption 5.

B. Are the Documents "Predecisional"?

Defendants also argue that the draft Privacy Impact Assessments are predecisional, and therefore withholding the documents is permissible under Exemption 5 of FOIA. Defendants contend that the drafts discuss aspects of the CAPPS II program and supporting information technology systems that have not been finalized or approved by DHS.[6] Defs.' Mem. at 10, Huie Decl. ¶ 14, Riep-Dice Decl. ¶ 29. Moreover, all the contested documents are "draft revisions of one document, the [Privacy Impact Assessment], that is yet to be finalized." Defs.' Mem. at 10. The July 30, 2003, version is still "under review" at DHS. Riep-Dice Decl. ¶ 29. Defendants state that "[n]one of these records represents final agency decisions," that "the underlying system is still evolving," and "no final decisions on the program's scope, use, architecture or application have yet been made."[7] *Id.* ¶ 33.

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[6] The eventual contents of the CAPPS II Privacy Impact Assessment may be predicted to some degree by OMB's September 26, 2003, memorandum providing guidance on conducting the Privacy Impact Assessments that are required by the E-Government Act. In addition to the more generally-stated requirements in the statute itself, *see supra* note 1, OMB requires that assessments made in the "IT development stage" include a "statement of need, functional requirements analysis, alternatives analysis, feasibility analysis, benefits/cost analysis, and especially, initial risk assessment," and "should address the impact the system will have on an individual's privacy, specifically identifying and evaluating potential threats . . . to the extent these elements are known at the initial stages of development." OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002, M-03-22, 2.C.2.a.i.

[7] Defendants also assert that the Privacy Impact Assessment is "part of the underlying documentation for the budget process," and should be accorded the same Exemption 5 protection that federal agencies' budget proposals enjoy prior to their approval by OMB and the President. Defs.' Mem. at 11 (citing *Bureau of Nat'l Affairs v. United States Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984)). However, this Circuit has not held that every document submitted to OMB for approval, even if sent concurrent with a budget proposal, is exempt from FOIA.

Defendants note that OMB Circular A-11 instructs federal agencies to not release "any materials underlying [budget] decisions" prior to submission of the President's Budget to Congress. Huie Decl. Ex. B-2 (OMB Circular A-11 § 22.1). OMB Circular A-11 also notes that (continued...)

Plaintiff argues that Defendants' draft Privacy Impact Assessments contain information that is not predecisional. Plaintiff contends that even if a Privacy Impact Assessment as a document is not yet final, much of the information in it does in fact reflect final policy. Pl.'s Opp'n at 9. Plaintiff suggests that many privacy-related details of CAPPS II had been decided at the time of at least the later two versions, and therefore at least some of the information in those two drafts could not be "predecisional." Pl.'s Opp'n at 10. As evidence of this, Plaintiff points to the public release of the "interim final" Privacy Act notice on CAPPS II, which contained public pronouncements of interim policy decisions with respect to individuals' privacy and the CAPPS II program. *Id*. (citing Pl.'s Ex. C (Privacy Act Notice, 68 Fed. Reg. 45265 (Aug. 1, 2003)).

While Plaintiff makes a strong argument as to why some information in the drafts does not meet the Exemption 5 criteria, the Court finds that the Privacy Impact Assessment drafts themselves, as documents, are predecisional. It is clear that "predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision . . . are exempt from disclosure [under Exemption 5]," while "postdecisional memoranda setting forth the reasons for an agency decision already made . . . are not." *Renegotiation Bd. v. Grumman Aircraft Engineering Corp*., 421 U.S. 168, 184 (1975). In deciding whether a document is

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[7](...continued)
"*many* agency budget documents" that are otherwise subject to the FOIA "are exempt from mandatory release pursuant to [the deliberative process privilege at] 5 U.S.C. 552(b)(5)." *Id.* § 22.5 (emphasis added). However, Circular A-11 does not state that all agency budget documents are covered by Exemption 5.

Given this fact, and the fact that Plaintiff does not contest that the documents are at least in part "predecisional," Pl.'s Opp'n at 7 (stating that the "invocation of the deliberative process privilege is likely appropriate with respect to *some* portion of the information withheld"), the Court finds that it need not address this argument.

"predecisional," a court looks to "whether it was generated before the adoption of an agency policy." *Coastal States Gas Corp.*, 617 F. 2d at 866. "Communications that occur after a policy has already been settled upon for example, a communication promulgating or implementing an established policy, are not privileged." *Jordan*, 591 F.2d at 774. "[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp.*, 617 F.2d at 866.

While Plaintiff may be correct that the Privacy Impact Assessment drafts contain some information that is not "predecisional," the Court finds that the actual documents are predecisional and deliberative in nature, and therefore are protected from disclosure by Exemption 5 of FOIA. Plaintiff does not contest Defendants' assertion that none of the drafts have been finalized. Pl.'s Opp'n at 10. Moreover, Plaintiff has conceded that at least part of the documents are covered by Exemption 5. *Id.* at 7.

Even if the interim final Privacy Act notice reflects policies that are also contained in draft Privacy Impact Assessments, that does not mean that the notice constitutes a "formal adoption" of the draft Privacy Impact Assessments. Courts have been willing to waive the deliberative process privilege for internal agency documents only when those documents clearly were used as statements of final policy. *See, e.g., Sears, Roebuck & Co.*, 421 U.S. at 158 n. 25 (noting "the possibility that the decision reached in an Advice Memorandum may be overturned in an Appeals Memorandum . . . does not affect its finality for our [FOIA review] purposes. The decision reached in the Advice Memorandum . . . has real operative effect . . .); *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 617 (D.C. Cir. 1997) (finding that IRS field service advice

memoranda "are themselves statements of an agency's legal position and, as such, cannot be viewed as predecisional. Although [they] may precede the field office's decision in a particular taxpayer's case, they do not precede the decision regarding the agency's legal position."); *Jordan*, 591 F. 2d at 774 (finding that while the requested documents "may not be absolutely binding on each Assistant, the guidelines do express the settled and established policy of the U.S. Attorney's Office."); *Coastal States Gas Corp.*, 617 F.2d at 869 (finding that certain documents that "were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent" did not qualify as predecisional); *Evans v. United States Office of Personnel Mgmt.*, 276 F. Supp. 2d 34, 41 (D.D.C. 2003) (stating that because "the memo at issue describes OPM's legal position in terms and under circumstances strongly suggestive of finality, the agency may not claim deliberative process to shield its articulation of that position."). This is because

> [t]he purpose of the privilege for predecisional deliberations is to insure that a decisionmaker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency.

Federal Open Market Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 359-60 (1979).

Moreover, a document that contains predecisional information on some matters but reflects an established agency policy on other matters may be covered by Exemption 5. FOIA's requirement that a federal agency provide a requestor with any reasonably segregable information covers such a scenario, permitting the agency to withhold a document as predecisional but provide information on decided matters to the extent it can be segregated from the exempted

material. 5 U.S.C. § 552(b). "The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Cent., Inc.,* 566 F.2d at 260. Therefore, Plaintiff's claim that the documents in question contain some non-exempt material does not preclude the agency from withholding *the documents* under FOIA Exemption 5; rather, it would require the agency to release the non-exempt *information*, if reasonably segregable, from the exempt material.

The Court therefore grants in part Defendants' Motion for Summary Judgment, finding that Defendants correctly conclude that the requested documents were exempt from disclosure under FOIA's deliberative process privilege. The Court finds that Plaintiff's claim that parts of the drafts are not predecisional, and therefore not exempt from FOIA, is best addressed as a question of whether Defendants have met the statutory requirement to identify and provide Plaintiff with any reasonably segregable non-exempt information contained in the documents at issue.

C. Do the Draft Privacy Impact Assessments Contain Non-Exempt Information That is Reasonably Segregable?

Defendants argue that to the extent there is any non-exempt information in the draft Privacy Impact Assessments, it cannot be reasonably segregated from the exempt information because the "facts are necessarily inextricably intertwined with policy-making processes," and releasing the facts would "expose the deliberative process." Defs.' Mem. at 12-13. Defendants contend that FOIA does not compel the release of purely factual material (as opposed to material that is deliberative in nature) when doing so would undermine the purposes of Exemption 5. *Id.* at 12. Defendants conclude that any facts in the draft assessments cannot be reasonably

segregated for release because they would reveal the subjectivity of the authors in their selection of which facts to include in the documents and thereby expose the process by which the agencies make their determinations. *Id.* at 12-13.

Plaintiff contends that Defendants have not met their burden in evaluating the segregability of non-exempt information in the drafts. As Plaintiff notes, an agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *Mead Data Cent.,* 566 F.2d at 254 n.28. "In addition to a statement of reasons, an agency should also describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Id.* at 261. Plaintiff argues that TSA failed to provide those descriptions to Plaintiff, and contends that for Defendants to withhold all of the Privacy Impact Assessment drafts they should have to address why they cannot segregate any information that was published in a separate Privacy Act notice. Pl.'s Opp'n at 11.

In support of its position that the documents at issue may contain non-exempt information, Plaintiff points to the public release of the "interim final" Privacy Act notice on CAPPS II. *Id*. (citing Pl.'s Ex. C (Privacy Act Notice, 68 Fed. Reg. 45265 (Aug. 1, 2003)). Plaintiff is skeptical that a draft Privacy Impact Assessment dated July 30, 2003, could contain "predecisional" information that became suitable for publication a mere 48 hours later in the Federal Register.[8] Pl.'s Opp'n at 10. Plaintiff contends that the Privacy Impact Assessment drafts likely contain at least some information that is not "predecisional." *Id.* at 9-10.

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[8] The Court observes that the time gap is even smaller than that, since TSA filed its notice with the Federal Register on July 31, 2003, at 8:45 a.m. 68 Fed. Reg. 45269. (Privacy Act Notice, 68 Fed. Reg. 45265 (Aug. 1, 2003))

In response, Defendants argue that the drafts of the Privacy Impact Assessment and the interim final Privacy Act notice for CAPPS II involved "two separate deliberative processes." Defs.' Reply in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Reply") at 3. Defendants contend that "[t]hey were developed . . . for different purposes," and that the Privacy Impact Assessments "are separate from, *and unrelated to*, the 'Interim Final Notice.'" *Id.* at 3-4 (emphasis added).

FOIA makes clear that an agency cannot exempt an entire document from disclosure simply because part of the document meets the requirements of an exemption. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt" from FOIA's disclosure requirements. 5 U.S.C. § 552(b). In conducting a segregability analysis, federal agencies are required to provide any material that does not meet FOIA's criteria for an exemption, such as information that is not "predecisional." *See, e.g., Center for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984) (noting that "[t]he 'segregability' requirement applies to all documents and all exemptions in the FOIA."). However, an agency need not be forced to supply information that is "inextricably intertwined" with otherwise exempt material. *See, e.g., Mead Data Cent., Inc*., 566 F.2d at 260 (noting that "[i]t has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.").

In the absence of an *in camera* review, a federal agency demonstrates its due diligence in conducting a segregability analysis through the submission of affidavits and a *Vaughn* index. *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 950 (D.C. Cir. 1998). "*Vaughn* itself requires agencies to 'specify in detail which portions of the document are disclosable and which are allegedly exempt.' A submission that does not do that does not even qualify as a '*Vaughn*

index.'" *Schiller v. Nat'l Labor Relations Bd.*, 964 F.2d 1205, 1210 (D.C. Cir. 1992) (citing *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973)). This Circuit requires "a more detailed justification" than merely "conclusory statements" stating that there is no segregable information. *Mead Data Cent., Inc.*, 566 F.2d at 261. "[U]nless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Id.*

Many decisions cited by Defendants have approached the question of segregability in terms of dividing the "deliberative process" material from "purely factual" material that is not covered by Exemption 5, and Defendants argue that the factual material in the drafts is inextricably intertwined with deliberative material that is exempt from disclosure. Defs.' Mem. at 12-13 (citing *Dudman Communications Corporation v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987), *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982), and others). However, Plaintiff does not seek only segregable factual information; rather, Plaintiff maintains that the documents, in light of the published "interim final" notice, contain segregable portions containing agency positions that were not pre-decisional at the time the drafts were created, but instead were settled policies that simply had not yet been publicly adopted . Pl.'s Opp'n at 9; *see also id.* at 9-10 (discussing segregability of factual information).

As stated *supra*, Plaintiff has made some persuasive arguments for why it believes the Privacy Impact Assessment drafts contain statements that are not actually predecisional.[9]

[9] TSA's Privacy Act notice describes "interim final" CAPPS II data collection policies, including the purpose of CAPPS II, how it will be used, and other matters, and it describes how (continued...)

However, those documents have not been finalized, and the Court has no evidence that they have been adopted as settled policies within TSA or DHS. On the other hand, Defendants' *Vaughn* index and declarations do not address the relationship between the development and content of those Privacy Impact Assessment drafts, particularly the later versions, and the Privacy Act notice that was published concurrent with the dates of those later drafts.[10] Defendants only state in their Reply brief, unsupported by affidavits or an amended *Vaughn* index, that the Privacy Act Notice and the Privacy Impact Assessments were prepared completely independently of each other and are completely unrelated to each other. Def.'s Reply at 3-4. This does not meet the requirements of the segregability analysis. *See Kimberlin*, 139 F.3d at 950. Defendants'

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[9](...continued)
the CAPPS II policies have changed since their proposal in a previous Federal Register notice in January 2003. Privacy Act Notice, 68 Fed. Reg. 45265 (Aug. 1, 2003). While Defendants assert that there are "no final agency decisions" on the scope and use of CAPPS II (*see* Huie Decl. ¶ 5, Riep-Dice Decl. ¶ 33), Defendants clearly *have* made a formal and public decision, effective as of August 1, 2003, regarding several aspects of CAPPS II.

[10] The relevant laws raise questions regarding Defendants' statement that the Privacy Act notice "is unrelated to" the Privacy Impact Assessments. Defendants' Privacy Act notice for CAPPS II follows the Privacy Act's requirements (*see* 5 U.S.C. 552a(e)(4)) in that it provides information about: categories of records in the system and individuals covered; purpose of the system; routine uses of the system and by whom it will be used; policies for storing, retrieving and safeguarding data; and policies for accessing and contesting individuals' records. Privacy Act Notice, 68 Fed. Reg. 45265 (Aug. 1, 2003). In comparison, the minimum statutory requirements for the Privacy Impact Assessment are very similar to those of the Privacy Act: what information is to be collected under the system; why the information is being collected; the intended use of the information; with whom the information will be shared; how the information will be secured; and how individuals can consent to the use of their information. E-Government Act of 2002, Pub. L. No.107-347, § 208 (B)(2)(b)(ii) (Dec. 17, 2002).

The E-Government Act also requires agencies, in their Privacy Impact Assessments, to discuss whether they are creating a system of records that is subject to the Privacy Act. *Id.* Moreover, OMB's guidance on Privacy Impact Assessments contemplates that an agency may choose to conduct the assessment while developing the Privacy Act notice "in that [they] overlap in content," and an agency can opt to publish both in the Federal Register at the same time. OMB Memorandum 03-22 § II.E.1-2 (Sept. 26, 2003).

submitted declarations provide only general, conclusory language regarding segregability. For example, Ms. Riep-Dice attests that:

> to the extent that the information in the draft is factual, the facts reflect the subjective editorial judgment of the program and reviewing offices by their very selection. The confirmation of the selection of certain facts for the readers' attention reflects the judgment of these offices as to their relative importance. As such, there is no reasonably segregable information because the manner of selecting or presenting the facts would expose the deliberative process and is inextricably intertwined with the deliberative materials.

Riep-Dice Decl. ¶ 30; *see also* ¶¶ 23, 26, 28; Huie Decl. ¶ 14 ("Because the disclosure of any facts in the drafts would reveal judgments made by staff, there is no segregable factual information that could be released without revealing protected predecisional and deliberative information at the expense of the decision-making process."). If this stated rationale, without further detail or explanation, could be the sole justification for non-segregability, the segregability requirement of FOIA would be gutted. Any time a fact is inserted into any document, someone exercises "subjective editorial judgment." This Circuit has expressly provided that such conclusory language is insufficient to justify a finding of non-segregability. *Mead Data Cent., Inc.*, 566 F.2d at 261.

Defendants point to *Dudman Communications*[11] and *Russell*[12] as support for the non-segregability of factual information, but these cases are more appropriately construed as applying to requests for documents akin to historical works, as opposed to articulating a general rule applying to all FOIA challenges. *See Petroleum Info. Corp. v. United States Dep't of Interior*,

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[11] *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987).

[12] *Russell v. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982).

976 F.2d 1429, 1434 (D.C. Cir. 1992) (noting that the *Dudman Communications* and *Russell* decisions that factual information from preliminary drafts of official military histories did not need to be segregated were based on the determination that "revelation of editorial changes threatened to 'stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.'"). This Circuit demands a more detailed analysis when assessing segregability. "To the extent that predecisional materials, even if 'factual' in form, reflect an agency'' preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id.* at 1435. "Conversely, when material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable." *Id.*

As noted *supra*, Defendants are required to provide Plaintiff with any reasonably segregable information that does not meet the dual Exemption 5 requirements of being deliberative in nature *and* predecisional. Accordingly, Defendants, in their affidavits and/or *Vaughn* index, must address segregability of any non-exempt information both in terms of "factual" information and also "settled" decisions that were not "predecisional" as of the date of the draft. Defendants have not met this burden as set established by the law of this Circuit, detailed *supra*. The Court shall therefore order Defendants to conduct another segregability review and release the reasonably segregable, non-exempt material to Plaintiff, or file another motion with the Court addressing the segregability issue, supported by affidavits and a *Vaughn* index.

IV: CONCLUSION

After considering the parties' briefings, submitted exhibits, and the relevant law, the

Court shall grant-in-part and deny-in-part Defendants' Motion for Summary Judgment. The Court finds that Defendants' draft Privacy Impact Assessments may be withheld from public disclosure under FOIA Exemption 5, but the Court finds that Defendants have not complied with FOIA's segregability analysis requirement. An Order accompanies this Memorandum Opinion.

Date: August 2, 2004

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff,

v.

TRANSPORTATION SECURITY ADMINISTRATION, *et al.*,

Defendants.

Civil Action No. 03-1846 (CKK)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 2nd day of August, 2004, hereby

ORDERED that Defendant's Motion for Summary Judgment is GRANTED-IN-PART and DENIED-IN-PART; it is further

ORDERED that Defendant shall conduct a segregability analysis of the documents in question; and it is further

ORDERED that the parties shall submit to the Court, no later than August 31, 2004, a Joint Status Report indicating whether or not the matter is resolved or whether the parties will be filing additional briefing.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge