

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEOFFREY NELS FIEGER,

Plaintiff,

Civil No. 2:08-14125

v.

Hon. David M. Lawson

FEDERAL ELECTION COMMISSION,

Defendant.

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(c), LR 7.1 and this Court’s July 2, 2009 Order, Doc. No. 36, defendant Federal Election Commission respectfully moves for summary judgment. In support of this motion, defendant submits the attached brief and exhibits, including the Declaration of the Commission’s Chief Freedom of Information Act Officer, Lawrence Calvert, and an index of records pursuant to *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) (hereafter referred to as a “*Vaughn* index”), describing the information withheld under one or more applicable exemptions of the Freedom of Information Act, 5 U.S.C. § 552.

Pursuant to LR 7.1(a), defendant has not obtained plaintiff’s concurrence with this motion.

Dated: August 21, 2009

Respectfully Submitted,

THOMASENIA P. DUNCAN
General Counsel

DAVID KOLKER
Associate General Counsel

HARRY J. SUMMERS
Assistant General Counsel

/s/ Greg J. Mueller
GREG J. MUELLER
Attorney
FEDERAL ELECTION
COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
Phone: (202) 694-1650
Email: gmueller@fec.gov

TONY WEST
Assistant Attorney General

TERRENCE BERG
United States Attorney

DERRI T. THOMAS
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
Phone: (313) 226-9153
E-mail: derri.thomas@usdoj.gov
(P53439)

/s/ James D. Todd, Jr.
JOHN R. TYLER, Assistant Director
JAMES D. TODD, JR., Senior Counsel
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, DC 20530
Phone: (202) 514-3378
Email: james.todd@usdoj.gov

Attorneys for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEOFFREY NELS FIEGER,

Plaintiff,

Civil No. 2:08-14125

v.

Hon. David M. Lawson

FEDERAL ELECTION COMMISSION,

Defendant.

_____ /

BRIEF IN SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

I. ISSUES PRESENTED..... 1

II. PRELIMINARY STATEMENT..... 2

III. BACKGROUND..... 3

 A. “Request 56”..... 3

 B. “Request 06”..... 5

 C. Plaintiff’s Complaint, as Amended..... 7

IV. STANDARD OF REVIEW..... 7

V. ARGUMENT..... 8

 A. Plaintiff Lacks Standing to Obtain Records Sought by Requests 56 and 06..... 8

 B. The FEC’s Search for Responsive Records Was Adequate under the FOIA..... 9

 1. The FEC’s initial failure to find records responsive to Request 56-2 does not render its search inadequate..... 12

 2. The FEC properly determined that certain records were not responsive.. 12

- 3. The FEC properly limited its search to “agency records”. 13
- C. The Case is Moot Because the FEC Has Disclosed All Non-Exempt Information.. . . . 15
- D. The Agency Properly Withheld Certain Responsive Information Because it Fell Under at Least One of the Applicable Exemptions for the FOIA. 16
 - 1. The FEC properly withheld investigatory files under FOIA Exemption 3.. . . . 17
 - 2. The FEC properly withheld information contained in files of ongoing investigations under Exemption 7(A). 18
 - 3. The FEC properly withheld personal information contained in records compiled for law enforcement purposes under Exemption 7(C).. . . . 20
 - 4. The FEC properly withheld under FOIA Exemption 5 confidential, pre-decisional recommendations under the deliberative process privilege and material prepared in anticipation protected by the attorney work product privilege 21
 - 5. The FEC properly withheld personal information under Exemption 6. . . 24
 - 6. The FEC properly withheld trivial internal information under Exemption 2.. . . . 27
- E. The FEC Disclosed All Non-Exempt Portions of Responsive Records. 28
- VI. CONCLUSION. 29

TABLE OF AUTHORITIES

FEDERAL CASES

Amaya-Flores v. Department of Homeland Security,
2006 WL 3098777 (W.D. Tex. Oct. 30, 2006). 15, 16

Associated Press v. Department of Defense, 554 F.3d 274 (2d Cir. 2009). 21

Balderrama v. Department Homeland Security, 2006 WL 889778 (D.D.C. Mar. 30, 2006). 25

Brehm v. Department of Defense, 593 F. Supp. 2d 49 (D.D.C. 2009). 11

Bureau of National Affairs, Inc. v. United States Department of Justice,
742 F.2d 1484 (D.C. Cir. 1984). 13

Burka v. United States Department of Health and Human Services,
142 F.3d 1286 (D.C. Cir. 1998). 9

Cal-Trim Inc. v. Internal Revenue Service, 484 F. Supp. 2d 1021 (D. Ariz. 2007). 26

Carbe v. Bureau of Alcohol, Tobacco, and Firearms,
2004 WL 2051359 (D.D.C. Aug. 12, 2004). 17

Carter v. United States Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987). 16, 25

Coleman v. Federal Bureau of Investigation, 13 F. Supp. 2d 75 (D.D.C. 1998). 27

Consumer Federation of America v. Department of Agriculture,
455 F.3d 283 (D.C. Cir. 2006). 13, 14

Core v. United States Postal Service, 730 F.2d 946 (4th Cir. 1984). 26

Cowdery, Ecker & Murphy, LLC v. Department of Interior,
511 F. Supp. 2d 215 (D. Conn. 2007). 26

Comer v. Internal Revenue Service, 2000 WL 1566279 (E.D. Mich. Aug. 17, 2000). 14

Department of the Air Force v. Rose, 425 U.S. 352 (1976). 27

Duenas Iturralde v. Comptroller of the Currency, 315 F.3d 311 (D.C. Cir. 2003). 10, 12

Dunaway v. Webster, 519 F. Supp. 1059 (C.D. Cal. 1981). 12

Edmonds v. Federal Bureau of Investigation, 272 F. Supp. 2d 35 (D.D.C. 2003). 27

Electronic Privacy Information Center v. Department of Homeland Security,
384 F. Supp. 2d 100 (D.D.C. 2005). 19

Environmental Protection Services v. Environmental Protection Agency,
364 F. Supp. 2d 575 (N.D. W. Va. 2005). 19

Essential Information, Inc. v. United States Information Agency,
134 F.3d 1165 (D.C. Cir. 1998). 17

Federal Trade Commission v. Grolier Inc., 462 U.S. 19 (1983). 22

Fisher v. Federal Bureau of Investigation, 94 F. Supp. 2d 213 (D. Conn. 2000). 16

Fitzgibbon v. Central Intelligence Agency, 911 F.2d 755 (D.C. Cir. 1990). 20

Harrison v. Executive Office of United States Attorneys, 377 F. Supp. 2d 141 (D.D.C. 2005). 7

Hickman v. Taylor, 329 U.S. 495 (1947). 23, 24

Hunt v. Federal Bureau of Investigation, 972 F.2d 286 (9th Cir. 1992). 26

Iacoe v. Internal Revenue Service, 1999 WL 675322 (E.D. Wis. July 23, 1999). 11

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989). 19

Judicial Watch, Inc. v. Department of Justice, 432 F.3d 366 (D.C. Cir. 2005). 28

Keys v. Department of Homeland Security, 570 F. Supp. 2d 59 (D.D.C. 2008). 26

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980). 15

Knight v. National Aeronautics and Space Administration,
2006 WL 3780901 (E.D. Cal. Dec. 21, 2006). 10

Kowalczyk v. Department of Justice, 73 F.3d 386 (D.C. Cir. 1996). 10

Larson v. Department of State, 2005 WL 3276303 (D.D.C. Aug. 10, 2005). 27

Logan v. Commercial Union Insurance Co., 96 F.3d 971 (7th Cir. 1996). 23

Manchester v. Federal Bureau of Investigation, 2005 WL 3275802 (D.D.C. Aug. 9, 2005). 29

Mapother v. Department of Justice, 3 F.3d 1533 (D.C. Cir. 1993). 19

MAXXAM, Inc. v. Federal Deposit Insurance Corp., 1999 WL 33912624 (D.D.C. Jan. 29, 1999). 8

Middleton v. Department of Labor, 2006 WL 2666300 (E.D. Va. Sept. 15, 2006). 28

McDonnell v. United States, 4 F.3d 1227 (3rd Cir. 1993). 2, 8

Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986)..... 10, 11

Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981)..... 7

Murphy v. Internal Revenue Service, 79 F. Supp. 2d 1180 (D. Haw. 1999)..... 10, 11

National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)..... 17, 19

National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975)..... 22

National Archives and Records Administration v. Favish, 541 U.S. 157 (2004)..... 21, 25

National Association of Retired Federal Employees v. Horner,
879 F.2d 873 (D.C. Cir. 1989). 2, 27

National Institute of Military Justice v. United States Department of Defense,
404 F. Supp. 2d 325 (D.D.C. 2005). 11, 12

Nation Magazine v. United States Customs Service, 71 F.3d 885 (D.C. Cir. 1995)..... 3, 9

New England Medical Center Hospital v. National Labor Relations Board,
586 F.2d 377 (1st Cir. 1976)..... 19

Odle v. Department of Justice, 2006 WL 1344813 (N.D. Cal. May 17, 2006). 28

Pacific Fisheries, Inc. v. Internal Revenue Service,
2006 WL 1635706 (W.D. Wash. June 1, 2006)..... 11

Perrone v. Federal Bureau of Investigation, 908 F. Supp. 24 (D.D.C. 1995)..... 21

Perry v. Block, 684 F.2d 121 (D.C. Cir. 1982). 11

Prison Legal News v. Lappin, 436 F. Supp. 2d 17 (D.D.C. 2006). 25

Ray v. Federal Bureau of Investigation, 441 F. Supp. 2d 27 (D.D.C. 2006)..... 28

Reporters Committee for Freedom of the Press v. Department of Justice,
816 F.2d 730 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C.
Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989). 17

Reporters Committee for Freedom of the Press v. Department of Justice,
489 U.S. 749 (1989)..... 25, 26

Rugiero v. Department of Justice, 257 F.3d 534 (6th Cir. 2001)..... 20, 21

SafeCard Services v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991).. 8, 20

Schell v. Department of Health and Human Services, 843 F.2d 933 (6th Cir. 1988)..... 22, 23

Scherer v. Kelley, 584 F.2d 170 (7th Cir. 1978). 27

Schiffer v. Federal Bureau of Investigation, 78 F.3d 1405 (9th Cir. 1996)..... 21

In re Sealed Case, 237 F.3d 657 (D.C. Cir. 2001)..... 18

Securities and Exchange Commission v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984)..... 20

Simon v. Department of Justice, 980 F.2d 782 (D.C. Cir. 1992). 16

Swan v. Securities and Exchange Commission, 96 F.3d 498 (D.C. Cir. 1996). 19

The Haskell Co. v. Department of Justice, 2006 WL 627156 (D.D.C. Mar. 13, 2006)..... 9

Three Forks Ranch Corp. v. Bureau of Land Management,
358 F. Supp. 2d 1 (D.D.C. 200). 8

Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987)..... 3, 15, 16

United States Department of Justice v. Tax Analysts, 492 U.S. 136 (1989)..... 13

United States Department of State v. Ray, 502 U.S. 164 (1991). 10

United States Department of State v. Washington Post Co., 456 U.S. 595 (1982)..... 25

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984). 22

Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975). *passim*

Voinche v. Federal Bureau of Investigation, 940 F. Supp. 323 (D.D.C. 1996),
aff'd, 1997 WL 411685 (D.C. Cir. June 19, 1997). 16, 26

Voinche v. Federal Bureau of Investigation, 999 F.2d 962 (5th Cir. 1993). 3, 15

Western Center for Journalism v. Internal Revenue Service,
116 F. Supp. 2d 1 (D.D.C. 2000), *aff'd*, 22 F. App'x 14 (D.C. Cir. 2001)..... 10, 12

Wichlacz v. United States Department of Interior, 938 F. Supp. 325 (E.D. Ca. 1996),
aff'd, 114 F.3d 1178 (4th Cir. 1997)..... 19

Wilson v. Department of Justice, 1991 WL 111457 (D.D.C. June 13, 1991)..... 27

UNPUBLISHED CASES

Bricker v. Federal Bureau of Investigation, No. 97-2742 (D.D.C. Mar. 26, 1999). 10

DOCKETED CASES

Beam v. Mukasey, No. 07-1227 (N.D. Ill.). 4, 5, 20, 24

FEDERAL STATUTES

2 U.S.C. §§ 431-55. 17

2 U.S.C. § 437g(a)(12)..... 18, 24

5 U.S.C. § 552..... *passim*

I. ISSUES PRESENTED

- (A) Whether plaintiff has standing to maintain this Freedom of Information Act (“FOIA”) action.
- (B) Whether the Federal Election Commission (“FEC”) performed an adequate search for records responsive to the requests for information under the FOIA.
- (C) Whether the FEC’s response to the requests for information renders the case moot.
- (D) Whether the FEC properly withheld records under one or more applicable exemptions under the FOIA.

II. PRELIMINARY STATEMENT

Under the Freedom of Information Act (“FOIA”), “an agency must disclose all records requested by ‘any person,’ 5 U.S.C. § 552(a)(3), unless the information sought falls within a specific statutory exemption.” *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) (citing 5 U.S.C. § 552(d)). Plaintiff Geoffrey Nels Fieger seeks a right of access to information in the custody and control of defendant Federal Election Commission (“FEC”) based on FOIA requests made on July 3 and October 27, 2008 by Michael Dezsi, Esq., an attorney at the law firm of Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (the “Fieger firm”). In his July 3 and October 27 requests, Mr. Dezsi sought records exchanged since January 2001 between the FEC and: (i) “the Department of Justice relating to possible violations of the Federal Election Campaign Act by [the Fieger firm], including . . . children and spouses [of the Fieger firm];” (ii) “the White House . . . relating in anyway to enforcement of federal criminal statutes;” and (iii) “the Executive Office of the President.” Exs. A & B. Plaintiff alleges that the FEC “failed to [timely] provide” the records requested by Mr. Dezsi and that he “has a right of access to the requested information under [the FOIA].” Doc. No. 26 (Amend. Compl.) ¶¶ 8, 9. *See also id.* ¶¶ 14, 15 (same).

This Court does not have subject matter over plaintiff’s claims because plaintiff lacks standing to seek judicial review of FOIA requests made by his attorney that failed to identify plaintiff as the attorney’s client. It is well settled that “a person whose name does not appear on a request for records has not made a formal request within the meaning of the statute. Such a person, regardless of his or her personal interest in disclosure of the requested documents, has no right to receive . . . the documents.” *McDonnell v. U.S.*, 4 F.3d 1227, 1236-37 (3rd Cir. 1993).

Even if the Court determines that it has subject matter jurisdiction, it should still grant the FEC's motion for summary judgment. The FEC has shown that it made "a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested," *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citation and quotation marks omitted), and has disclosed all non-exempt portions of records responsive to the FOIA requests, which is all that is required under the FOIA.

Having established the adequacy of the FEC's search and that the agency disclosed all non-exempt portions of the records responsive to the FOIA requests, this case is moot. Plaintiff has alleged only that the FEC has "failed to provide" the requester records and that he "has a right of access" to them. Doc. No. 26 ¶¶ 8, 9, 14, 15. But plaintiff has not challenged any of the agency's withholding determinations. *See id. passim*. It is well settled that when a plaintiff challenges only the agency's failure to respond and the agency then provides responsive information, the case becomes moot and brings the Court's jurisdiction to an end. *Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993); *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987).

However, if this Court were to review the agencies withholding determinations, it would find, on review of the agency's declaration and index of withheld records, that the FEC properly withheld certain responsive information under one or more applicable exemptions under the FOIA, including, as addressed below, Exemptions 2, 3, 5, 6, 7(A), and 7(C).

III. BACKGROUND

A. "Request 56"

On July 9, 2008, the FEC's FOIA Service Center received a FOIA request from Michael R. Dezsi, Esq. *See* Decl. of Lawrence Calvert ("Calvert Decl.") ¶ 6 [Attached as Ex G]. Mr.

Dezsi is an attorney at the law firm of Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (the “Fieger Firm”). Mr. Dezsi is also plaintiff’s counsel in this matter. The request was numerically designated as FOIA Request 2008-56. *Id.* (hereafter referred to as “Request 56”).

Request 56 sought records exchanged since January 2001 between the FEC and: (i) “the Department of Justice relating to possible violations of the Federal Election Campaign Act by [the Fieger firm], including . . . children and spouses [of the Fieger firm]” (hereafter “Request 56-1”); and (ii) “the White House . . . relating in anyway to enforcement of federal criminal statutes” (hereafter “Request 56-2”). Ex. A.

The FEC conducted a comprehensive search for responsive records. Calvert Decl. ¶¶ 9-10, 12, 20. The FEC determined that it had no records responsive to Request 56-2. *Id.* ¶ 13. The Commission released its final agency decision, along with all non-exempt portions of responsive FEC records responsive to Request 56-1 to Mr. Dezsi on September 30, 2008. *Id.* ¶ 18. On November 19, 2008, the Department of Justice released all non-exempt portions of responsive FEC records that had been referred to the Department for consultation. *Id.* ¶ 19.

Request 56 was not Mr. Dezsi’s only attempt to obtain this information. Plaintiff’s counsel is also counsel of record in *Beam v. Mukasey, et al.*, No. 07-1227 (N.D. Ill.). On November 4, 2008, the *Beam* plaintiffs served a document request on the FEC seeking almost the identical documents plaintiff seeks in Request 56. *See Beam* Doc. No. 130-3 [Attached hereto as Ex. C]. For the convenience of the Court, the *Beam* plaintiffs’ document request is compared with Request 56:

Beam Doc. Req: # 2:

[A]ny and all documents of any kind, including but not limited to memoranda, correspondence and e-mails, dated from January 2001 through the present, between officials, agents, and/or employees of the FEC and officials, agents, and/or employees of the DOJ relating to possible violations of the Federal Election Campaign Act by the [Fieger firm], including its partners, employees, contractors, associates, and their children and spouses.

Beam Doc. Req. 5:

[A]ny and all documents of any kind, including but not limited to memoranda, correspondence and e-mails, dated from January 2001 through the present, between (to/from) FEC officials, employees or agents including former FEC Chairman Michael E. Toner and White House officials, employees or agents including former White House Aide Karl Rove and former White House Counsel Harriet Miers, or their agents and/or assistants, including any and all present and/or former employees and/or agents of the Executive Office of the President and/or Vice President, relating in any way to the Federal Election Campaign Act.

Request 56-1:

Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between officials, agents and/or employees of the FEC and officials, agents and/or employees of the Department of Justice relating to possible violations of the Federal Election Campaign Act by the [Fieger firm], including its partners, employees, contractors, associates, and their children and spouses.

Request 56-2:

Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between (to/from) FEC officials, employees or agents, including former FEC Chairman Michael E. Toner, and White House officials, employees or agents, including former White House Aide Karl Rove and former White House Counsel Harriet Miers, or their agents and/or assistants, relating in any way to enforcement of federal criminal statutes, including, but not limited to, the Federal Election Campaign Act.

On March 2, 2009, the *Beam* plaintiffs filed a motion to compel production of about 100 pages of responsive FEC documents identified in an FEC privilege log. On July 7, 2009, after reviewing all contested documents *in camera*, “[t]he court sustain[ed] the FEC’s ‘attorney work product’ and ‘law enforcement privilege’ objection to production of the documents.” *Beam*, Doc. No. 141 [Attached as Ex. D].

B. “Request 06”

The FEC’s FOIA Service Center received a second FOIA request from Mr. Dezsi on

November 3, 2008. Calvert Decl. ¶ 21. The request was numerically designated as FOIA Request 2009-06. *Id.* (hereafter “Request 06”). Request 06 sought records exchanged since “January 2001 . . . between . . . the FEC . . . the Executive Office of the President.” Ex. B. Because there was no subject matter limitation on this request, the FOIA Service Center interpreted Request 56 as seeking *all* communications between the FEC and the Executive Office of the President (“EOP”). Calvert Decl. ¶ 22. However, to clarify the scope of Request 06, the Service Center sent Mr. Dezsi an email on November 7, 2008, to determine whether the request in fact sought all communications between the FEC and all offices in the EOP. *Id.* ¶ 24. At that time, Mr. Dezsi clarified that his request sought FEC records exchanged with all EOP offices except for the Office of Management and Budget (“OMB”). *Id.*

The FEC conducted a comprehensive search for records responsive to Request 06. Calvert Decl. ¶¶ 25-26. The FEC sent Mr. Dezsi an initial batch of responsive records on December 3, 2008. *Id.* ¶ 33. At the time, the FEC also advised Mr. Dezsi that it was engaging in consultation with the White House over White House portions of potentially responsive records. *Id.* The FEC provided additional, non-exempt portions of records responsive to Request 06 on December 17 and December 31, 2008. *Id.* In addition, after consulting with the Department of Justice and the Office of Management and Budget, the FEC released an additional responsive record on April 1, 2009. *Id.* ¶ 34. The FEC turned over additional responsive records on April 29, 2009. *Id.* ¶ 35. After completing its consultation with the White House about the portion of responsive records generated by White House personnel, the Commission provided all non-exempt portions of all remaining records responsive to Request 06 on June 11 and 12, 2009. *Id.* ¶ 36.

C. Plaintiff's Complaint, as Amended

Plaintiff filed a Complaint in this Court on September 25, 2008. Doc. No. 1. Plaintiff alleged that the FEC failed to provide records responsive to his first FOIA request (Request 56). *Id.* ¶ 6. Plaintiff filed an Amended Complaint on February 19, 2009, additionally alleging that the Commission failed to provide records responsive to his second FOIA request (Request 06). Doc. No. 26, ¶ 15. Plaintiff's Amended Complaint challenges neither the adequacy of the FEC's search nor the applicability of the FOIA exemptions the FEC has invoked. Doc. No. 26 *passim*. Rather, plaintiff alleges only "a right of access to the requested information under 5 U.S.C. § 552" with respect to both Request 56 and Request 06. *Id.* ¶¶ 9, 15.

IV. STANDARD OF REVIEW

FOIA cases are typically and appropriately decided on motions for summary judgment. *Harrison v. Exec. Ofc. of U.S. Attys.*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005). Under FOIA, a court conducts a *de novo* review to determine whether the government properly withheld records under any of the FOIA's nine statutory exemptions. 5 U.S.C. § 552(a)(4)(B). In a FOIA case, the Court may award summary judgment solely on the basis of information provided by the agency in declarations when the declarations describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Agency declarations must be "relatively detailed and non-conclusory . . ." *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Such declarations are accorded "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the

existence and discoverability of other documents.” *Id.* (internal citation and quotation omitted).

V. ARGUMENT

A. Plaintiff Lacks Standing to Obtain Records Sought by Requests 56 and 06

The FOIA provides that any person has a judicially enforceable right of access to federal agency records, except to the extent that such records are protected from disclosure by one of nine exemptions. *See* 5 U.S.C. § 552. Upon receipt of a request for records from “any person,” the agency must determine within twenty days whether it will comply with the request “and shall immediately notify the person making such request of such determination and the reasons therefor.” *Id.* § 552(a)(6)(A)(i). After such time has expired, that person may bring suit to compel production of improperly withheld records. *Id.* § 552(a)(4)(B).

However, it is well settled that “a person whose name does *not* appear on a request for records has not made a formal request within the meaning of the statute. Such a person, regardless of his or her personal interest in disclosure of the requested documents, has no right to receive . . . the documents.” *McDonnell v. U.S.*, 4 F.3d 1227, 1236-37 (3rd Cir.1993) (emphasis added). In particular, “an attorney must adequately identify that he is making the FOIA request for his client in order for the client to have standing to pursue a FOIA action.” *Three Forks Ranch Corp. v. The Bureau of Land Mgt.*, 358 F. Supp. 2d 1, 3 (D.D.C. 200). *See also* *MAXXAM, Inc. v. FDIC*, 1999 WL 33912624, at *2 (D.D.C. Jan. 29, 1999).

In this case, plaintiff’s attorney made Requests 56 and 06. *See* Exs. A, B. Nowhere do Requests 56 or 06 identify that they are made on behalf of plaintiff. Exs. A, B. *Cf. The Haskell Co. v. U.S. Dep’t of Justice*, 2006 WL 627156, at *2 (D.D.C. Mar. 13, 2006). “As a result, only plaintiff’s attorney ha[d] standing to bring this suit when [the FEC] failed to comply within the

statutory time limits.” *MAXXAM*, 1999 WL 33912624, at *2.

Nor can the plaintiff’s attorney, after filing the Complaint in this action, cure this jurisdictional defect by sending correspondence to defendant’s counsel of record in this action claiming that plaintiff’s attorney actually made these requests on behalf on plaintiff. *See* Ltr. from Michael Dezsi, Esq. to Greg Mueller, FEC (Nov. 19, 2008) [Attached as Ex. E]. The fact remains that plaintiff did not “administratively assert a right to receive the requested documents in the first place.” *The Haskell Co.*, 2006 WL 627156, at *2 (quotation marks omitted). “Any arrangements [plaintiff’s attorney] had with a third party are legally irrelevant for the purposes of [t]his FOIA request.” *Burka v. U.S. Dep’t of Health & Human Servs.*, 142 F.3d 1286, 1291 (D.C. Cir. 1998). Consequently, plaintiff lacks standing to bring this lawsuit.

B. The FEC’s Search for Responsive Records Was Adequate under the FOIA

Even if this Court determines that it has subject matter jurisdiction over plaintiff’s claims, this Court should hold that the FEC’s search for responsive records was adequate under the FOIA. To prevail in a FOIA action, the agency must show that it made “a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citation and quotation marks omitted).

It is well settled that under the FOIA, an agency’s search for responsive records “need not be perfect, [but] only *adequate*, and adequacy is measured by the reasonableness of the effort in light of the specific request.” *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) (emphasis added). An agency “is not obligated to look beyond the four corners of the request for leads to the location of responsive documents.” *Kowalczyk v. Dep’t of Justice*, 73 F.3d 386, 389 (D.C.

Cir. 1996). Rather, where, as here, a request provides no “specific information” about where to search for records responsive to the subject of the request, courts will approve an agency’s search of “files where *responsive information would likely be located.*” *Bricker v. FBI*, No. 97-2742, slip op. at 7 (D.D.C. Mar. 26, 1999) (emphasis added) [Attached as Ex. F]. *See also Knight v. NASA*, 2006 WL 3780901, at *5 (E.D. Cal. Dec. 21, 2006) (“there is no requirement that an agency search all possible sources in response to a FOIA request when it believes all responsive documents are likely to be located in [a particular] place” or places); *Murphy v. IRS*, 79 F. Supp. 2d 1180, 1185-86 (D. Haw. 1999) (holding that the agency “conducted a reasonable search in light of the fact that Plaintiff gave no indication as to what types of files could possibly contain documents responsive to this request or where they might be located.”).

Nor does an agency’s failure to locate any particular document undermine an otherwise adequate search. *Duenas Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). “[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate After all, particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them.” *Id.* Indeed, “it is *unreasonable* to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed.” *W. Ctr. for Journalism v. IRS*, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (concluding that agency conducted reasonable search and acted in good faith by locating and releasing additional responsive records mistakenly omitted from its initial response), *aff’d*, 22 F. App’x 14 (D.C. Cir. 2001). In other words, even if an “initial search was inadequate,” it “does not demonstrate bad faith,” especially if the agency eventually conducts an adequate

search. *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 404 F. Supp. 2d 325, 333 (D.D.C. 2005).

In this case, as set out in detail in the attached Declaration of the FEC's Chief FOIA Officer, Lawrence Calvert [attached hereto as Ex. G], the FEC's search for records responsive to plaintiff's FOIA requests was more than adequate. *Meeropol*, 790 F.2d at 956. *See also Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982) (declaration need not "set forth with meticulous documentation the details of an epic search for the requested records."). Neither Request 56 nor Request 06 identified any particular file systems for the FEC to search. Exs. A, B. *Cf. Bricker, supra*, slip op. at 7; *Murphy*, 79 F. Supp. 2d at 1185-86. The FEC accordingly directed its search efforts towards offices and individuals it determined were likely to have responsive records. Calvert Decl. ¶¶ 9, 12, 20, 25-26. *Cf. Pac. Fisheries, Inc. v. IRS*, 2006 WL 1635706, at *2-3 (W.D. Wash. June 1, 2006) (agency's search was adequate when agency sent search queries to people "likely to have responsive documents"). Further, the agency reasonably directed its search efforts towards file systems it determined were likely to have responsive records. Calvert Decl. ¶¶ 9, 12, 20, 25-26. *Cf. Brehm v. Dep't of Defense*, 593 F. Supp. 2d 49, 50 (D.D.C. 2009) (search was adequate where agency searched two systems likely to have responsive records). Moreover, even after the FEC completed its search, it conducted additional searches to confirm that it had located all responsive records. Calvert Decl. ¶ 20. *Cf. Iacoe v. IRS*, 1999 WL 675322, at *4 (E.D. Wis. July 23, 1999). Accordingly, the FEC's search for responsive records was adequate under the FOIA.

1. The FEC's initial failure to find records responsive to Request 56-2 does not render its search inadequate

The FEC's initial failure to find records responsive to Request 56-2, Calvert Decl. ¶ 13, does not render its search inadequate. *Duenas Iturralde*, 315 F.3d at 315. As detailed in the Chief FOIA Officer's declaration, the FEC conducted a comprehensive search for records responsive to Request 56-2. Calvert Decl. ¶¶ 9, 10, 12, 20. The fact that the agency later located and disclosed a document which this Court determined was responsive to Request 56-2, Hrg. Tr. on Mot. for Leave to Conduct Discovery, at 31:6-7 (Apr. 16, 2009) [Attached as Ex. H], does not undermine an otherwise adequate search. *W. Ctr. for Journalism*, 116 F. Supp. 2d at 10. Nor, as this Court has correctly determined, does it demonstrate bad faith. Hrg. Tr., *supra*, at 31:8-9. *Accord Nat'l Inst. of Military Justice*, 404 F. Supp. 2d at 333.

2. The FEC properly determined that certain records were not responsive

In searching for responsive records, the FEC's properly determined that potentially responsive records that only mentioned the Fieger firm in passing were, in fact, not necessarily responsive to plaintiff's FOIA requests. An "agency is under no obligation to release an entire document simply because the name of a person or organization which is the subject of the request is mentioned in the document." *Dunaway v. Webster*, 519 F. Supp. 1059, 1083 (C.D. Cal. 1981). "In fact, any other approach could work to the detriment of the person making the request, since an agency could inundate the requester with mounds of documents of dubious relevancy, . . . only making it harder to pick out the material which was truly the object of the request." *Id.*

In this case, the FEC reasonably determined that emails discussing, for example, briefing

schedules, that only mentioned the Fieger firm by name, Calvert Decl. ¶ 13, were not responsive to plaintiff's FOIA request. *Cf. Dunaway*, 519 F. Supp. at 1083. Accordingly, the FEC properly limited its search to records actually responsive to plaintiff's FOIA request, *viz*, those records as described in Requests 56 and 06 that related to possible violations of the Federal Election Campaign Act or enforcement of federal criminal statutes.

3. The FEC properly limited its search to "agency records"

The FOIA provides a requester with a limited right to "agency records." *Consumer Fed'n of Am. v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006). An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). However, an "agency record" subject to FOIA is distinguishable from a "personal record." A personal record is one that might be physically maintained by agency employees at the agency but that is *not* subject to the FOIA. To determine whether a record is an agency record or a personal record, an agency examines "the totality of the circumstances surrounding the creation, maintenance, and use" of the record. *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1492 (D.C. Cir. 1984). Factors relevant to this inquiry include, among others, (1) the *purpose* for which the document was created; (2) the degree of integration of the record into the agency's filing system; and (3) the extent to which the record's author or other employees *used* the record to conduct agency business. *See Consumer Fed'n of Am.*, 455 F.3d at 287-88 (considering "[record] creation, location/possession, control, and use"– the "principal factors" identified in *Bureau of Nat'l Affairs* – and deciding that "*use* [of the records] is the decisive factor." (emphasis added)). To the extent that a requester's rights under the FOIA differ from

those provided by Federal Rules of Civil or Criminal Procedure, it is important to remember that the “FOIA is not intended to be a substitute for discovery.” *Comer v. IRS*, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000). Accordingly, regardless of whether personal records may be responsive to a valid discovery request, personal records are not subject to the FOIA.

In this case, the FEC properly determined that purely personal records were not agency records subject to FOIA. *See* Calvert Decl. ¶ 28. The FOIA Service Center excluded as personal records only those documents which met *all* of the following criteria: the records did *not* contain substantive information; were created solely for the employee’s personal convenience; were *not* used for business purposes; were not disseminated to others within the Commission; and were records which the author was free to dispose of or delete at his or her personal discretion. *Id. Cf. Consumer Fed’n of Am.*, 455 F.3d at 287-88. Moreover, in the interest of the fullest possible disclosure, the Service Center did *not* exclude as a personal record any record that appeared to relate in any way, no matter how trivial, to the business of the United States Government. Calvert Decl. ¶ 28. For example, the Service Center determined that emails between former Commissioner Toner and White House personnel in which he inquired about White House tours for personal friends and acquaintances were agency records. *Id.* For a record to be excluded, the Center determined that there was no apparent relation on the face of the record to any business of the government whatsoever. *Id.* In addition, in cases where records contained both personal and governmental information, the Center treated the record as an agency record and considered at a later step in the process whether the wholly personal portion of any information contained therein was redacted. *Id.* Accordingly, the FEC’s exclusion of personal records was proper.

C. The Case is Moot Because the FEC Has Disclosed All Non-Exempt Information

Because plaintiff's Complaint, as amended, alleges only a right of access to information under the FOIA, the FEC's disclosure of information responsive to Requests 56 and 06 renders this case moot. Jurisdiction in a FOIA suit is based upon the plaintiff showing that an agency has improperly withheld agency records. *Kissinger v. Reporters Cmte. for Freedom of the Press*, 445 U.S. 136, 150 (1980). If, however, the agency establishes that responsive records have been released to the requester, the suit should be dismissed on mootness grounds as there is no justiciable case or controversy. *Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993) (holding that plaintiff's "claim was rendered moot by the FBI's response to his request."). See also *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) (holding case is moot because "the agency by now has released all nonexempt materials the Tijerinas seek."). Because the FEC has provided records responsive to plaintiff's FOIA requests, Calvert Decl. ¶¶ 18, 19, 36, this case is moot.

In *Amaya-Flores v. Dep't of Homeland Sec.*, 2006 WL 3098777 (W.D. Tex. Oct. 30, 2006), the court addressed an agency's claim that because it has turned over responsive records, the case was moot. 2006 WL 3098777, at *2. The court held that because the plaintiff's "allegations relate[d] only to a delay in obtaining a FOIA response and not the improper withholding of documents," the agency's release of responsive information rendered the case moot. *Id.* at *3. In reaching this conclusion, the court rejected the plaintiff's claim that "she also specifically complained about documents improperly withheld and requested injunctive relief in the form of an order requiring the agency to produce the records," finding instead that that "her allegations relate only to a delay in obtaining a FOIA response and not the improper withholding of documents." *Id.* at *2-3.

The *Voinche* and *Amaya-Flores* cases show that, because the FEC provided records responsive to Request 56 and Request 06, this case is moot. Like the complaint of the *Amaya-Flores* plaintiff, plaintiff's Amended Complaint alleges only "a right to information" under the FOIA. Doc. No. 26 ¶¶ 9, 15. Also like the complaint of the *Amaya-Flores* plaintiff, plaintiff's Amended Complaint here does not allege improper withholding under the FOIA, *see* Doc. No. 26 *passim*, even though the FEC had withheld certain records responsive to Requests 56 and Request 06, Calvert Decl. ¶¶ 15-17, 19, 34, by the time plaintiff filed his Amended Complaint. Accordingly, because the FEC has now provided information responsive to plaintiff's FOIA request, this Court has "no further judicial function to perform under the FOIA." *Tijerina*, 821 F.2d at 799. *See also Fisher v. FBI*, 94 F. Supp. 2d 213, 216 (D. Conn. 2000).

D. The Agency Properly Withheld Certain Responsive Information Because it Fell Under at Least One of the Applicable Exemptions for the FOIA

If this Court were to review the FEC's withholding determinations, it would find that the FEC properly withheld the exempt portions of records responsive to Requests 56 and 06 under one or more applicable exemptions under the FOIA. The FOIA provides nine exemptions pursuant to which an agency may withhold requested information. *See* 5 U.S.C. §§ 552(a)(4)(B), (b)(1)-(9). The agency may justify its withholdings in its supporting declaration together with an index of records identifying the particular records or portions of records withheld under one or more exemptions. *See Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) (hereafter referred to as a "*Vaughn* index"). However, if the Court determines that the agency's *Vaughn* index is not sufficiently detailed, the FOIA authorizes the court to review the withheld records, or a sample of the withheld records *in camera*. *Simon v. Dep't of Justice*, 980 F.2d 782, 784 (D.C. Cir. 1992); *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 n.16 (D.C. Cir. 1987). "The *in camera*

review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

In this case, this Court should find that the agency’s declaration, *see* Ex. G, and *Vaughn* index, *see* Ex. I, provide sufficient detail to review the propriety of the agency’s withholding determinations, and should find that each determination was proper. *Carbe v. Bureau of Alcohol, Tobacco, and Firearms*, 2004 WL 2051359, at *8 n.5 (D.D.C. Aug. 12, 2004) (denying plaintiff’s request for in camera inspection, because *Vaughn* Index adequately described withheld information).

1. The FEC properly withheld investigatory files under FOIA Exemption 3

The FEC properly withheld records compiled for ongoing administrative matters under FOIA Exemption 3. FOIA Exemption 3 protects from disclosure under the FOIA information for which disclosure is prohibited by *another* statute, if that statute either: (A) “requires that the matters be withheld from the public in such a manner to leave no discretion on the issue;” or (B) “establishes particular criteria for withholding *or* refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3)(A)-(B) (emphasis added). To qualify as an Exemption 3 withholding statute, the statute “must, on its face, exempt matters from disclosure.” *Reporters Cmte. for Freedom of the Press v. Dep’t of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev’d on other grounds*, 489 U.S. 749 (1989). *See also Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1168 (D.C. Cir. 1998) (statute that prohibits “dissemination” and “distribution” of certain information within the U.S. qualifies as Exemption 3 “nondisclosure” statute). The privacy provision of section 437g of

the Federal Election Campaign Act, 2 U.S.C. §§ 431-55, clearly qualifies as a FOIA Exemption 3(A) statute. The statute provides that “[a]ny notification or investigation made under this section *shall not be made public* by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.” 2 U.S.C. § 437g(a)(12) (emphasis added). The provision clearly leaves the FEC “no discretion on the issue” in “requir[ing] that matter be withheld from the public.” 5 U.S.C. § 552(b)(3)(A). As the D.C. Circuit has explained, section 437g(a)(12)(A) is rooted in a concern that is analogous to the “strong confidentiality interest” served by Federal Rule of Criminal Procedure 6(e)(6), in which “secrecy is vital” to an investigation. *In re Sealed Case*, 237 F.3d 657, 666-67 (D.C. Cir. 2001). Accordingly, information properly withheld under section 437g(a)(12) is exempt from disclosure under FOIA Exemption 3.

In this case, the FEC properly withheld documents identified in the FEC’s *Vaughn* index under 2 U.S.C. § 437g(a)(12) because they relate to ongoing administrative matters. Calvert Decl. ¶ 15. *See* Ex. I (identifying documents at Bates Nos. 1-246, 265-69, 298, 304, 306-09, 311-36, and 384 as withheld under Exemption 3). This Court should find that all documents so identified in the FEC’s *Vaughn* index are properly withheld under FOIA Exemption 3.

2. The FEC properly withheld information contained in files of ongoing investigations under Exemption 7(A)

The FEC properly withheld records compiled for ongoing administrative investigations under Exemption 7(A). Exemption 7(A) of the FOIA protects from disclosure “records [or information] compiled for law enforcement purposes,” to the extent that production of such information could reasonably be expected to “interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). Information compiled for law enforcement purposes is protected by Exemption

7(A) if (i) a law enforcement proceeding is pending or prospective, and (ii) release of the information could reasonably be expected to cause some articulable harm. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). The Exemption protects information compiled for pending or prospective administrative, as well as civil and criminal, proceedings. *See, e.g., Env'tl Prot. Servs. v. EPA*, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005). Exemption 7(A) also protects information compiled for a closed law enforcement proceeding when it may be used again in other pending or prospective proceedings. *New England Med. Ctr. Hosp. v. NLRB*, 586 F.2d 377, 385-86 (1st Cir. 1976). Even information not initially obtained or generated for law enforcement purposes qualifies under Exemption 7 if it is subsequently compiled for a valid law enforcement purpose. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989).

To demonstrate the applicability of Exemption 7(A), the agency need only describe in “generic fashion” the type of interference that would result from disclosure. *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 331 (E.D. Ca. 1996), *aff'd*, 114 F.3d 1178 (4th Cir. 1997). In that regard, a simple showing that release of records compiled for law enforcement purposes “could undermine the effectiveness” of the agency’s investigation, “could reveal much about the focus and scope of the . . . investigation,” or could “provide critical insights into the [the agency’s] thinking and strategy” is sufficient. *Elec. Privacy Info. Ctr. v. Dep't of Homeland Security*, 384 F. Supp. 2d 100, 119 (D.D.C. 2005); *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996); *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1543 (D.C. Cir. 1993).

In this case, the FEC’s *Vaughn* index identifies several categories of records that the FEC has compiled for ongoing MURs. *See* Ex. I, at 114-15. The FEC properly withheld these documents because disclosure would substantially increase the ability of persons to impede the

Commission's investigations through means such as destruction or alteration of documents, intimidation of witnesses, or placement of funds out of reach of the government. Calvert Decl. ¶¶ 15, 19. *Cf. SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 750 (1984). Moreover, in the *Beam* case described above, the court reviewed *in camera* the documents identified in the FEC's *Vaughn* index at Bates Nos. 45-51, 52-56, 57, 58-59, 60, 61-63, 64-65, 66-69, 162-63, 171-233, 235-44 and 311 and sustained the government's invocation of the law enforcement privilege. *See* Ex. D. Because all documents withheld under Exemption 7(A) are of a similar nature, this Court should find that the FEC properly withheld each of these categories of documents.

3. The FEC properly withheld personal information contained in records compiled for law enforcement purposes under Exemption 7(C)

The FEC properly withheld personal information contained in records compiled for law enforcement purposes under Exemption 7(C). Exemption 7(C) provides protection for personal information in law enforcement records. 5 U.S.C. § 552(b)(7)(C). Based upon the traditional recognition of the strong privacy interests inherent in law enforcement records, the "categorical withholding" of information that identifies personal information in law enforcement records, whether about suspects, witnesses, or investigators, is appropriate under Exemption 7(C). *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (citation omitted). Exemption 7(C) has been regularly applied to withhold references to private persons who are not necessarily targets of investigations but who are merely mentioned in law enforcement files. *See, e.g., Rugiero v. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001).

"The first question to ask in determining whether Exemption 7(C) applies is whether

there is any privacy interest in the information sought,” and if so, what the magnitude of that interest is. *Associated Press v. Dep’t of Defense*, 554 F.3d 274, 284 (2d Cir. 2009). *See also Rugiero*, 257 F.3d at 552. The privacy interest and its magnitude is balanced against the magnitude of any recognized public interest that would be served by disclosure. *Schiffer v. FBI*, 78 F.3d 1405, 1410 (9th Cir. 1996). The burden to show that the public interest in disclosure outweighs the privacy interest falls on the requester. *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). However, courts routinely protect the identities of private persons contained in law enforcement records, finding the balance in protecting the privacy interest easily outweighs the potential benefit of disclosure. *See, e.g., Perrone v. FBI*, 908 F. Supp. 24, 26-27 (D.D.C. 1995).

In this case, the FEC properly withheld the identities of witnesses in records compiled for law enforcement purposes. Calvert Decl. ¶¶ 17, 19. *See* Ex. I, at 115 (identifying the category of witnesses’ name and contact information about contained in the records compiled for law enforcement purposes). *Id.* at 115, 118 (identifying portions of DOJ Crim 8 and EOUSA 1 for same reason). The FEC has demonstrated that disclosure of the identities of these witness could result in stigmatizing public attention and even harassment. Calvert Decl. ¶¶ 17. *Cf. Perrone*, 908 F. Supp. at 26-27. Accordingly, the FEC properly withheld this information under FOIA Exemption 7(C).

4. The FEC properly withheld under FOIA Exemption 5 confidential, pre-decisional recommendations protected by the deliberative process privilege and material prepared in anticipation of litigation protected by the attorney work product privilege

The FEC properly withheld confidential, pre-decisional recommendations protected by the deliberative process privilege and material prepared or gathered in anticipation of litigation

protected by the attorney work product privilege under Exemption 5. Exemption 5 of the FOIA protects “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). Courts have construed this language to “exempt those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

However, there is a significant difference between the application of privileges in civil discovery and in the FOIA context. In the former, the use of qualified privileges may be overcome by a showing of relevance or need by an opposing party. In the FOIA context, however, the Supreme Court has held that the standard to be employed is whether the documents would “routinely be disclosed” in civil litigation. *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984). By definition, documents for which a party would have to make a showing of need are not routinely disclosed and thus do not fall into this category. *FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983). Accordingly, an agency need only make a threshold showing that information is protected by one or more common law privileges to properly withhold it under Exemption 5. *See id.*

In this case, many records responsive to Request 56-1 contain information protected by the deliberative process privilege. The deliberative process protects the “decision making processes of government agencies.” *Sears, Roebuck & Co.*, 421 U.S. at 150. The privilege protects not merely documents, but also the integrity of the deliberative process itself. *Schell v. Dep’t of Health and Human Servs.*, 843 F.2d 933, 940 (6th Cir. 1988). For the deliberative process privilege to be invoked, a communication must be pre-decisional, and it must be

deliberative. *Id.* So long as a document is generated as part of a continuing process of agency decision making, Exemption 5 is applicable. “The exemption thus 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.* To evaluate the applicability of the deliberative process privilege, “the key question in Exemption 5 cases [is] whether disclosure of materials would expose an agency’s decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency’s ability to perform its functions.” *Id.*

Here, the FEC withheld confidential, pre-decisional recommendations and opinions under Exemption 5 because they are protected by the deliberative process privilege. Calvert Decl. ¶¶ 16, 19. *See also* Ex. I (identifying documents at Bates Nos. 1-611, and DOJ Crim 3-27, EOUSA 1, and DOJ Civil 1-6 as withheld under Exemption 5). Moreover, the FEC demonstrated that disclosure of this information would interfere with agency decision making. *Id.* ¶ 16. Accordingly, this Court should hold that the FEC properly withheld documents at Bates Nos. 1-611 under Exemption 5 because they are protected by the deliberative process privilege.

Additionally, the same records responsive to Request 56-1 contain information protected by the attorney work product doctrine. The requested material encompasses information about interactions among Commission counsel about one or more pending enforcement matters, and between the Commission and DOJ counsel about this case and other lawsuits that associates of the Fieger firm have filed. The attorney work produce privilege shields from discovery a counsel’s memoranda, reports, correspondence, and other information that would disclose the mental impressions, conclusions, opinions, or legal theories of an attorney or other party

representative prepared in anticipation of litigation. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); Fed. R. Civ. P. 26(b)(3). This privilege protects from discovery materials “prepared or obtained because of the prospect of litigation,” *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996) (emphasis omitted), as well as an attorney’s mental impressions, opinions, and legal theories concerning litigation. *Hickman*, 329 U.S. at 510-11. *See also* Fed. R. Civ. P. 26(b)(3).

In this case, records responsive to Request 56-1 consist of documents prepared or gathered by the Commission attorneys to defend the various lawsuits brought by associates of the Fieger firm, including emails between attorneys, attorney notes, and charts. Calvert Decl. ¶ 16. Such documents unquestionable go to the heart of the work product doctrine. *See also* Ex. I (identifying documents at Bates Nos. 1-611 as withheld under Exemption 5). The *Beam* court reviewed *in camera* the documents identified in the FEC’s *Vaughn* index at Bates Nos. 45-51, 52-56, 57, 58-59, 60, 61-63, 64-65, 66-69, 162-63, 171-233, 235-44 and 311 and sustained the government’s withholding of those documents under the attorney work product privilege. *See* Ex. D. Because all documents for which the FEC invoked the Exemption 5 are the same type of documents, this Court should hold that the FEC properly withheld documents at Bates Nos. 1-611 under Exemption 5 because they are protected by the attorney work product privilege.

5. The FEC properly withheld personal information under Exemption 6

The agency properly withheld personal information under FOIA Exemption 6. Exemption 6 permits the government to withhold all information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). All information that

“applies to a particular individual” meets the threshold requirement for Exemption 6 protection. *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982); *Balderrama v. Dep’t Homeland Security*, 2006 WL 889778, at *9 (D.D.C. Mar. 30, 2006).

After the agency has demonstrated that a personal privacy interest is threatened by a requested disclosure, the burden switches to the plaintiff to show the public interest in disclosure. *Carter v. U.S. Dep’t of Commerce*, 830 F.2d 388, 391 nn. 8 & 13 (D.C. Cir. 1987); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 22 (D.D.C. 2006). In *Reporters Committee, supra*, the Supreme Court limited the concept of public interest under the FOIA to the “core purpose” for which Congress enacted it: To “shed light on an agency’s performance of its statutory duties.” 489 U.S. at 773. Moreover, the Court has held that “the public interest sought to be advanced” must be “a significant one.” *Nat’l Archives & Record Admin. v. Favish*, 541 U.S. 157, 172 (2004). As a result, information that does not *directly* reveal the operations or activities of the federal government “falls outside the ambit of the public interest that the FOIA was enacted to serve.” *Reporters Cmte.* 489 U.S. at 775. Indeed, the Court held that the FOIA’s “core purposes” would not be furthered by disclosure of a record about a private individual, even if it “would provide details to include in a news story, [because] this is not the kind of public interest for which Congress enacted the FOIA.” *Id.* at 774.

In this case, as identified in the FEC’s *Vaughn* index, the Commission redacted personal information about government employees, their family members, and private citizens. Calvert Decl. ¶¶ 19, 20, 31, 36. *See* Ex. I (identifying personal information withheld in documents at Bates Nos. 612-1082, 1084-1200, 1202-1267, 1268-1331, 1333, 1335-41, 1346, 1351, 1356-57, 1362-76, 1378, 1384-85, 1393-1449, 1451, 1453-85, 1487-1511, 1513, 1515-1704, and DOJ

Crim 8), under FOIA Exemption 6). The FEC properly withheld personal information about government employees. *See, e.g., Cowdery, Ecker & Murphy, LLC v. Dep't of Interior*, 511 F. Supp. 2d 215, 219 (D. Conn. 2007). The FEC also properly withheld the identity of job applicants. *See Core v. U.S. Postal Serv.*, 730 F.2d 946, 948-49 (4th Cir. 1984). Additionally, the agency properly withheld contact information for government employees potentially subject to annoyance or harassment. *Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992); *Cal-Trim Inc. v. IRS*, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007). *See also Keys v. Dep't of Homeland Security*, 570 F. Supp. 2d 59, 68 (D.D.C. 2008). However, the FEC disclosed all non-exempt information in the records. Calvert Decl. ¶¶ 31, 36, 37.

Moreover, disclosure of the withheld personal information, identities of job applicants, and email addresses of government employees and private citizens would not “shed[] light on an agency’s performance of its statutory duty” or inform citizens about ““what their government is up to.”” *Reporters Cmte.*, 489 U.S. at 773. Rather, the disclosure of this information would only reveal “who” works for the federal government and not directly show “how” any alleged “government practices” occurred. As other courts have concluded, “there is no reason to believe that the public [would] obtain a better understanding of the workings of various agencies by learning” the personal information, job applicants’ identities, or email addresses of the individuals associated with the documents. *Voinche v. FBI*, 940 F. Supp. 323, 330 (D.D.C. 1996), *aff’d*, 1997 WL 411685 (D.C. Cir. June 19, 1997). Indeed, “[u]nless the public would learn something *directly* about the workings of the *Government* by knowing [personal information, email addresses and identities of job applicants] . . . , their disclosure is not affected with the public interest.” *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879

(D.C. Cir. 1989) (first emphasis added). Thus, public interest in disclosure of the information is virtually non-existent. Accordingly, this Court should hold that the FEC properly withheld personal information contained in the responsive records under Exemption 6.

6. The FEC properly withheld trivial internal information under Exemption 2

Finally, the agency properly withheld trivial internal information under FOIA Exemption 2. Exemption 2 protects records that are “related solely to the internal personnel rules and practices of an agency.” In *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), the Supreme Court construed Exemption 2 as protecting internal agency matters so routine or trivial that they could not be “subject to . . . a genuine and significant public interest.” *Id.* at 369. As such, Exemption 2 is the only exemption in the FOIA having a conceptual underpinning totally unrelated to any harm caused by disclosure per se. *Edmonds v. FBI*, 272 F. Supp. 2d 35, 51 (D.D.C. 2003) (observing that showings of “foreseeable adverse consequence[s]” are not necessary to withhold information that is trivial and of no public interest). Accordingly, under Exemption 2, an agency may withhold all trivial internal information from documents. *Scherer v. Kelley*, 584 F.2d 170, 175-76 (7th Cir. 1978) (approving agency’s withholding of “file numbers, initials, signature and mail routing stamps, references to interagency transfers, and data processing references”). See also *Larson v. Dep’t of State*, No. 02-1937, 2005 WL 3276303, at *14 (D.D.C. Aug. 10, 2005) (finding that “low 2” covers “message routing data”); *Coleman v. FBI*, 13 F. Supp. 2d 75, 78 (D.D.C. 1998) (listing “mail routing stamps” among types of information properly withheld under “low 2”); *Wilson v. Dep’t of Justice*, 1991 WL 111457, at *3 (D.D.C. June 13, 1991) (applying “low 2” to State Department transmittal slips from low-level officials); *Ray v. FBI*, 441 F. Supp. 2d 27, 33 (D.D.C. 2006) (internal FBI telephone

number); *Odle v. Dep't of Justice*, 2006 WL 1344813, at *13 (N.D. Cal. May 17, 2006) (“non-public [Office of Professional Responsibility] fax numbers and telephone numbers”); *Middleton v. Dep't of Labor*, 2006 WL 2666300, at *6 (E.D. Va. Sept. 15, 2006) (concluding that “it is apparent” that “the redacted ID numbers [do not] constitute a matter of genuine public interest”).

In this case, the agency withheld non-public government employee phone numbers, facsimile numbers and email addresses under Exemption 2 because they are trivial internal information. Calvert Decl. ¶¶ 30, 36. *See* Ex. I (identifying trivial internal government information contained in documents at Bates Nos. 783-84, 788-811, 816-17, 820-24, 826-27, 834, 874, 1052-81, 1084-1199, 1202-1265, 1268-1331, 1333, 1335-37, 1341, 1346, 1351, 1356-57, 1341, 1346, 1351, 1356-57, 1362-72, 1374-76, 1378, 1378, 1384-85, 1393, 1449, 1451, 1453-1485, 1487-1511, 1513, 1515-1523, 1541-1549, and 1567-1704 as withheld under Exemption 2). However, the FEC provided all other non-exempt information contained in the responsive records. Calvert Decl. ¶ 36. Because there is no public value in disclosure in this information, this Court should hold the FEC properly withheld this information under Exemption 2.

E. The FEC Disclosed All Non-Exempt Portions of Responsive Records

The FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). Of course, when an agency demonstrates that the withheld records are exempt in their entireties, courts have upheld the determination that no segregation is possible. *See, e.g., Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 371-72 (D.C. Cir. 2005) (holding that

because Exemption 5 protects from disclosure attorney work-product documents in full, including factual portions, such portions are not subject to segregability).

In this case, the FEC properly held documents protected by Exemption 3, Exemption 5, and Exemption 7(A) in their entirety because there was no portion of the document that was not protected by the Exemptions. Calvert Decl. ¶¶ 15, 16. By contrast, for all other documents, the agency carefully redacted only information protected by Exemption 6 and Exemption 2, and produced all other relevant information. *Id.* ¶¶ 36, 37. As a result, the agency met its segregability obligations under the FOIA. *Accord Manchester v. FBI*, 2005 WL 3275802, at *4 (D.D.C. Aug. 9, 2005).

VI. CONCLUSION

For the foregoing reasons, this Court should grant defendant's motion for summary judgment.

Dated: August 21, 2009

Respectfully Submitted,

THOMASENIA P. DUNCAN
General Counsel

TONY WEST
Assistant Attorney General

DAVID KOLKER
Associate General Counsel

TERRENCE BERG
United States Attorney

HARRY J. SUMMERS
Assistant General Counsel

DERRI T. THOMAS
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
Phone: (313) 226-9153
E-mail: derri.thomas@usdoj.gov
(P53439)

/s/ Greg J. Mueller
GREG J. MUELLER
Attorney
FEDERAL ELECTION
COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
Phone: (202) 694-1650
Email: gmueller@fec.gov

/s/ James D. Todd, Jr.
JOHN R. TYLER, Assistant Director
JAMES D. TODD, JR., Senior Counsel
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, DC 20530
Phone: (202) 514-3378
Email: james.todd@usdoj.gov

Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 21, 2009, he filed the foregoing document with the Court's ECF system, through which a copy will be emailed to the following counsel of record:

Michael R. Dezsi, Esq.
FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX, P.C.
19390 West Ten Mile Road
Southfield, Michigan 48075
m.dezsi@fiegerlaw.com
Attorney for Plaintiff

/s/ James D. Todd, Jr.
JAMES D. TODD, JR.