UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARK W. MILLER,	:	**Case No. 1:12:-CV-242**
	:	
Plaintiff,	:	**Chief Judge Dlott**
	:	
v.	:	
	:	**PLAINTIFF'S MEMORANDUM**
FEDERAL ELECTION COMMISSION,	:	**IN OPPOSITION TO DEFENDANT'S**
	:	**MOTION FOR SUMMARY**
Defendant.	:	**JUDGMENT (Doc. No. 8**
	:	

COMES NOW the Plaintiff, Mark W. Miller, by and through undersigned counsel, and hereby tenders the attached Memorandum in Opposition to Defendants' Motion for Summary Judgment (Doc No. 8). Also attached hereto are the (i) Declaration of Christopher P. Finney; and (ii) Response to Proposed Undisputed Facts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing, together with the attachments thereto, will be served upon all counsel of record via the Court's electronic filing system on the date of filing.

/s/ Curt C. Hartman

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PLAINTIFF'S MEMORANDUM

IN OPPOSITION TO

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Doc. No. 8)

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MEMORANDUM IN OPPOSITION

I. Introduction

"One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached." *White v. Clinton Cty. Bd. of Commr's*, 76 Ohio St.3d 416, 419, 1996-Ohio-380, 667 N.E.2d 1223. For an informed public "is the most potent of all restraints upon misgovernment." *Grosjean v. America Press Co.*, 297 U.S. 233, 250 (1936). "[They] alone can here protect the values of democratic government." *New York Times v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is one of the principle means afforded by the United States Congress by which the public may have access to and understand the operations of the government. For it is through the FOIA that the public is able to serve a vital role as the ultimate guardian of our republic. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989)("[t]he generation that made the nation thought secrecy in government one of the instruments of Old World tyranny, and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to" (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting))). Thus, any effort by the government and governmental officials to deny full knowledge to the public of governmental operations must be met with extreme skepticism, less we lose the republic given to given to us by the blood and sweat of our Founding Fathers. For as Judge Keith of the United States Court of Appeals of the Sixth Circuit recognized:

> Democracies die behind closed doors. . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.

Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002). Thus, this action was commenced in order to vindicate the principles at the heart of the Freedom of Information Act – exposure of governmental operations to public scrutiny so that the public may serve its right role as a guardian of the republic.

II. Factual Overview and Background

Starting in March 2009, Congresswoman Jean Schmidt (OH-2) initiated or participated in a series of legal proceedings against or relating to one of her political opponents, David Krikorian.[1] (Finney Decl. ¶6.) During the course of the first of those proceedings, Mr. Krikorian learned that Ms. Schmidt had illegally received and accepted hundreds of thousands of dollars in funding for those proceedings from a non-profit organization involved with or interested in matters the United States Congress. (Finney Decl. ¶7.) Ultimately, in August of 2011, the House Ethics Committee ruled that the provision of such gifts to Ms. Schmidt (which the House Ethics Committee approximated totaled nearly $500,000) was a violation of House Rules and ordered Schmidt to repay such amounts, though allowing the lion's share to be repaid through a legal expense trust. However, the Committee did require Ms. Schmidt to repay "immediately" approximately $40,000.00, from sources other than the legal expense trust.[2] Subsequently, the treasurer for Ms. Schmidt's campaign

[1] In November 2008, Mr. Krikorian ran as an independent candidate against Ms. Schmidt in the general election for Congress. (Finney Decl. ¶5.)

[2] A copy of the complete report of the House Ethics Committee concerning Ms. Schmidt may be found at the following government websites: http://ethics.house.gov/committee-report/matter-allegations-relating-representative-jean-schmidt/ and at http://www.gpo.gov/fdsys/pkg/CRPT-

committee, Phil Greenberg, wrote to the Federal Election Commission seeking a formal opinion as to whether the campaign committee itself, as opposed to Ms. Schmidt, could pay that portion of the debt which the House Ethics Committee had ordered to be repaid from sources other than the legal expense trust. (Complaint ¶15 & Exh. A; Answer ¶15.) Upon receipt of the request for an advisory opinion from Mr. Greenburg, the FEC assigned advisory opinion request number 2011-20 to that request.[3] (Complaint ¶17; Answer ¶17.)

Pursuant to 11 CFR 112.2(a), "[a]dvisory opinion requests which qualify under 11 CFR 112.1 shall be made public at the Commission promptly upon their receipt." Thus, upon receipt of the request for an advisory opinion from Mr. Greenburg, the FEC publicly posted AOR 2011-20 in its website on October 18, 2011. (Complaint ¶20; Answer ¶20.) Even though any interested person may submit written comments concerning any advisory opinion requests made public by the FEC, 11 CFR 112.3(a), and disposition or resolution of any advisory request will occur within 60 calendar days after receipt of an advisory opinion request, 11 CFR 112.4(d), the FEC removed AOR 2011-20 from its website approximately one week after the AOR was posted on its website without any public explanation. (Complaint ¶26; Answer ¶26.)

Plaintiff Mark W. Miller became aware of the request for an advisory opinion submitted on behalf Ms. Schmidt's campaign committee, as well as its sudden and unexplained withdrawal from the FEC's website. (Finney Decl. ¶13.) Concerned, nay convinced, that Ms. Schmidt through her campaign committee had failed to disclose all material facts relating to the request (which would

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112hrpt195/pdf/CRPT-112hrpt195.pdf.

[3] Pursuant to 11 CFR 112.1(f), "[u]pon receipt by the Commission, each request which qualifies as an advisory opinion request (AOR) under 11 CFR 112.1 shall be assigned an AOR number for reference purposes."

make her ineligible to receive the requested opinion), as well as concerned with the sudden and unexplained removal of AOR 2011-20 from the FEC's website, Mr. Miller tendered a request to the FEC pursuant to the Freedom of Information Act. (Finney Decl. ¶14.) Mr. Miller's request sought:

> copies of all records received, produced, maintained, or kept by the Federal Elections [sic] Commission pertaining to a letter sent to [the] Commission by Phil Greenberg on behalf of [the] Schmidt for Congress Committee ("Greenberg Letter"). I do not request a copy of the Greenberg Letter, nor do I request a copy of the public comment letter submitted by David Krikorian received by the Commission on October 26, at approximately 3:20 p.m.

(Buckley Decl. ¶ 9; Baker Decl. ¶8.)

On December 5, 2011, the FOIA Service Center at the Federal Elections Commission ("FEC") received a FOIA request letter via regular mail from Mr. Miller. (Buckley Decl. ¶7.) This request was numerically designated by the FEC as FOIA Request 2012-13. (Buckley Decl. ¶7.) Upon receipt of Mr. Miller's FOIA letter, the Freedom of Information Act set forth the following obligation upon the FEC:

> [to] determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and [to] immediately notify the person making such request of such determination and the reasons therefor . . . .

5 U.S.C. § 552(a)(6)(A)(i); *see* 11 CPF 4.7(c). Thus, the FEC was to determine whether it would comply with Mr. Miller's request and to notify him of this decision by January 4, 2012. But that date came and passed and the FEC did not provide any notification or other communication to Mr. Miller concerning his FOIA request and whether it would comply with the request for records. (Finney Decl. ¶15.)

In light of the silence on the part of the FEC, Mr. Miller's next option was to commence an administrative appeal:

> Any person . . . who has received no response within ten working days . . . after the request has been received by the Commission, may appeal . . . the failure to respond by requesting the Commission to direct that the record be made available.

11 CPF 4.8(a).[4] Thus, on January 9, 2012, Mr. Miller submitted an appeal to the FEC. (Complaint ¶36 & Exh. C.; Answer ¶36.) And to ensure or clarify his contact information, Mr. Miller re-submitted the appeal to the FEC on February 14, 2012. (Complaint ¶37 & Exh. D; Answer ¶37.) In terms of adjudicating the appeal, the FEC was obligated to:

> make a determination with respect to any appeal within twenty days (excluding Saturdays, Sundays and legal holidays) after receipt of the appeal (or within such extended period as is permitted under Sec. 4.7(c) of this part).

11 CFR 4.8(f). Twenty working days after January 9, 2012, was February 7, 2012.

After no determination was made with respect to the appeal by that date, Mr. Miller commenced the present action, waiting until March 26, 2012, to actually file the complaint. In the present action, the following relief is sought from the Court: (i) to declare that the FEC's failure to respond to the Mr. Miller's FOIA request is unlawful under FOIA; (ii) to declare that FEC's failure to respond to the Mr. Miller's appeal is unlawful under FOIA; (iii) to order and enjoin the FEC to make the records requested immediately available to Mr. Miller without any fee or charge; (iv) to award Mr. Miller costs and reasonable attorney fees, pursuant to 5 U.S.C. §552(a)(4)(E); and (v) to grant Mr. Miller such other relief to which he may be entitled, in law or in equity.

Only after the commencement of this lawsuit did the FEC finally respond to Mr. Miller's FOIA request. On April 18, 2012, the FEC tendered certain responsive records to Mr. Miller.

[4] While the Freedom of Information Act provides for 20 days before an appeal is filed, the FEC's own regulations reduce this period to 10 days.

However, the FEC withheld numerous records that were responsive, claiming that they were exempted from disclosure pursuant to the FOIA.

Based upon a document which the FEC submitted and which it characterized as a *Vaughn* index, there were a total of 77 records responsive to Mr. Miller's request.[5] Of that number, the FEC produced 12 records without any redactions and 10 records with partial redactions; but as for the remaining 55 records, the FEC withheld those records in their entirety.

III. Argument

A. Mootness – Plaintiff's claim for attorney fees, which the FEC failed to even address, precludes the conclusion that this action has become moot.

Initially, the FEC claims that this entire action "was rendered moot by the Commissions' production of responsive documents in April 2012." (FEC Motion, at 1; *accord* FEC Motion, at 7-8.) "If a person receives all the information he has requested under FOIA, even if the information was delivered late, his FOIA claim is moot to the extent that such information was sought." *Grabe v. United States Dep't of Homeland Security*, 2011 WL 2565246 (11th Cir. June 29, 2011). However, regardless of whether the FEC's belated production of documents was complete (including withholding only those records specifically permitted to be withheld under the FOIA), "when a plaintiff seeks information under FOIA and associated attorney fees, courts retain equitable jurisdiction to adjudicate the fee claim after the defendant produces the requested information and thus renders the FOIA claim moot." *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 493 (7th Cir. 2011).

Because the FEC failed to produce any documents long after the statutory deadlines had

passed, Mr. Miller commenced this action, seeking both the production of documents and an award of attorney fees. (*See* Complaint (Doc. No. 1).) Thus, regardless of the Court's disposition of the issue of whether the FEC has met its burden of justifying the withholding of responsive records, the FEC has failed to even address the claim for the award of attorney fees and, accordingly, the FEC is not entitled to summary judgment with respect to that claim. *Bolger v. District of Columbia*, 608 F.Supp.2d 10, 29 (D.D.C. 2009)("[b]ecause defendants have failed to address this claim in their motion, summary judgment on this basis will be denied."

Pursuant to the Freedom of Information Act, "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case. . . in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). And in 2007, Congress passed and the president signed the OPEN Government Act of 2007 which amended the Act by expanding the meaning of "substantially prevailed" so as to add a clause which provides that "a complainant has substantially prevailed if the complainant has obtained relief through either – (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." *Id.* § 552(a)(4)(E)(ii). Thus, though this amendment, "Congress amended the FOIA to incorporate the catalyst theory" in the context of awarding attorney fees. *Summers v. Department of Justice*, 569 F.3d 500, 503 (D.C. Cir. 2009); *accord Judicial Watch, Inc. v. Bureau of Land Management*, 562 F.Supp.2d 159, 165 (D.D.C. 2008)("the OPEN Government Act of 2007 . . . altered the fee-shifting provision in FOIA to remove it from under *Buckhannon's* compass"), *rev'd and vacated on other grds.* 610 F.3d 747 (D.C. Cir. 2010); *see* Bu*ckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human*

[5] These 77 documents consisted of a total of 218 pages.

Resources, 532 U.S. 598 (2001)(rejecting catalyst theory of awarding attorney fees under fee-shifting statutes).

As it well established, the party moving for summary judgment "bears the initial burden of showing that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law." *McCoy v. Burns*, 756 F.Supp.2d 868, 875 (S.D. Ohio 2010); *accord* Fed. R. Civ. P. 56(a)("[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). Yet, in failing to address Mr. Miller's claim for attorney fees which, as noted above, is permitted even under a catalyst theory of recovery, the FEC has failed to meet its initial burden of demonstrating entitlement to judgment as a matter of law on such claims. Thus, at best, the FEC's motion is best characterized as a motion for partial summary judgment.

But beyond the failure of the FEC to even raise the issue of entitlement *vel non* to attorney fees, the evidence demonstrates that, other than an initial acknowledgment of Mr. Miller's FOIA request, every communication from Mr. Miller was ignored by the FEC, including the administrative appeal of the FEC's refusal to substantively respond to the FOIA request. It was only after the commencement of this action did the FEC finally provide some responsive records, though, as noted above and developed below, withholding *in toto* the vast majority of records responsive to Mr. Miller's FOIA request. Accordingly, the reasonable inference to draw from such evidence is that, without the initiation of this action, the FEC would have continued to refuse to acknowledge or respond to Mr. Miller's requests for these public documents from the FEC. At a minimum, though, discovery to this issue is necessary so that a factual records may be developed by which the Court may properly adjudicate the claim for attorney fees. But in the interim and as noted above, the

failure of the FEC to even address the claim for attorney fees within its motion precludes the granting of summary judgment with respect to that claim.

B. Adequacy of Search – no issues exists with respect to the adequacy of the search.

Due to the very narrow scope of the FOIA request tendered by Mr. Miller, as well as the short time period covered by the request, it appears that the FEC has conducted a search of its records that was reasonable calculated to uncover all relevant documents. *Valencia-Lucena v. U.S. Coast Guard,* 180 F.3d 321, 325 (D.C.Cir.1999)("[a]n agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'"). Accordingly, Mr. Miller does not take issue or dispute the adequacy of the search.

C. Claimed Exemptions to Production – the FEC has failed to meet its evidentiary burden of demonstrating, with respect to each and every withheld record, the application of a statutory exemption to justify the non-production of the record.

The Freedom of Information Act provides that every federal agency shall promptly make available upon request records reasonably described. 5 U.S.C. § 552(a)(3)(A). For the purpose of the Act is "to open up the workings of government to public scrutiny through the disclosure of government records." *Stern v. FBI,* 737 F.2d 84, 88 (D.C. Cir. 1984) (quotation omitted). In so doing, however, Congress acknowledged that "legitimate governmental and private interests could be harmed by release of certain types of information." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871, 872 (D.C. Cir. 1992). Accordingly, FOIA recognizes nine exemptions pursuant to which an agency may withhold requested information. 5 U.S.C. § 552(a)(4)(B) & (b)(1)-(9). However, a defendant agency seeking summary judgment must demonstrate that no material facts are in dispute and that each responsive record that it has located

has been produced to the plaintiff or is exempt from disclosure under one of the exemptions enumerated in 5 U.S.C. § 552(b) or otherwise "inextricably intertwined with" exempt information (and therefore not reasonably segregable). *Clemente v. F.B.I.*, 2012 WL 1245656, at *5 (D.D.C. Apr. 13, 2012); *accord Students Against Genocide v. U.S. Dep't of State*, 257 F.3d 828, 833 (D.C. Cir. 2001).

"Under the [Freedom of Information] Act, an agency may not withhold or limit the availability of any record, unless one of the FOIA's specific exceptions applies." *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 543 (6th Cir. 2001). These exceptions are to be narrowly construed, and the burden is on the agency to justify its action. *Id.*; 5 U.S.C. § 552(a)(4)(B). The FEC has withheld the bulk of the identified responsive documents, *i.e.*, withholding 55 of the 77 responsive records, based upon a claim that at least one of three specific exemptions is applicable:

(i) Exemption 3 – nondisclosure mandated by other federal statute;

(ii) Exemption 5 – inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency;

(iii) Exemption 6[6] – personal privacy interest.

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6 In the motion for summary judgment, the FEC claims that it "has relied upon two of the nine potential exemptions to support its withholding determinations" (FEC Motion, at 14-15) and then cites to Exemption 3 and Exemption 5. With respect to Exemption 6, the FEC does note, though does not develop any legal argument, that "small portions of personally identifiable information such as personal e-mail addresses and telephone numbers were removed from produced documents . . . and might also be subject to FOIA Exemption 6." (FEC Motion, at 15 n.5.) Claiming that the "limited scope of the actual reductions," the FEC asserts that "a full discussion of the applicability of Exemption 6 is not required." (FEC Motion, at 15 n.5.) Of course, as this matter is before the Court on a motion for summary judgment, "the moving party bears the initial burden of showing that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law." *McCoy v. Burns*, 756 F.Supp.2d 868, 875 (S.D. Ohio 2010); *accord* Fed. R. Civ. P. 56(a)("[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"); *Sua Ins. Co. v. S&O Investments*, LLC, 2011 WL 5121285 (S.D. Ala. Oct. 28, 2011)("*ipse dixit* is inadequate as a matter

Ultimately, this Court must evaluate and determine the propriety of the claimed exemptions by which the FEC has sought to withhold 55 of 77 responsive records (in their entirety) from Mr. Miller. In so doing, this Court must consider not only the law and the narrow scope of the exemptions themselves, but also the sufficiency of the FEC's *Vaughn* index and the ability and effort by the FEC to segregate exempt from non-exempt information within any withheld record. Before addressing the exemptions themselves, the latter issues will be considered firstly.

1. The *Vaughn* Index – the index submitted by the FEC fails to adequately establish the applicability of the claimed exemptions.

An agency's denial of a FOIA request is reviewed by a district court *de novo*. 5 U.S.C. § 552(a)(4)(B). In an effort to satisfy its burden of justifying the withholding of any responsive document, the agency ordinarily submits a "*Vaughn* index" in which "the agency describes the documents responsive to a FOIA request and indicates the reasons for redactions or withholdings in sufficient detail to allow a court to make an independent assessment of the claims for exemptions from disclosure under the Act." *Rugiero*, 257 F.3d at 544; *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The defendant must include in the *Vaughn* index "a description of each document being withheld, and an explanation of the reason for the agency's nondisclosure." *Oglesby v. United States Dep't of Army*, 79 F.3d 1172, 1176-77 (D.C. Cir.1996). The index must provide "as much information as possible without thwarting the [asserted] exemption's purpose." *King v. United States Dep't of Justice*, 830 F.2d 210, 224-25 (D.C. Cir.1987).

In its effort to meet its burden of so demonstrating the application of the claimed exemptions, the FEC submitted what it characterized as a *Vaughn* index. However, what the FEC has submitted:

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of law to carry the plaintiff's initial burden on motion for summary judgment").

(i) is not supported with any affidavit or declaration; and (ii) fails to contain sufficient details to justify the non-production of the withheld documents based upon the exemptions claimed within that index. For "when an agency seeks to withhold information[,] it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). For example, "[b]arren assertions that an exempting statute has been met cannot suffice to establish that fact." *Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 831 (D.C. Cir. 1979). Nor can an agency meet its obligation simply by quoting the statutory language of an exemption. *See, e.g., Army Times Pub. Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993) (remarking that affidavits "[p]arroting the case law" were insufficient).

Yet, in this case, for a vast majority, if not essentially all, of the documents withheld, the FEC has simply provided a broad and generalized description of the records, *i.e.*, date, author, recipients and a very general description,[7] none of which demonstrating or identifying the reasons why a particular exemption is relevant and applicable to the withheld document. The present *Vaughn* index is comparable to the situation the Court of Appeals for the District of Columbia Circuit recognized as being inadequate:

> [C]onclusory assertions of privilege will not suffice to carry the Government's burden of proof in defending FOIA cases. A typical line from the index supplied in this case identifies who wrote the memorandum, to whom it was addressed, its date,

[7] And in terms of recipients, there is no indication whether the identified recipients were the principle recipients of the record or whether they were simply copied or blind copied. Of course, this presumes that the FEC actually listed all such recipients and did not limit the description in the index only to the principle recipients while ignoring those individuals who were copied or blind copied on any of the responsive records.

> and a brief description of the memorandum such as "Advice on audit of reseller whether product costs can include imported freight charges, discounts, or rental fees. Sections 212.93 and 212.92." . . . That is all we are told, save for the affidavits submitted by the regional counsel which repeat in conclusory terms that all the documents withheld fall within one or another of the exemptions.
>
> Such an index is patently inadequate to permit a court to decide whether the exemption was properly claimed. . . .

Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980); *see also, e.g.*, *American Management Services, LLC v. Department of Army*, 842 F.Supp.2d 859, 874 (E.D. Va. 2012)("there is . . . insufficient factual information to determine conclusively whether each withheld document relates to the Army's deliberative process. For example, in an email dated June 9, 2010, the *Vaughn* index states that the text of the email was withheld where the content related to "recent discussion with Clark representatives concerning termination of Pinnacle from management of Fort Benning family housing").

In this case, the *Vaughn* index submitted by the FEC contains nothing more than generalized and conclusory descriptions of the withheld documents that are similar to descriptions which other courts have concluded to not be sufficient to demonstrate the application of a claimed exemption. For example, the FEC describes FEC0001 as a memorandum to file concerning a "telephone call with member of the public" regarding AOR 2011-20; such a description fails to provide any means to assess the application *vel non* of the claimed exemptions. FEC0005 simply references an effort to contact via telephone the "original requestor in AOR 2011-20; FEC0095 simply concerns a telephone call with Don Brey (who was counsel for the Schmidt campaign committee) concerning the withdrawal of AOR 2011-20 from the website; and FEC00158-00159 simply provides the conclusory declaration that it concerns "related confidential, active enforcement matters." Time and space preclude an extended and detailed assessment of the deficiency of the descriptions of each of

the responsive records withheld; the foregoing simply demonstrates the failure of the FEC to meet its evidentiary burden of justifying the invocation of exemptions under the Freedom of Information Act with respect to but a few of the withheld records, though the deficiency is applicable for the vast majority of the withheld documents.[8]

2. Segregability Considerations – the FEC fails to demonstrate the necessity for the withholding of 55 responsive records in their entirety.

Once an agency identifies a document that it believes falls within an exemption, it must undertake a "segregability analysis," in which it separates the exempt from the non-exempt portions of the document, and produces the relevant non-exempt information. 5 U.S.C. § 552(B)("[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection"); s*ee Vaughn,* 484 F.2d at 825 ("an entire document is not exempt merely because an isolated portion need not be disclosed. Thus the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information.").

Furthermore, the *Vaughn* index should contain a description of the segregability analysis, explaining "in detail which portions of the document are disclosable and which are allegedly exempt." *Id.* at 827; *see King,* 830 F.2d at 224 (quotation omitted) (agency should provide a "relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they

[8] Mr. Miller would request that the Court consider an oral argument wherein the sufficiency *vel non* of the descriptions of the each and every withheld records could be addressed. Such a process would allow the FEC to explain how and why the description is adequate in order to meet its burden of demonstrating the application of the claimed exemption to each withheld record, as well as an opportunity for Mr. Miller to challenge such explanation.

apply"). "A submission that does not do that does not even qualify as a 'Vaughn index.'" *Schiller v. NLRB*, 964 F.2d 1205, 1210 (D.C.Cir.1992).

Thus, courts require agencies to demonstrate that they have disclosed all reasonably segregable, nonexempt information. The Sixth Circuit discussed the requirements concerning segregability as follows:

> The agency has the burden to show that portions withheld are not segregable from the disclosed material. Under this principle of segregability, an agency cannot justify withholding an entire document simply because it contains some material exempt from disclosure. Rather, an agency must supply a relatively detailed justification and explain why materials withheld are not segregable.

Rugiero, 257 F.3d at 553.

While some of the withheld records may ultimately need to be withheld in their entirety, the FEC has done so with 55 of the 77 records identified by the FEC as being responsive to Mr. Miller's FOIA request. And despite having the obligation "to supply a relatively detailed justification and explain why materials withheld are not segregable," the FEC has failed to undertake any such effort in this case. Thus, the FEC has not met its burden of demonstrating that the 55 responsive records withheld in whole do not contain any information which may be disclosable under the Freedom of Information Act.

3. Exemption 3 – the FEC overextends the scope of non-disclosure required by another provision of federal law.

Of the 88 records responsive to Mr. Miller's FOIA request and identified by the FEC, the FEC has invoked FOIA Exemption 3 with respect to 34 of those records.[9]

[9] Of these 34 records, 31 records have been withheld in their entirety. With respect to some of the records withheld under a claim of Exemption 3, the FEC has invoked other exemptions with respect to most, but not all, of these records, too.

FOIA Exemption 3, 5 U.S.C. § 552(b)(3)(A), protects information specifically exempted by a statute other than FOIA "if that statute... (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." "A two-part inquiry determines whether Exemption 3 applies to a particular FOIA request. The court first determines whether the withholding statute meets the requirements of Exemption 3 and then determines whether the requested information falls within the scope of the withholding statute." *Raher v. Federal Bureau of Prisons*, 2011 WL 2721613 (D. Ore. May 28, 2011); *accord Central Platte Nat. Res. Dist. v. United States Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011)("[w]hen determining whether FOIA exemption 3 is applicable, the court first decides if a statute is a withholding statute and then determines whether the information sought after falls within the boundaries of the non-disclosure statute" (quoting *Association of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 332 (D.C. Cir. 1987))). With respect to the bulk of records withheld by the FEC in this case, the FEC simply asserts in a conclusory manner that "FECA's confidentiality provision, 2 U.S.C. § 437g(a)(12), plainly meets the Exemption 3 standard." (FEC Motion, at 16.) But as developed below, the FEC's self-serving declaration is belied by the law and dearth of evidence it has offered on the subject.

2 U.S.C. § 437g(a)(12)(A) provides that:

> any 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.

Initially, Mr. Miller concedes that, to a certain and limited degree, 2 U.S.C. § 437g(a)(12)(A) is a withholding statute that meets the requirements of 5 USC § 552(b)(3)(A)(ii) in that 2 U.S.C. §

437g(a)(12)(A) "refers to particular types of matters to be withheld." Thus, the issue in this case relative to the records withheld under the claim of Exemption 3 is whether the requested, but withheld, records fall within the scope of 2 U.S.C. § 437g(a)(12)(A) and, specifically, whether the FEC has met its burden of demonstrating the applicability of 2 U.S.C. § 437g(a)(12)(A) for the withheld records. *See Garside v. Webster*, 733 F.Supp. 1142 (S.D. Ohio 1989)("[i]t is further the intent of FOIA that the exemptions are to be narrowly construed and the government bears the burden to prove that the information was properly withheld under an exemption").

By its express terms, 2 U.S.C. § 437g(a)(12)(A) applies to the public disclosure of "any notification" or "any investigation" under the Federal Election Campaign Act ("FECA"). In order to understand and place in context these two concepts, an overview of the process is necessary. The United States District Court for the District of Columbia provided a succinct overview of the process:

> FECA permits any person to file an administrative complaint with the FEC alleging violation thereof. 2 U.S.C.§ 437g(a)(1). Once a complaint is filed alleging violations of FECA, the FEC notifies any and all respondents and invites written responses. 2 U.S.C. § 437g(a)(1). The FEC then reviews the complaint and any responses filed thereto to determine whether there is "reason to believe" that a violation of FECA has occurred or is about to occur. 2 U.S.C. § 437g(a)(2). If the FEC determines that there is "reason to believe" that FECA has been or will be violated, it undertakes an "investigation" of the alleged violation. 2 U.S.C. § 437g(a)(2). After completion of an investigation, the Commission votes on whether there is "probable cause" to believe FECA has been violated. 2 U.S.C. § 437g(a)(3). If the Commission finds that there is no probable cause to believe that a violation of FECA has occurred, the investigation is closed and the case is dismissed. Complainants may challenge this dismissal in federal district court. 2 U.S.C. § 437g(a)(8)(A). If, on the other hand, the Commission concludes that there is probable cause to believe that FECA has been violated, it must first attempt conciliation, and failing that, may seek enforcement of FECA in federal district court. 2 U.S.C. § 437g(a)(6)(A).

American Federation of Labor & Congress of Indus. Organizations v. Federal Elec. Comm'n, 177 F.Supp.2d 48, 52 (D.D.C. 2001)(footnote omitted).

Thus, a "notification" occurs upon the filing of a complaint and it is this "notification" which must not be made public pursuant to 2 U.S.C. § 437g(a)(12)(A). And, pursuant to the explicit statutory process, an "investigation" does not even commence until after an initial review from which the FEC concludes that there is "reason to believe" that a violation of FECA has occurred or is about to occur. 2 U.S.C. § 437g(a)(2); *accord* 11 CFR 111.10(a)("[a]n investigation shall be conducted in any case in which the Commission finds reason to believe that a violation of a statute or regulation over which the Commission has jurisdiction has occurred or is about to occur"). In fact, before an "investigation" even begins, the FEC must "determine[] by an affirmative vote of four (4) of its members that it has reason to believe that a respondent has violated a statute or regulation over which the [FEC] has jurisdiction." 11 CFR 111.9(a); *accord* 2 U.S.C. § 437g(a)(2).

Yet, in attempting to justifying the invocation Exemption 3, the FEC claims that the withheld responsive records relating to AO 2011-12 "implicated a confidential investigation being handled by [Office of General Counsel's] Enforcement Division" and that "section 437g(a)(12) prohibits the release of any information concerning that confidential investigation to Mr. Miller." (FEC Motion, at 16 & 17.) But there is no evidence indicating that an "investigation' (as specifically provided for by 2 U.S.C. § 437g) has even commenced. Instead, the only summary judgment evidence tendered by the FEC that even mentions, addresses or attempts to address the application *vel non* of Exemption 3 based upon 2 U.S.C. § 437g(a)(12) is a single paragraph in the Affidavit of William F. Buckley, Jr. (Doc. No. 8-3) which contains nothing more than a self-serving, conclusory assertion:

> In evaluating records responsive to Mr. Miller's FOIA request, I determined that information related to open enforcement or investigatory matters should be withheld under 5 U.S.C. § 552(b)(3). Such records are prohibited from disclosure under 2 U.S.C. § 437g(a)(12)(A) unless written consent is obtained from the subjects of the enforcement or investigatory matters, and those records are thus provided statutory protection from disclosure. All information withheld under 5 U.S.C. § 552(b)(3) relates to an open Matter Under Review ("MUR"), which is an FEC enforcement matter conducted pursuant to 2 U.S.C. § 437g. Thus, I determined that records related to this open enforcement matter should be withheld under 2 U.S.C. § 437g(a)(12)(A).

(Buckley Affidavit (Doc. No. 8-3) ¶33.)

As is evident by Mr. Buckley's affidavit, the responsive records being withheld supposedly related "to an open Matter Under Review ('MUR')" which is distinctly different from an "investigation' which is specifically provided for by 2 U.S.C. § 437g; for a MUR number is assigned upon receipt of a complaint. *See Federal Election Comm'n v. Friends of Jane Harman*, 59 F.Supp.2d 1046, 1052 (C.D. Cal. 1999)(noting that upon receipt of a complaint, the matter is "designated by the FEC as a Matter Under Review for administrative purposes"); *Antosh v. Federal Election Comm'n*, 599 F.Supp. 850, 852 (D.D.C. 1984)("[t]he complaint was designated Matter Under Review ('MUR') 1719 by the Commission"). It is evident that, in this case, the FEC attempts to greatly expand the scope of 2 U.S.C. § 437g(a)(12)(A) so as to include, in the words of Mr. Buckley, any and all records related to "an open enforcement matter" while the statute itself limits the non-disclosure to the public of only the "notification" and the "investigation."

And the overly broad meaning and scope to which the FEC now attempts to graft into the limited scope of 2 U.S.C. § 437g(a)(12)(A) is all the more evident when appreciation is given to the FEC's own administrative rules:

> no complaint filed with the Commission, nor any notification sent by the Commission, nor any investigation conducted by the Commission, nor any findings

> made by the Commission shall be made public by the Commission or by any person or entity without the written consent of the respondent with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.

11 CFR 111.21(a). While this list is also broader than that explicitly provided for in 2 U.S.C. § 437g(a)(12)(A), it does not even go as far as the FEC now claims via the Buckley Affidavit to encompass anything and everything touching upon or relating to an "open enforcement matter."

The bottom line is that the FEC has not met or established its burden of demonstrating the application of Exemption 3 to the withheld records which were responsive to Mr. Miller's request; the FEC improperly relies upon a too broad of an interpretation of 2 U.S.C. § 437g(a)(12)(A) and an affidavit which only contain a conclusory assertion as opposed to specific facts that actually establish the application of Exemption 3.

4. Exemption 5 – the FEC has not met its burden of demonstrating application of the work product doctrine and/or the deliberative process privilege to the withheld records.

Of the 88 records responsive to Mr. Miller's FOIA request and identified by the FEC, the FEC has invoked FOIA Exemption 5 with respect to 55 of those records.[10]

FOIA Exemption 5, 5 U.S.C. § 552(b)(5), permits a federal agency to withhold "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." To qualify for this exemption, a document "must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of the Interior v. Klamath Water Users Protective Ass 'n*, 532 U.S. 1, 8 (2001). Courts have construed this language to "exempt those documents, and only those

[10] Of these 55 records, 49 records have been withheld in their entirety.

documents that are normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). And the Sixth Circuit has construed this exception to preserve the recognized evidentiary privileges, such as the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege. *Rugiero*, 257 F.3d at 550.

With respect to some of the records withheld by the FEC in this case, the FEC contends that "the records the [FEC] withheld under Exemption 5 constitute attorney work product," as well as being "confidential, pre-decisional recommendations and opinions . . . protected by the deliberative process privilege." (FEC Motion, at 18 & 19.) It is noteworthy that, in the document which the FEC characterized as a *Vaughn* index, every record for which Exemption 5 was claimed as the basis for withholding the document, the FEC asserted that both the attorney work product doctrine *and* the deliberative process privilege were applicable to each and every such record withheld; it appears that, instead of assessing which of the two privilege were arguably applicable to each record, the FEC elected to blindly claim both privileges. Regardless, though, as developed below, the FEC has failed to meet its burden of demonstrating the application of Exemption 5 to the withheld records.

a. Attorney Work Product Doctrine.

The work-product doctrine shields materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." Fed. R. Civ. P. 26(b)(3)(A). But "[t]he work product doctrine does not extend to every written document generated by an attorney; rather, work product covers only documents prepared in contemplation of litigation." *Senate of the Commonwealth of P.R. v. Dep't of Justice*, 823 F.2d 574, 586-87 (D.C. Cir. 1987). For as the purpose of the doctrine is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny, the work-product privilege ordinarily does not attach until at least "some

articulable claim, likely to lead to litigation" has arisen. *See Hertzberg v. Veneman*, 273 F.Supp.2d 67, 75 (D.D.C. 2003)("[w]hile litigation need not be imminent or certain in order to satisfy the anticipation-of-litigation prong of the [attorney work-product] test, . . . 'at the very least some articulable claim, likely to lead to litigation, must have arisen' such that litigation was ''fairly foreseeable at the time' the materials were prepared" (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980))). Thus, materials prepared "in the ordinary course of business or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes" are not protected. Fed. R. Civ. P. 26(b), advisory comm. note (1970 amend.).

Yet, the only litigation or prospect of litigation to which the FEC claims justifies the invocation of Exemption 5 has nothing to do with the requested AOR 2011-20 or Mr. Miller's FOIA request concerning that specific advisory request. Instead, in order to justify the putative availability of the work product doctrine, the FEC attempts to elevate the potential of litigation regarding the unidentified or nebulous "confidential enforcement matter" and then to bootstrap that enforcement matter onto most of the work relating to AOR 2011-20. But the only evidence offered by the FEC in this regard is the self-serving, conclusory declaration that the withheld records were prepared by "attorneys in anticipation of litigation related to the enforcement matter described above or potentially in connection with the advisory opinion request that was the subject of Mr. Miller's FOIA request." (Buckley Affidavit (Doc. No. 8-3) ¶34.) *But see Blair v. Scott Specialty Gases*, 283 F.3d 595, 608 (3d Cir. 2002)("[a]n affidavit that is essentially conclusory and lacking in specific facts is inadequate to satisfy the movant [or non-movant]'s burden"); *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir.1978) (conclusory, "bald assertions of ultimate facts are ordinarily insufficient to support summary judgment"); *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135,

138-39 (5th Cir.1973) (nonmovant survives motion for summary judgment, without countering movant's showing, where movant's affidavit "set forth only ultimate facts or conclusions").

In this case, it appears that the FEC is trying to attribute attorney work product to nearly everything in which any attorney at the FEC was involved. But "if the agency were allowed to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated." *Senate of the Commonwealth*, 823 F.2d at 587 (internal quotation marks omitted). Yet, that it what the FEC is apparently attempting to do. As with other issues raised, the FEC has not sufficiently demonstrated or supported its burden, under Fed. R. Civ. 56 or under the Freedom of Information Act, of actually demonstrating the application of the work product doctrine to those documents (or most of the documents) withheld under a claim of Exemption 5.

b. Deliberative Process Privilege.

The deliberative-process privilege shields internal agency "advisory opinions, recommendations and deliberations" in order to "protect[] the decision making processes of government agencies." *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted). Such an exemption "allows agency staffers to provide decision makers with candid advice without fear of public scrutiny." *Judicial Watch, Inc. v. United States Postal Serv.*, 297 F.Supp.2d 252, 258-59 (D.D.C. 2004). To qualify under this privilege, a record must meet two requirements. Firstly, the record must be predecisional, *i.e.*, "antecedent to the adoption of an agency policy." *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*) (emphasis omitted), *overruled in part on other grounds*, *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*). Secondly, a record must be deliberative, *i.e.*, "a direct part of the deliberative process in that it makes recommendations or

expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). "A document that does nothing more than explain an existing policy cannot be considered deliberative." *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 876 (D.C. Cir. 2010). For material is deliberative if "it reflects the give-and-take of the consultative process." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quoting *Coastal States*, 617 F.2d at 866).

Furthermore, "[n]ot only must an agency specify the deliberative process pursuant to which documents are redacted, the agency must demonstrate that harm will result if the redacted documents are released." *Hall v. U.S. Dep't of Justice*, 552 F.Supp.2d 23, 29 (D.D.C. 2008). "To do so, the agency must 'show, by specific and detailed proof that disclosure would defeat, rather than further, the purposes of FOIA.'" *Id.* (quoting *Mead Data Central*, 566 F.2d at 258). Yet, in this case, the FEC has not clearly established that any of the documents withheld under a claim of deliberate process privilege actually involved such a deliberative process such that they would be protected from discovery in civil litigation. Furthermore, completely lacking from the proof offered by the FEC is any demonstration that harm will actually result if the documents withheld under a claim of deliberative process privilege are released. Accordingly, the FEC has failed to meet its burden of demonstrating the application of the deliberative process privilege to the records responsive to Mr. Miller's request but which it is continuing to withheld under a claim of Exemption 5.

IV. Conclusion

Notwithstanding the preference for exposing governmental operations to public scrutiny, the FEC has withheld, in their entirety, the bulk of records relating to an effort by a Congresswoman to have her campaign committee assist in complying with the order of the House Ethics Committee to

repay nearly $500,000 in illegally received gifts. Even though the burden is imposed upon the FEC to establish and to justify the invocation of any exemption to disclosure under the Freedom of Information Act, the FEC has failed to meet or establish this burden, relying upon a deficient *Vaughn* index and conclusory affidavits. Accordingly, the FEC's motion for summary judgment must be denied.

Respectfully submitted,

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