

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Center for Public Integrity,

Plaintiff,

v.

Federal Election Commission,

Defendant.

Civil Action No. 17-1162 (CRC)
ECF

**PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, the Center for Public Integrity, moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 and opposes Defendant's Motions for Summary Judgment. Plaintiff's Memorandum of Points and Authorities, Statement of Material Facts as to Which There Is No Genuine Issue and a proposed Order accompany this motion.

Respectfully submitted,

/S/

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, to secure the production of certain agency records. Plaintiff submitted two FOIA requests to Defendant that are at issue. Defendant has produced responsive records while also withholding and redacting some records. Plaintiff objects to the withholdings and redactions that Defendant has made under FOIA Exemption 5.

PLAINTIFF'S FOIA REQUESTS

By email on February 1, 2017, Plaintiff requested from the FEC:

Any emails, memoranda or other correspondence or communication that discuss, mention, reference or otherwise pertain to the Twitter account "altFEC." This includes direct mention of the account "@altFEC", as well as other obvious references to the @altFEC account, which should include, but not be limited to: "alt FEC Twitter," "alt FEC account" and "fake @FEC account."

Declaration of Katie A. Higginbotham, Exhibit A. The FEC subsequently produced seven pages of responsive records and withheld 14 pages in full. After an administrative appeal, the agency affirmed its denial of the 14 pages.

By email on February 6, 2017, Plaintiff submitted a records request to the FEC. The items requested included:

A copy of all emails from the domain “EOP.gov” to senior managers and commissioners encompassed within the required agency system for retaining emails of senior officials. Frequently, this records management policy/system is described by the name Capstone.

Higginbotham Decl., Exhibit G. After the commencement of this lawsuit, the FEC produced 14 pages of responsive records, with redactions.¹

Each of these requests was submitted by Dave Levinthal, an employee of Plaintiff. Each request included a statement from Mr. Levinthal that “I am a reporter for the Center for Public Integrity” Each request contained, in the signature block, Mr. Levinthal’s job title (“Senior political reporter”), a URL for Plaintiff’s website (“Web: <http://www.publicintegrity.org>”), and a logo for Plaintiff (including the words “The Center for Public Integrity”). Higginbotham Decl., Exhibit A and Exhibit G.

ARGUMENT

I. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to the material facts, and the moving party demonstrates it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). A court reviews agency handling of a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B).

In a case brought under FOIA, “the burden is on the agency to sustain its action.” 5 U.S.C. § 552(a)(4)(B); see also *Electronic Privacy Information Center v. Dep’t of Homeland Security*, 384 F. Supp. 2d 100, 106 (D.D.C. 2005). While FOIA includes exemptions from

¹ Plaintiff does not contest the redactions made pursuant to FOIA Exemption 6.

disclosure, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

II. Exemption 5

Exemption 5 of the Freedom of Information Act 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).

With respect to the EOP.gov emails, Defendant has not specified what privilege it is asserting to make redactions under Exemption 5. Defendant has not offered any explanation or argument for why the redacted information is exempt. Defendant has not met its burden of justifying its action in withholding this information.

With respect to the @altFEC FOIA request, Defendant has asserted the deliberative process privilege. Material withheld under this privilege must be “both predecisional and deliberative.” *Wolfe v. Dep’t of Health & Human Services*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc) (citing *EPA v. Mink*, 410 U.S. 73 (1973)).

The precedents are clear that “[f]actual material that does not reveal the deliberative process is not protected by this exemption.” *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984).

III. Segregability

The statute requires that “[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

....” 5 U.S.C. § 552(b). However, a “vague and conclusory” affidavit cannot provide a basis for summary judgment. E.g., *PHE, Inc. v. Dep’t of Justice*, 983 F.2d 248, 252-53 (D.C. Cir. 1993).

Defendant has provided only the conclusory statement that “[t]he Administrative Law Team concluded that the remaining 14 pages of documents ... should not be released pursuant to 5 U.S.C. § 552(b)(5), because the information was covered by the deliberative process privilege and did not contain any reasonably segregable non-exempt information. The Commission’s Chief FOIA Officer concurred in these determinations.” Declaration of Katie A. Higginbotham, at ¶ 6. This is obviously insufficient to establish whether segregable non-exempt information actually exists.

It does not seem possible that no non-exempt information can be released from these emails. For example, the names of the senders and recipients are factual information, not deliberative. So are the dates of the emails. In addition, Defendant concedes that “[t]he withheld ‘altFEC’ emails contain factual material” Defendant’s Memorandum, at 11, asserts that this material is “inextricably intertwined with exempt deliberative material,” but does not cite evidence in this case. Defendant’s arguments do not distinguish between factual information that is “inextricably intertwined” and that which is reasonably segregable, nor do they provide a factual basis for making a determination about the information withheld in this case.

Defendant has not met the burden required of it for summary judgment. Because Defendant’s declarations are too vague to allow a determination, Plaintiff is filing, along with this Motion, a Motion for *in Camera* Judicial Review.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and deny Defendant's Motion for Summary Judgment.

Respectfully submitted,

/S/

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