

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

_____)	
CENTER FOR PUBLIC INTEGRITY,)	
)	
Plaintiff,)	Civ. No. 17-1162 (CRC)
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	OPPOSITION AND REPLY
)	AS TO SUMMARY JUDGMENT
)	
Defendant.)	
_____)	

**DEFENDANT FEDERAL ELECTION COMMISSION'S
OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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October 12, 2017

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INTRODUCTION

The Federal Election Commission (“FEC” or “Commission”) has provided detailed explanations showing that it properly withheld information responsive to the two Freedom of Information Act (“FOIA”) requests at issue here. Plaintiff Center for Public Integrity’s (“CPI”) cross-motion for summary judgment does not argue that the FEC unreasonably delayed in providing documents or that the FEC failed to adequately search for responsive documents. Any such claims are now waived. *See Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 72 (D.D.C. 2014) (in judicial review of agency action, “a plaintiff’s failure to raise arguments or theories in its motion for summary judgment results in waiver of those arguments”). The sole argument CPI makes now is that the FEC’s explanations for its withholding decisions were inadequate. However, the FEC’s detailed descriptions of the protected material, including through the declaration attached to its opening brief and the Vaughn index attached to this brief, are clearly sufficient for the Court to evaluate the agency’s decisions. Specifically, the submissions show that the agency properly withheld the information at issue pursuant to the deliberative process privilege under FOIA Exemption 5. Summary judgment should be granted to the FEC.

I. THE FEC’S SUBMISSIONS SHOW THAT THE @altFEC DOCUMENTS WERE PROPERLY WITHHELD PURSUANT TO FOIA EXEMPTION 5

With regard to materials responsive to the FOIA request about the “@altFEC” Twitter account, the Commission described in its principal brief why fourteen pages of documents were not disclosed, under 5 U.S.C. § 552(b)(5) (Exemption 5), pursuant to the deliberative process privilege. (FEC’s Mem. in Supp. of Mot. for Summ. J. (“Mem.”) at 7-14 (Docket No. 12).) The Assistant General Counsel who supervises the FEC’s Administrative Law Team provided a declaration explaining that the privilege applied because the documents “consisted of communications among attorneys at different levels in the FEC’s Office of General Counsel

working to identify and analyze potential legal issues that the '@altFEC' Twitter account might raise.” (Higginbotham Decl. ¶ 6 (Docket No. 12-1).) And the declaration further explained that the documents did not contain any reasonably segregable non-exempt information. (*Id.*) In order to provide further context, the Commission has also attached a Vaughn index to this filing that identifies the senders, recipients, and dates of each withheld email, as well as specific explanations of why each document was withheld. Exh. A; *see Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973) (a Vaughn index is a document that lists all withheld records, the specific FOIA exemptions applicable to each, and the agency’s justifications for nondisclosure).

Plaintiff argues that the FEC provided insufficient detail with its opening briefing to “establish whether segregable non-exempt information actually exists,” but these arguments lack merit. (*See* Mem. of P.&A. in Supp. of Pl.’s Cross-Mot. for Summ. J. and in Opp’n to Def.’s Mot. for Summ. J. (“Pl.’s Mem.”) at 5 (Docket No. 13).) As the FEC explained in its principal brief (FEC’s Mem. in Supp. of its Mot. for Summ. J. (“FEC Mem.”) at 5-6 (Docket No. 12)), summary judgment is warranted when the government submits declarations that demonstrate with adequate specificity the reason for the withholding and that the information withheld logically falls within the claimed exemption. Agency affidavits submitted in the FOIA context are accorded a presumption of good faith. FEC Mem. at 6; *see also Davis v. DOJ*, 970 F. Supp. 2d 10, 14 (D.D.C. 2013) (government affidavits adequate if they are “not controverted by either contrary evidence in the record [or] by evidence of agency bad faith.”) (alteration in original) (internal citation and quotation marks omitted); *Mobley v. Dep’t of Justice*, 870 F. Supp. 2d. 61, 65 (D.D.C. 2012) (same).

In this case, contrary to plaintiff’s claims, the FEC’s declaration sufficiently described the nature of the documents, and the Vaughn index removes any doubt that the agency’s withholding

decisions are justified. As those submissions show, the withheld documents are subject to the deliberative process privilege because they consist of emails among attorneys at different levels working to preliminarily identify and analyze potential legal issues and whether additional action may be needed, and the information contained in them is not reasonably segregable. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding FOIA Exemption 5 protects from disclosure the “give-and-take of the consultative process”); *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 776 (D.C. Cir. 1988) (“[W]hen agency opinions are fluid and tentative,” . . . “disclosure could chill discussion [when] subordinates are reporting to superiors.”). Plaintiff argues that information about the senders, recipients, and dates of the emails are non-deliberative and should have been made available (Pl.’s Mem. at 5); in any event, the FEC Vaughn index now provides the information plaintiffs seek. Forcing the FEC to explain each email in greater detail would undermine the purpose of the privilege by revealing the very content that is being withheld. If such preliminary information was released and subject to public scrutiny before being debated and refined, employees involved in these sorts of ethics compliance issues would be reluctant to engage in written discussion of such issues and consideration of planned future action, thus adversely affecting the quality of recommendations and counsel to the agency officials operating that ethics program. In addition, because several of the withheld emails consist of a single sentence or two, it would be impossible to disclose much content from the email without revealing it in full. Nor is there any basis to believe that the FEC’s explanatory submissions were made in bad faith, and there is no contradictory evidence in the record. Thus, the FEC has adequately explained and justified the logic of its withholding decisions with regard to the “@altFEC” information.

II. THE FEC’S SUBMISSIONS SHOW THAT MINOR REDACTIONS TO THE OMB DOCUMENTS WERE PROPERLY MADE PURSUANT TO FOIA EXEMPTION 5

The FEC also made minor redactions pursuant to FOIA Exemptions 5 and 6 in the fourteen pages it provided responsive to the second FOIA request, which sought certain materials originating with the Office of Management and Budget (“OMB”).¹ Plaintiff now challenges the Exemption 5 redactions, which occurred on only two of the pages at issue. However, the FEC has included adequate explanations for those two redactions on its Vaughn index, including information about the senders and recipients. (*See* Exh. A.) As described in that index, the first redaction, of an agenda for an OMB conference call with certain agency representatives, was made pursuant to the deliberative process privilege because disclosure would reveal preliminary plans regarding subjects to be addressed in a future meeting. The second redaction, also from an OMB email, was redacted under the same privilege because disclosure would reveal suggestions regarding assessments of agency management of information resources. These portions of the emails reveal suggestions for potential future action and if subject to potential public scrutiny, employees would be reluctant to engage in these sorts of deliberations. Thus, the FEC’s Vaughn index adequately describes the content of the two redactions and shows why the deliberative process privilege applies. In addition, the FEC has attached the two pages at issue in redacted form, in order to provide the Court with further context in evaluating the redactions. (Exh. B.) These submissions are sufficiently detailed for the Court to determine that these limited redactions represent a proper withholding of information under FOIA.

¹ As plaintiff notes (Pl.’s Mem at 4), the FEC has not previously provided detailed explanations for these redactions, but that was because the FEC was only able to disclose the materials in early September, after the agency received the results of its consultation with OMB, and plaintiffs had not yet challenged the withholding explanations at that time.

CONCLUSION

For the reasons stated in the FEC's principal brief and this brief, the Court should grant summary judgment to the Commission.

Respectfully submitted,

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