

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

Dave Levinthal, et al.,

Plaintiffs,

v.

Federal Election Commission,

Defendant.

Civil Action No. 15-1624 (APM)
ECF

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

Plaintiffs, Dave Levinthal and the Center for Public Integrity, move for summary judgment pursuant to Federal Rule of Civil Procedure 56 and oppose Defendant's Motion 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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April 8, 2016

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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 from the Federal Election Commission ("FEC"), the Defendant. The remaining document, or set of documents, at issue in this case is an information-technology vulnerability assessment conducted for the FEC, along with a summary and appendices. Because the assessment was intended "to inform [the FEC's] decision regarding whether to implement information security standards and guidelines developed by the U.S. Department of Commerce's National Institute of Standards and Technology ("NIST") for federal information systems" (Decl. of Alec Palmer, ¶ 7), it has often been referred to as "the NIST Study."

BACKGROUND

Plaintiffs Dave Levinthal and the Center for Public Integrity are engaged in investigative journalism. Mr. Levinthal's assignments include covering the Federal Election Commission and the influence of money in federal politics.

On July 6, 2015, Plaintiffs filed a FOIA request that sought, *inter alia*, “a copy of a 2015 National Institute of Standards and Technology report — also known as the NIST study — pertaining to the Federal Election Commission’s operations.” FEC staff withheld this study in full and on September 30, 2015, notified Plaintiffs that on appeal the Commission had upheld the denial of Plaintiffs’ request.

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 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. Release of the NIST Study would serve the important purpose of informing the public.

In its Memorandum in Support of Its Motion for Summary Judgment, at 1-2, Defendant notes the importance of cybersecurity within federal agencies. Precisely because this is an important issue, it is critical that citizens have the information necessary to judge whether an agency is adequately protecting data from hackers who might wish to steal or alter it. As the Supreme Court has explained, “[t]he basic purpose of FOIA is to ensure an informed citizenry,

vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citation omitted).

III. The NIST Study is not exempt under FOIA Exemption 7(E).

A. The NIST Study is not a law enforcement record.

To withhold the NIST Study under Exemption 7(E), the FEC must meet the so-called “threshold” requirement of demonstrating that it falls within the category of “records or information compiled for law enforcement purposes” U.S.C. § 552(b)(7).

The standard established in the D.C. Circuit is that “[a] record is deemed to have been created or compiled for a law enforcement purpose only if (1) it arose from an investigation ‘related to the enforcement of federal laws or to the maintenance of national security’ (the ‘nexus’ requirement), and (2) ‘the nexus between the investigation and one of the agency’s law enforcement duties [is] based on information sufficient to support at least “a colorable claim” of its rationality.’” *Simon v. Dep’t of Justice*, 980 F. 2d 782, 783, (D.C. Cir. 1992) (quoting *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982)).

The FEC describes the NIST Study as “an information technology vulnerability assessment” (Palmer Decl., ¶ 18.) It is not connected to an investigation, and it was not “compiled for law enforcement purposes.” In its Memorandum, the FEC has cited cases that protect agency data from disclosure under Exemption 7, but in each of those cases the data were themselves law-enforcement records. The NIST Study undoubtedly describes systems that contain law-enforcement information (along with other information), but the Study itself is not a law-enforcement record.

B. The FEC has not established that the vulnerabilities described in the NIST Study still exist.

The Declaration of Alec Palmer, at ¶¶ 18-21, asserts that information in the NIST Study could be used in cyberattacks on the FEC's systems. The Declaration does not discuss whether, after the NIST Study was produced, the FEC has adopted measures to address identified vulnerabilities.

A major part of the NIST Study (the "Gap Analysis Final Report") was completed by April 17, 2015. (Palmer Decl. ¶ 12.) Even assuming, *arguendo*, that Exemption 7(E) applies to portions of the NIST Study, to the extent that facts on the ground have changed since the preparation of the report, disclosure of previous vulnerabilities would not fall under Exemption 7(E). Under FOIA, the Defendant has the burden of demonstrating that the claimed exemption is still applicable. In addition, the Defendant is required to segregate any non-exempt information (including no-longer-exempt information) and release it.

IV. The FEC's failure to release any portion of the NIST Study is not consistent with FOIA's requirements.

The FEC's Memorandum, at 15-16 and 20-21, acknowledges the obligation to release any reasonably segregable non-exempt information, but it has not met this obligation. Plaintiffs do not doubt that the NIST Study contains predecisional recommendations. But the FEC has admitted that there are segregable factual portions as well. It argues that "the Final Report's factual descriptions of the Commission's information technology systems and their vulnerabilities form the basis of the analysis in the Final Report and reflect the need for the recommended protocols that constitute the core of the NIST Study." (Def.'s Memorandum, at 20.) The unexceptionable circumstance that the factual sections of the report are consistent with its recommendations is not sufficient to allow withholding of the factual sections under Exemption 5. Defendant has not established that they are actually "inextricably entwined" with deliberations.

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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