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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

STEPHEN RAHER, **Case No. CV 09-526-ST**

Plaintiff

v.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

FEDERAL BUREAU OF PRISONS,

Defendant.

Table of Contents

Table of Cases and Authorities

Cases

Statutes

Rules

Constitutional Provisions

I. Introduction and Factual Background

On November 3, 2008 plaintiff, then in his third year of law school, submitted a Freedom of Information Act request (the "FOIA Request") to defendant Bureau of Prisons ("BOP"). Complaint ¶ 20.[1] Plaintiff is an experienced criminal justice policy analyst with a record of published research. *Id.*, Ex. C, at 11. Plaintiff submitted the FOIA Request in connection with a research paper he was writing as part of his law school education. *See* Second Raher Decl., Ex. A. Defendant summarily denied plaintiff's request for a fee waiver and demanded payment of $1,642.95 to release the requested information. Complaint, Ex. B. Defendant instructed plaintiff to address any response to BOP's designated appeals agency, the Department of Justice's Office of Information and Privacy ("OIP"). *Id*. Plaintiff timely filed an appeal with OIP and made numerous attempts to negotiate an informal resolution with OIP. Complaint ¶¶ 23-27. After OIP constructively denied the appeal, plaintiff filed this action. *See id.* ¶¶ 35-37.

Although plaintiff has subsequently completed law school, his research is still ongoing. Part of the research paper is currently in publication and the remaining portion is under revision in anticipation of future publication. *See* Second Raher Decl., Ex. B (offer to publish).

After plaintiff commenced this action, BOP produced several heavily redacted contracts that were responsive to the FOIA Request. *See* First Raher Decl., Ex. B (Vaughn Index). Plaintiff then wrote to defendant's counsel, noting that the documents failed to include several categories of documents which were encompassed by the FOIA Request. *Id.*, Ex. C. BOP

[1] The documents cited in this brief include the following: Plaintiff's Complaint ("Complaint"); Declaration of Stephen Raher in Support of Plaintiff's Motion to Compel Discovery (Doc. #14) ("First Raher Decl."); Declaration of Stephen Raher in Support of Plaintiff's Motion for Partial Summary Judgment ("Second Raher Decl."); Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment (Doc. #29) ("Def. Mem."); Declaration of LeeAnn Tufte (Doc. #18) ("Tufte Decl."); Supplemental Declaration of LeeAnn Tufte (Doc. #30) ("Supp. Tufte Decl."); Declaration of Ben Erwin (Doc. #31) ("Erwin Decl.").

subsequently produced another round of documents which were also heavily redacted. *See id.*, Ex. D (Supplemental Vaughn Index). When plaintiff attempted to seek additional information about the withheld documents and the scope of defendant's records search, BOP resisted, arguing that discovery was not appropriate. Def. Resp. to Pltf. Mot. to Compel (Doc. #16).

A. The Documents

The documents described in the two Vaughn Indices pertain to a series of procurement actions undertaken by the BOP, known as the "Criminal Alien Requirements" (the "CAR Series"). The BOP has used the CAR Series to procure contract detention facilities to house "a low security adult male population consisting primarily of criminal aliens." Second Raher Decl., Ex. D, at 2. The documents relate to five contractors, as follows:

Table 1.

Contractor	Vaughn Index Document Numbers	Supplemental Vaughn Index Document Numbers
Corrections Corporation of America	1-3 (contract), 11 (contract)	1-5 (proposal), 6 (proposal revisions), 60 (past performance records), 61 (technical proposal records), 62 (environmental proposal)
Reeves County (Texas)	4 (contract), 5-7 (contract)	32-40 (proposal), 41-44 (proposal revisions), 45 (proposal), 46-47 (proposal revisions), 48 (past performance records), 49 (technical proposal records), 50 (environmental proposal), 51 (past performance records), 52 (technical proposal records), 53 (environmental proposal)
Cornell Corrections Co.	8-10 (contract)	7-20 (proposal), 21 (proposal revisions), 54 (past performance records), 55 (technical proposal records), 56 (environmental proposal)
Management & Training Corp.	12-14 (contract)	26-28 (proposal), 29-31 (proposal revisions), 63 (past performance records), 64 (technical proposal records), 65 (environmental proposal)
LCS Corrections Services	15-17 (contract)	22-24 (proposal), 25 (proposal revisions), 57 (past performance records), 58 (technical proposal records), 59 (environmental proposal)

B. The Claimed FOIA Exemptions

BOP has withheld information based on the following FOIA exemptions: Exemption 2, Exemption 4, Exemption 6, and Exemption 7(F). First Raher Decl., Exs. B and D. BOP has also withheld several documents based on an implausible interpretation of 5 U.S.C. § 552(a). Def. Mem., at 11. Notably, defendant has withheld large numbers of documents without specifying *any* statutory basis.[2]

Plaintiff accepts the withholding of information under Exemption 2 as it relates to documents in the original Vaughn Index. Plaintiff objects to the Exemption 2 withholdings in the Supplemental Vaughn Index. Plaintiff accepts the one withholding that is based on Exemption 7(F). *See* First Raher Decl., Ex. B, at 3.

Plaintiff objects to all Exemption 4 withholdings, for the reasons discussed in this brief. Defendant's motion contains an accurate characterization of plaintiff's position regarding the Exemption 6 withholdings. Def. Mem., at 10; *see also* Second Raher Decl., Ex. L.

II. Legal Standards

A. Freedom of Information Act

The Freedom of Information Act ("FOIA") requires federal executive branch agencies to release information to the public upon request. 5 U.S.C. § 552(a)(3)(A). The government's obligation to produce information is mandatory, it applies to any request made by any person, and disclosure must be made promptly. *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1171 (9th Cir. 2000). FOIA "is a commitment to the principle that a democracy cannot function

[2] These "totally withheld" documents entail unresolved questions of material fact. Accordingly, they are addressed in plaintiff's response to defendant's motion for summary judgment and are not included in this motion.

unless the people are permitted to know what their government is up to. The statute's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *Id.* (internal quotation marks and citations omitted) (quoting *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-774 (1989)).

The only exceptions to disclosure are the nine statutory exemptions listed in FOIA. 5 U.S.C. § 552(b). FOIA as a whole "is to be liberally construed in favor of disclosure and its exemptions narrowly construed." *Julian v. U.S. Dept. of Justice*, 806 F.2d 1411, 1416 (9th Cir. 1986).

The purpose and plain text of FOIA give rise to a "strong presumption in favor of disclosure." *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173 (1991). Accordingly, an agency bears the evidentiary burden of justifying the withholding of requested documents. *Id.*

B. Summary Judgment

A court should grant summary judgment on a claim "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view the facts and draw all inferences in the light most favorable to the non-moving party. *Horphag Research Ltd. v. Pellegrini*, 337 F.3d 1036, 1040 (9th Cir. 2003). The primary inquiry is whether the evidence presents a sufficient disagreement to require a trial, or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

A party opposing a properly supported motion for summary judgment must present

affirmative evidence of a disputed material fact from which a finder of fact might return a verdict in its favor. *Id*. at 257. A non-moving party "may not rely merely on allegations or denials in its own pleading," but must respond with "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

III. Defendant Has Not Justified Withholding Information under Exemption 4

BOP has withheld a large amount of information under the auspices of FOIA's "Exemption 4." Although defendant has generally provided inadequate descriptions of the withheld information, it has produced enough information to show that Exemption 4 is simply inapplicable to the documents at issue. Specifically, BOP inappropriately seeks to withhold contractor proposals and final contracts under the theory that they contain confidential commercial or financial information that is protected by Exemption 4. As a matter of law, Exemption 4 is not applicable to the information that defendant seeks to withhold and plaintiff is entitled to summary judgment as to these documents.

A. FOIA Exemption 4

FOIA's Exemption 4 protects two categories of information: (1) trade secrets, and (2) "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). BOP has not argued that any of the withheld information constitutes trade secrets, and its summary judgment motion addresses only the latter category of commercial-or-financial-information. Def. Mem., at 7. Accordingly, BOP appears to concede that the trade secrets exemption is inapplicable.

To qualify as protected information under the commercial-or-financial-information

component of Exemption 4, information must satisfy three elements: (1) it must be commercial or financial, (2) it must be "obtained from a person or by the government," and (3) it must be privileged or confidential. *Pac. Architects & Engineers v. U.S. Dept. of State*, 906 F.2d 1345, 1347 (9th Cir. 1990). Although the withheld information here does appear to be commercial or financial and "obtained from a person," BOP has failed to prove that the information is privileged or confidential for purposes of Exemption 4.

An agency seeking to prevent disclosure of information under FOIA bears the burden of proving that a statutory exemption is applicable. *Doyle v. Fed. Bureau of Investigation*, 722 F.2d 554, 556 (9th Cir. 1983). When satisfying this burden, the government "may not rely on conclusory and generalized allegations of exemptions." *Id*. An agency must provide "affidavits or oral testimony . . . detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption." *Id*. at 556-557. In the context of Exemption 4, the government must present "specific evidence revealing (1) actual competition and (2) a likelihood of substantial competitive injury" if the information is disclosed. *Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996) (internal quotation marks omitted) (quoting *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994)). Defendant's withholding of information under Exemption 4 is unwarranted for two reasons. First, BOP has not proven the existence of actual competition of the type that Exemption 4 is designed to protect. Second, BOP has failed to prove that disclosure would result in substantial competitive injury to the bidders.

1. The CAR Contracts Do Not Involve Actual Competition of the Type That Exemption 4 Is Designed To Protect

When evaluating FOIA withholdings under Exemption 4, a court must "be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Nat'l.*

Parks & Conservation Ass'n. v. Morton (*National Parks I*), 498 F.2d 765, 767 (D.C. Cir. 1974). As relevant here, Exemption 4 is designed to maintain competitive commercial markets. *Id.* at 769 (Exemption 4 is meant to prevent disclosure of "private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce.") (quoting *Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure, S. Comm. on the Judiciary*, 88th Cong., 1st Sess., 199 (1964)).

The procurement activity at issue here relates to privately operated detention facilities for so-called "criminal aliens." Second Raher Decl., Ex. D. The overall commercial marketplace for immigrant detention is neither free nor competitive because it is both a monopsony and an oligopoly. Immigrant detention is a monopsony because the federal government is the only customer, due to Congress's plenary powers under the Immigration Clause of the U.S. Constitution. U.S. Const. Art I., § 8, cl. 4; *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal quotation marks omitted). The BOP's management of the CAR series of contracts has created an oligopoly because BOP has relied on a market dominated by a small handful of "sellers." Second Raher Decl., Ex. A, at 4; Greene Decl., ¶¶ 6-8. Moreover, not only is the immigrant detention market non-competitive as a matter of economic theory, but BOP's management of the CAR contracts is non-competitive as a matter of law. *See infra*, at 21-23.

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2. Release of the Information Withheld under Exemption 4 Would Not Cause Substantial Competitive Injury

Defendant has produced some evidence that disclosure would be inconvenient for the bidders; however, this argument misconstrues the applicable standard. To qualify for Exemption 4 protection, disclosure must do more than merely cause inconvenience—it must cause "substantial competitive injury." *Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996). BOP has not introduced competent evidence showing that disclosure of the withheld information would cause substantial competitive injury.

Disclosure of operational information (such as narrative answers contained in contractor proposals) would not be substantially injurious because prison operation does not entail specialized or complex processes. Indeed, information about prison operations is generally "freely or cheaply available from other sources [and thus] can hardly be called confidential." *See id.*, at 371 (internal quotation marks omitted). Although prisons operate under necessary security measures, they are public institutions and operational information—with limited exceptions—is plainly observable by inmates and visitors, neither of whom are under a duty a confidentiality. *Accord id.* (holding that Exemption 4 does not protect information that is "available to anyone using or visiting the [contractor-operated] facilities.").

Moreover, with respect to the CAR facilities, the contractors' operational plans are dictated by the voluminous specifications imposed by the BOP. Second Raher Decl., Ex. D. This also counsels in favor of disclosure, given *Frazee*'s holding that contractor management methods taken from an agency's published guidance is not confidential for purposes of Exception 4. *Id.* Finally, the documents produced by defendant illustrate the non-competitive nature of the CAR contracting process. The two Vaughn indices indicate that no bidder in the CAR-5 and -6 procurements was *not* issued a contract, and that BOP allowed bidders to revise their proposals

during the evaluation process. *See* First Raher Decl., Exs. B and D. Moreover, even though CAR contracts consist of a "base period" term of years, followed by several option years, there is no evidence that BOP has ever *not* exercised an option or otherwise terminated a CAR contract. Second Raher Decl., Ex. K.[3] The absence of unsuccessful bidders, the ability of contractors to modify bids during procurement, and the relative lack of contract terminations are all indicia of a non-competitive commercial environment.

Likewise, disclosure of pricing information (namely the per diem payment information contained in the contractors' proposals and the final contracts) does not cause substantial competitive injury for two reasons. First, "[t]here is a strong public interest in release of component and aggregate prices in Government contract awards and '[d]isclosure of prices charged the Government is a cost of doing business with the Government. It is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed.'" *AT&T Info. Sys. v. Gen. Servs. Admin.*, 627 F. Supp. 1396, 1403 (D.D.C. 1986) (second brackets in original) (quoting *Racal-Milgo Gov't. Sys., Inc. v. Small Bus. Admin.*, 559 F. Supp. 4, 6 (D.D.C. 1981)). BOP has failed to rebut the strong presumption in favor of disclosure. The only competent evidence BOP has produced concerning competitive harm relating to price disclosure is a letter from Corrections Corporation of America (CCA) saying that disclosure of prices for unexercised option periods would allow competitors to underbid CCA if the BOP chose not to exercise the option period. Supp. Tufte Decl., Ex. 1 at 5.

[3] Although one of the contracts listed in Exhibit K to the Second Raher Declaration is scheduled to expire soon, this still does not prove the existence of actual competition. The contract at issue (the CAR-1 contract for California City Correctional Center) is held by Corrections Corporation of America ("CCA"). Since the 2000 award of the California City contract, CCA has received five additional CAR contracts. Because the BOP has not released information on how many beds are covered by each contract, it is entirely possible that CCA has received a net increase in contracted beds notwithstanding the pending expiration of the California City contract.

Assuming, *arguendo*, that this is true, it provides no justification for withholding the prices for base periods and option periods for which the government has already exercised its option.

Second, pricing information is not confidential under Exemption 4 if it does not allow a reader to determine the contractor's profit margin. *Pac. Architects & Engineers v. U.S. Dept. of State*, 906 F.2d 1345, 1347 (9th Cir. 1990). Here, the per diem prices do not reveal the profit margin, and are thus non-confidential as a matter of Ninth Circuit law. *See* Barry Decl., Ex. A (per diem prices do not list component parts).

B. Contractor Proposals Are Not Covered by Exemption 4

Documents 1 through 11 and 20 through 46 of the Supplemental Vaughn Index are proposals submitted to defendant by contractors seeking to obtain lucrative contracts to operate immigrant detention facilities. Defendant has partially released these records in such a manner as to remove all salient information. Except for a handful of isolated instances,[4] BOP's claimed justifications for withholding information are inadequate as a matter of law. Because defendant has failed to produce any evidence that reasonably justifies the withholdings, plaintiff is entitled to summary judgment ordering defendant to release the disputed portions of the proposals.

The proposals at issue in this case pertain to five contractors. *Supra* at 4, tbl. 1. Two of the five contractors have provided explanations of why they feel certain information is confidential. Supp. Tufte Decl., Ex. A; Erwin Decl. (Doc. #31). BOP has provided no such evidence concerning the other three contractors—i.e., Reeves County, Management and Training Corporation, and LCS Corrections Services. Although a contractor's designation of information as "confidential" is not determinative, the bidders' behavior in this case is highly instructive.

[4] *See* Second Raher Decl., Ex. L for a listing of withholdings that plaintiff does not object to.

Bidders were given ample warnings that material they submitted would be disclosable under FOIA. *Infra*, at 13-14. The contractors' general conduct of not labeling information as confidential is highly probative evidence indicating they did not consider such evidence to be confidential or proprietary. This weighs heavily in favor of a finding that Exemption 4 does not apply. *See Nat'l Parks & Conservation Ass'n v. Kleppe* (*National Parks II*), 547 F.2d 673, 678, n.16 (D.C. Cir. 1976) ("if a party claiming [FOIA Exemption 4] has customarily disclosed similar information to the public, it may be hard pressed to justify a subsequent claim of confidentiality.").

"Confidential" information, for purposes of Exemption 4, is information that a party "wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential." *Gen. Servs. Admin. v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969) (internal quotation marks omitted). Here, there was no express or implied promise of confidentiality. On the contrary, bidders were expressly warned that any information they provided *would* be subject to disclosure under FOIA. Each request for proposals ("RFP") issued by the BOP contains a section titled "Instructions, Conditions, and Notices to Offerors." *See* Second Raher Decl., Ex. E. Paragraph L.11 of this section warns offerors:

> The Freedom of Information Act (FOIA) and its amendments have resulted in an increasing number of requests to Federal agencies for copies of Technical and Business Proposals from other than Government sources.
>
> The offeror should identify information in its proposals the offeror believes should be withheld from these sources, on the basis the proposals consist of "trade secrets and commercial or financial information obtained from a person and privileged or confidential"

Id, at 13. Bidders were also told that per diem pricing information was subject to FOIA disclosure. *Id.*, Ex. G, at 21. Paragraph L.11 also requires offerors to mark the cover page and

each confidential page of their proposals with specified language notifying the government of the inclusion of protected information. After explaining these processes for designating information as confidential or privileged, the instructions note that "*[a]ll information* in an offeror's proposal not designated [as confidential] may be subject to automatic public disclosure if it is requested under the FOIA." *Id.* (emphasis added). With only two exceptions (Cornell Corrections and MTC), the proposals did not indicate that they contained confidential information, as required by paragraph L.11. Accordingly, the bidders other than Cornell and MTC waived their right to exempt any of the proposal documents from disclosure under Exemption 4. *See Jos. Schlitz Brewing Co. v. Sec. and Exch. Comm'n.*, 548 F. Supp. 6, 9 (D.D.C. 1982) (company who is aware of its right to assert Exemption 4 claim, but fails to do so when submitting information to government, waives such claim).

Although two bidders (Corrections Corporation of America and Cornell) have attempted to provide *post hoc* designations of confidentiality (see *infra*, at 17-20) the other three have not even gone that far. Accordingly, BOP has provided no evidence that these three contractors consider their proposals confidential. Defendant's only attempt at such evidence is a handful of conclusory statements by LeeAnn Tufte, such as a her claim that she "made a good faith determination that the information withheld fit the FOIA exemptions based upon my belief and any objections provided to me by the competitive submitters." Supp. Tufte Decl. ¶ 13. Such statements are inadequate to support a finding of confidentiality for four reasons.

First, without showing that the submitter regards the withheld information as confidential, the government cannot properly invoke an exemption designed to protect a submitter's expectations of confidentiality. *See Gen. Servs. Admin. v. Benson*, 415 F.2d 878, 881-882 (9th Cir. 1969).

Second, Ms. Tufte's supplemental declaration does not conform with Rule 56's requirement that declarations supporting or opposing summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e)(1). Because Ms. Tufte is not an employee or agent of the contractors, she is not competent to testify as to the contractors' interests in preventing disclosure. *Accord Black Hills Alliance v. U.S. Forest Serv.*, 603 F. Supp. 117, 121-122 (D.S.D. 1984). Defendant has only produced objections from two of the five contractors. Ms. Tufte's declaration that she received oral objections (Supp. Tufte Decl., ¶ 3) is inadmissible hearsay and cannot be used to support defendant's claims of confidentiality.

Third, a party opposing FOIA disclosure must prove the applicability of an exemption by specific evidence, not "conclusory and generalized allegations of exemptions." *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973). Ms. Tufte's declarations are case studies in generalizations and conclusory statements. Although Ms. Tufte says multiple times that she made a "good faith determination" that information was properly withheld, she does not once specifically explain the basis for such determinations nor does she explain how disclosure could be significantly harmful to the contractors. Instead, she merely references the Vaughn indices. *E.g.,* Supp. Tufte Decl. ¶ 13 ("Justification for withholdings are contained in the two *Vaughn* Indexes incorporated in this case filing."). The Vaughn indices, however, are themselves hopelessly vague and conclusory. For example, defendant's Supplemental Vaughn Index states that information was withheld from LCS Corrections' proposal because

> the release could cause competitive harm to the submitter of the information. Release of such pricing information would cause substantial harm to the competitive position of the submitter on future bidding and would reveal elements crucial in determining the submitters pricing structure.

First Raher Decl., Ex. D at 17, Doc. #24. Such "justifications" for withholding are exercises in

ipse dixit—defendant does not describe with specificity how LCS could be harmed in future bidding, nor does defendant provide any evidence that LCS has objected to the release of this information. Additionally, in addition to withholding price information defendant has *also* withheld the number of beds at each contract facility, without providing any explanation as to why basic quantity information is exempt from disclosure. *E.g.*, Second Raher Decl., Ex. I, at 6-9 (redacting bed quantities) As another example, seven pages of MTC's proposal were withheld with the "explanation" that "[s]pecific documents or specific sections of these contracts which [sic] contain confidential business information the release of which would be substantially harmful to offeror's competitive position." First Raher Decl., Ex. D, at 19. It is difficult to imagine a more general and conclusory justification for withholding information.

Fourth, and finally, bidders were told that their proposals would be evaluated based upon their ability to "demonstrate at the time of proposal submission [that] they have corporate experience operating secure corrections/detention facilities for a continuous three-year period as of the date the solicitation was issued." Second Raher Decl., Ex. F, at 1 (setting forth the "Decisional Rule Criteria," (DRC)). Based on the extremely broad wording of the DRC, it is not likely that bidders provided confidential or proprietary information to prove such a basic factual premise. Accordingly, defendant bears the burden of proving that a contractor did, in fact, provide unsolicited confidential information in response to the DRC. Because defendant has not carried its burden, plaintiff is entitled to summary judgment.

Only two bidders (Cornell and MTC) designated portions of their proposals as confidential. One additional bidder (CCA) has attempted to provide a *post hoc* designation of confidentiality. As to the remaining two bidders (Reeves County and LCS), defendant has failed to provide any evidence of contractor objections to disclosure. Accordingly, plaintiff is entitled to summary

judgment as to the Reeves County and LCS proposals. The remaining three contractors are addressed in turn.

1. Cornell's Proposal

Cornell Corrections submitted a proposal for RFP-PCC-0010 ("CAR 6") which included, pursuant to Section L.11 of the instructions, a statement that certain portions of the proposal were considered confidential by the bidder. Second Raher Decl., Ex. H, at 5. This designation is relevant but not determinative. *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994). Cornell's designation of certain information as confidential does not justify defendant's withholdings for three reasons.

First, defendant has withheld *more* information from Cornell's proposal than just those portions labeled as confidential. *Compare* Second Raher Decl., Ex. H, at 5, *with* First Raher Decl., Ex. D, at 5-15. Although defendant has produced an affidavit by Cornell's vice president, this affidavit does not address these "extra" withholdings.

Second, defendant's primary evidence concerning Cornell's proposal is the affidavit of Ben Erwin, a corporate vice-president. Erwin Decl.[5] (Doc. #31). The Erwin affidavit is deficient for several reasons. Aside from many paragraphs addressing issues that are not in dispute, most of the declaration consists of assertions that are either irrelevant, overly vague, or inadmissible. The irrelevant portions include several statements that it is Mr. Erwin's "understanding that BOP agreed to withhold" specific documents. *E.g.*, Erwin Decl., ¶ 7. Mr. Erwin's understanding of defendant's decisions are not probative evidence of any relevant fact. The overly vague portions of the affidavit include assertions that release of the proposal would "allow[] outside entities to

[5] Although Mr. Erwin's affidavit was made under oath, defendant has erroneously captioned it a declaration.

determine confidential elements of Cornell's proposals to government customers" and "allow[] competitors a view into Cornell's proprietary approach of providing correctional services." *Id.* ¶¶ 12, 16. Because Mr. Erwin fails to provide even a basic description of the allegedly confidential information, this Court should give no weight to his conclusory determination that the information is protected. Mr. Erwin also states that when evaluating contractor bids, "price is . . . weighed heavily by the BOP and in some instances, outweighs other factors." *Id.* ¶ 11. Not only does this assertion contradict the BOP's own bidding instructions, but Mr. Erwin is obviously not competent to testify as to the BOP's business practices. *See* Second Raher Decl., Ex. F, at 2 ("The combined non-price evaluation criteria are significantly more important than price."). In the end, no material part of the Erwin affidavit contains competent, admissible evidence supporting the withholding of Cornell's proposal.[6]

Third, the Court should discount the Erwin affidavit because the affidavit did was not before defendant when it decided to withhold Cornell's proposal. The Erwin affidavit is dated February 23, 2010. Erwin Decl., at 4. BOP's determination to withhold proposal information was made no later than November 14, 2009, the date on which defendant sent plaintiff the redacted proposals. First Raher Decl., ¶ 5. Thus, the Erwin affidavit constitutes a *post hoc* rationalization of defendant's earlier decision. Accordingly, neither the Erwin declaration nor the portions of Ms. Tufte's declarations which apply to the Cornell proposal should not be accorded substantial weight. *Accord AT&T Info. Sys. v. Gen. Servs. Admin.*, 627 F. Supp. 1396, 1400 (D.D.C. 1986) (giving weight to agency affidavits because the administrative record "indicate[s] that [the agency employee] contemporaneously considered the factors on which he relies in his . . . declaration, and that that declaration is not simply a *post hoc* rationalization that

[6] Mr. Erwin's affidavit also addresses pricing information and past performance information, which are addressed *infra*, at 21-23 and 26-27.

must be discounted by the Court.").

In conclusion, Cornell labeled certain portions of its proposal as confidential but defendant has not produced sufficient evidence to justify withholding these portions. As a result, plaintiff is entitled to receive Cornell's entire proposal.

2. CCA's Proposal

Corrections Corporation of America ("CCA") submitted a proposal with *no* portions labeled as confidential. Second Raher Decl., Ex I. As discussed earlier, by not complying with BOP's instruction L.11, CCA waived the ability to protect any of the proposal under FOIA Exemption 4. *See supra*, at 13-14. However, even if CCA did not waive its Exemption 4 protection, defendant has still failed to produce sufficient evidence justifying withholding.

Defendant has produced no evidence that it received objections from CCA related to plaintiff's FOIA request. Although it has produced a letter from CCA, the letter concerns an unrelated FOIA request that sought documents relating to different procurement activities. Supp. Tufte Decl., Ex. 1. Assuming, *arguendo*, that the CCA letter included in Ms. Tufte's supplemental declaration is admissible for purposes of plaintiff's FOIA request, it is nonetheless insufficient to justify withholding any portion of CCA's proposal. The CCA letter mostly addresses *pricing* information (which is considered *infra*, at 21-33).[7] In fact, only one paragraph of the CCA letter addresses the type of information contained in the proposal:

> Other commercial information such as staffing patterns, activity plans, quality control plans, and small business subcontracting plans have also been developed only after the

[7] CCA's letter does contain requests that BOP withhold "Confidential Information" and "Security or Operational Information" from disclosure under FOIA. Supp. Tufte Decl., Ex. 1 at 6. To the extent that such information is accurately classified by BOP, plaintiff does not object to the withholding of the specific types of information described in these two sections of CCA's letter.

> investment of great time and expense. Allowing our competitors access to our commercial data will unfairly allow them to shortcut the hard work we have done and compete unfairly against us in the bids that are sure to come in the near future.

Id., at 6. Not only does this paragraph fail to identify, with specificity, the protected information contained in CCA's proposal, but CCA's interpretation of Exemption 4 is clearly contrary to the text and legislative purpose of FOIA. CCA's reading of Exemption 4 would extend protection to *all* contractor proposals simply because the contractors put time and money into developing such proposals. Such an interpretation of Exemption 4 would render FOIA a dead letter in all cases of government procurement and has no basis in legislative history or case law.

Because defendant has not produced sufficient evidence showing that withheld portions of CCA's proposal are protected by Exemption 4, plaintiff is entitled to the proposal in its entirety.

3. MTC's Proposal

Contractor Management and Training Corporation ("MTC") submitted a proposal with certain portions labeled as confidential. Second Raher Decl., Ex. J. This designation is relevant but not determinative. *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994). MTC's designation of certain information as confidential does not justify defendant's withholdings for two reasons.

First, defendant has withheld, under Exemption 4, portions of MTC's proposal which were not labeled as confidential. *E.g.*, Second Raher Decl., Ex. J, at 3. Defendant has failed to produce any evidence justifying these additional withholdings.

Second, some of the items labeled as confidential are not plausibly protected by Exemption 4. For example, MTC labeled "Attachment B" as confidential. *Id.*, at 24. Attachment B consists of a list of states in which MTC is licensed to conduct business. Plaintiff is aware of no state in

which business registration information is confidential.

The combined effect of MTC's apparent overuse of confidentiality labeling and the lack of any additional evidence supporting withholding, is to cast doubt on all withheld portions of MTC's proposal. Because BOP has failed to carry its evidentiary burden, MTC's proposal should be released to plaintiff in its entirety.

B. Contracts Are Not Covered by Exemption 4

Defendant has withheld the material price terms of all bidders' contracts under the theory that such pricing information is protected by Exemption 4. Not only has defendant failed to overcome the strong presumption in favor of disclosure, but defendant's application of Exemption 4 to price information is foreclosed by the two National Parks cases.

The National Parks cases involved a FOIA request for detailed financial information pertaining to concessioners in the national parks system. *Nat'l. Parks & Conservation Ass'n. v. Kleppe* (*National Parks II*), 537 F.2d 673, 675-677 (D.C. Cir. 1976). In *National Parks I*, the D.C. Circuit promulgated a rule for classifying confidential information that is protected by Exemption 4. *Nat'l. Parks & Conservation Ass'n. v. Morton* (*National Parks I*), 498 F.2d 765, 770 (holding, in relevant part, that information is "confidential" if disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained"). The Ninth Circuit has subsequently adopted the *National Parks* test, while also expressly articularing the implicit requirement that the party seeking to withhold information must prove "actual competition." *E.g., GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994).

When the D.C. Circuit decided *National Parks I*, it remanded the case so that the district

court could apply the new test. *Nat'l. Parks I*, 498 F.2d at 770-771. On remand, the district court found that disclosure of the concessioners' financial information would cause significant competitive harm. *Nat'l. Parks II*, 547 F.2d at 678. On their second appeal, the FOIA requesters argued that the concessioners were monopolists and thus did not face competition of the type that Exemption 4 requires. *Id.* Noting that rivals of the concessioners faced "practical barriers to competition" and that the concession contracts were infrequently renewed, the circuit panel held that the district court *had* committed clear error by finding competitive injury in the face of such monopolistic protections. *Id.* at 682. Notably, however, the court nonetheless upheld the judgment as to most of the concessioners because it found an alternative basis, namely that the concessioners faced considerable day-to-day competition from nearby businesses. *Id.*

The *National Parks II* opinion is notable both for its pronounced similarities and differences as compared to the contracts at issue in the present case. The recipients of defendant's CAR contracts enjoy monopolistic protection by virtue of the federal government's exclusive role in carrying out immigrant detention operations. In addition, BOP's pricing structure shields contractors from changing "marketplace" dynamics—once the prisons exceed a set capacity, contractors are guaranteed a fixed revenue stream during the term of the contract, regardless of actual inmate population. Second Raher Decl., Ex. C, at 2 ("Once the population exceeds 50% of contract beds, the [monthly operating price] will apply *regardless of the number of inmates*, until the end of the contract."). This could be efficient risk allocation if the contractors bore the risk of above-expected populations, but BOP does not even avail itself of this protection, since contractors are paid *additional* amounts if population exceeds 115% of contract beds. *Id.*, at 3.

As in *National Parks II*, the contractors here face infrequent re-bidding as evidenced by

BOP's management of the CAR contracts. *See* Second Raher Decl., Ex. K. The barriers to entry into the commercial detention market are substantial because contractors must invest substantial amounts of capital to develop the required physical infrastructure. Moreover, BOP has structured its solicitations so as to accentuate barriers to entry. *Id.*, Ex. D, at 2:11-13 (bidding limited to contractors with existing facilities). *Unlike* the concessioners in *National Parks*, the prison operators do not face day-to-day competition from other sources because prisons have no private customers.

A bedrock principle of government accountability is that public spending should be subject to complete transparency. Defendant seeks to withhold the prices paid to contractors (and even the number of beds the government is paying for) based solely on self-serving statements from two contractors. CCA states that "[o]ur prices are our most precious business secrets." Supp. Tufte Decl., Ex. 1, at 5. This contradicts the practice of most state and local governments, which make private prison per-diem payments public. Greene Decl. ¶ 5. FOIA's Exemption 4 was enacted as a shield to protect private entities from exposing proprietary methods and processes to public scrutiny merely because they chose to sell some products to governments. CCA, with defendant's assistance, is attempting to use FOIA as a sword, protecting its expansive corporate enterprise by preventing effective public oversight of the highly-secretive system of immigrant detention. CCA has *no* business outside of government contracts, thus its use of Exemption 4 to prevent any type of meaningful accountability turns Exemption 4 on its head.

IV. Defendant Has Not Justified Withholding Information under Exemption 2

Defendant has withheld multiple documents under FOIA Exemption 2, which protects information "related solely to the internal personnel rules and practices of an agency." 5 U.S.C.

§ 552(b)(2). As a general matter, BOP has misconstrued the relevant statutory language and has misapplied it to most of the information withheld under Exemption 2.[8] Defendant has specifically labeled two groups of withheld documents as protected under Exemption 2. First Raher Decl., Ex. D., at 7-14, 28. The latter of these two groups is addressed in plaintiff's response memorandum because it entails unresolved issues of material fact. This motion addresses the other group of Exemption 2 records (the Cornell past performance documents). However, defendant has refused to produce additional records while simultaneously failing to claim a statutory basis for withholding. *See* Pltf. Resp. to Def. Mot. for Summary Judgment, at 5-6. Some of the Supplemental Vaughn Index remarks covering these records hint at the policy issues underlying Exemption 2. Accordingly, as a precautionary matter, plaintiff provides an overview of Exemption 2 to foreclose any subsequent *post hoc* justifications that defendant may raise.

A. FOIA Exemption 2

BOP's application of Exemption 2 to information concerning *contractor* operations is contrary to the purpose and plain text of the statute. Specifically, defendant's use of Exemption 2 is unwarranted for three reasons.

First, the plain text of Exemption 2 forecloses defendant's interpretation. Exemption 2 applies to an agency's *internal* personnel and practices. By definition, contractor operations and personnel matters are *external* matters because contractors are separate legal entities. Despite the clear wording of the statute, defendant seeks to use Exemption 2 to withhold information

[8] Plaintiff does not dispute the withholding of certain information technology information under Exemption 2. *See* Second Raher Decl., Ex. L.

concerning contractor "staffing patterns." *E.g.,* First Raher Decl., Ex. D, at 28. Because issues of contractor staffing are not "internal" BOP matters, Exemption 2 is inapplicable.

Second, defendant attempts to use Exemption 2 to withhold information which allegedly "poses a security concern" for third-party entities. *E.g.*, First Raher Decl., Ex. D, 10. BOP seeks to withhold information without describing the information or explaining how its release could endanger security. Although Exemption 2 can be used to withhold sensitive law enforcement information, the Supplemental Vaughn Index descriptions of withheld information make a mockery of the government's duty to prove the applicability of narrowly construed FOIA exemptions. Specifically, BOP should not be able to invoke Exemption 2 absent an articulable bona fide threat to security. Having failed to articulate such threats, plaintiff is entitled to release of the disputed Exemption 2 documents.

Third, defendant's use of Exemption 2 contravenes FOIA's underlying policy rationale. Exemption 2 serves a policy goal of exempting "minor or trivial matters" from disclosure, while requiring disclosure of "more substantial matters which might be the subject of legitimate public interest." *Dept. of Air Force v. Rose*, 425 U.S. 352, 365 (1976). For example, in *Rose*, the Supreme Court held that certain records were not properly withheld under Exemption 2 because the subject-matter was "not matter with merely internal significance. [The documents] do not concern only routine matters. Their disclosure entails no particular administrative burden." *Id.* at 370. The question of staffing levels at contractor-operated CAR facilities is a matter of acute public interest. *See e.g.,* Second Raher Decl., Ex. M. Staffing of correctional facilities implicates question of inmate and public safety. BOP makes vague allegations that release of the withheld staffing information "could risk circumvention of security at the prison," *see e.g.,* First Raher Decl., Ex. D, at 28, but BOP has introduced no evidence suggesting that the withheld

information describes staffing patterns at a level of specificity that raises legitimate security concerns.

B. Cornell's Past Performance Records

Defendant has completely withheld 624 pages which it describes as "a series of contract documents submitted by Cornell in response to the requirement . . . that offerors provide contract documents for each of the facilities listed in the 'Decisional Rule Criteria.'" First Raher Decl., Ex. D, 7-14. BOP claims that such records are withheld pursuant to Exemptions 2 and 4. The inapplicability of Exemption 4 has been discussed previously. *See supra*, 9-19. Exemption 2 is inapplicable to these past performance documents for three reasons.

First, information submitted in response to the "Decisional Rule Criteria" ("DRC") is presumptively non-confidential and non-sensitive because the DRC merely asked for factual information which is already in the public domain. The BOP's solicitation for the CAR-6 contract informed bidders that their proposals would be evaluated based on the DRC. The DRC is described thusly: "To be evaluated for award, offerors must clearly demonstrate at the time of proposal submission they have corporate experience operating secure corrections/detention facilities for a continuous three-year period as of the date the solicitation was issued." Second Raher Decl., Ex F, at 1. Because the DRC does not ask for confidential or protected information, any materials provided by bidders in response to the DRC are presumptively disclosable. Although it is conceivable that some bidders may have submitted confidential or sensitive information in response to the DRC, the burden is on BOP (as the party opposing disclosure) to describe such information with specificity. So far, defendant has merely described the withheld information as:

> *either* (1) specific documents *or* specific sections of these contracts which contain confidential business information, the release of which would be substantially harmful to Cornell's competitive position, *or* (2) documents containing information which poses a security concern for the particular customer for that contract, such as the state governments of California, Georgia, and Oklahoma.

E.g., First Raher Decl., Ex. D, at 7 (emphasis added). Defendant's use of the disjunctive "either/or" indicates a vague and legally insufficient description. The purpose of a *Vaughn* Index is "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Weiner v. Fed. Bureau of Investigation*, 943 F.2d 972, 977 (9th Cir. 1991) (internal quotation marks omitted) (quoting *King v. Dept. of Justice*, 830 F.2d 201, 218 (D.C. Cir. 1987)). BOP's cursory description of Documents 12-19 in the Supplemental Vaughn Index easily fails this standard. For the same reasons, the perfunctory treatment of the withheld documents in the Erwin affidavit is an insufficient basis upon which to base withholding. *See* Erwin Decl., ¶ 22.

Second, defendant's use of Exemption 2 to withhold the Cornell documents does not fit within the scope of the statutory language. Exemption 2 applies to information that is "related solely to the internal personnel rules and practices *of an agency*." 5 U.S.C. § 552(b)(2) (emphasis added). For purposes of FOIA, an agency is an "authority of the Government of the United States." 5 U.S.C. § 551(a). Thus, BOP's attempts to use Exemption 2 to withhold information that is allegedly harmful to *state* governments is improper.

Third, pursuant to Paragraph L.11 of BOP's bid instructions (*see supra*, 13-14), Cornell labeled numerous parts of its proposal as exempt from disclosure under FOIA. Second Raher Decl., Ex. H, at 5. The past performance records that BOP seeks to withhold were not among the records that Cornell designated as protected. Thus, defendant's withholding and the boilerplate

language in the Erwin affidavit appear to be *post hoc* rationalizations that should not be considered by this Court.

V. No Documents Pertaining to Reeves County Are Exempt from Disclosure

One of the bidders in the CAR-5 and -6 procurement actions is Reeves County, Texas. Although the arguments made in prior two sections apply with equal force as to Reeves County, there is an additional legal basis which entitles plaintiff to *all* records pertaining to the Reeves contract, to the extent that the county possesses, or has the right to access, copies of such records.

Reeves County is a political subdivision of Texas. Texas law requires most public records to be disclosed upon request. Specifically, requesters are "entitled . . . at all times to complete information about the affairs of government and the official acts of public officials and employees. . . . The provisions of [the Public Information Act] shall be liberally construed to implement this policy." Tex. Code Ann. § 552.001(a). Texas's public records law applies to:

> Information that is collected, assembled, or maintained . . . in connection with the transaction of official business:
> (1) by a governmental body; or
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Tex. Code Ann. § 552.002(a). Although the Texas statute does exempt bidding information that "would give advantage to a competitor or bidder," Tex. Code Ann. § 552.104(a), numerous rulings of the Texas Attorney General have held that such protection only lasts until the contract is awarded. *See e.g.*, Second Raher Decl., Ex. N (Texas Attorney General Open Records Decision No. 514 (1988)). Accordingly, unless BOP can prove that Reeves County does not have a right of access to certain of the records pertaining to the Reeves

contracts, all such records should be disclosed to plaintiff, subject only to necessary withholding of bona fide security information.

In fact, other requesters have successfully obtained from Reeves County documents which BOP now refuses to release because of claimed confidentiality. *Compare* Second Raher Decl., Ex. O, *with* Barry Decl., Ex. A. Indeed, Reeves County has even released information detailing its profit margin—information that defendant claims is categorically non-disclosable under Exemption 4. *See* Barry Decl., Ex. B.

Finally, it is highly unlikely that the Reeves proposal contains confidential commercial information within the scope of Exemption 4. Reeves County is a public entity, thus information pertaining to its operations is not commercial. It is true that Reeves has engaged the GEO Group, as subcontractor, to operate the CAR facility, yet even this does not help defendant's argument. At the BOP's pre-bid conference, the agency was asked to "clarify how the decision rule criterion would be applied to a county or other local government entity who seeks to satisfy the requirement for corporate experience operating secure corrections detention facilities for a continuous three-year period by subcontracting with a private corrections firm who meets the decisional rule criteria." Second Raher Decl., Ex. G, at 14. BOP's answer was: "the prime contractor must be the contractor that meets the decisional rule criterion." *Id.* Accordingly, the information in Reeves' proposal presumably relates to the county, not GEO, thus making it highly unlikely that Exemption 4 applies. In any event, Exemption 4 only protects confidential information and the Reeves County documents are not confidential as a matter of Texas law.

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VI. Defendant's Refusal To Produce NEPA Documents Has No Basis in Law

Defendant has identified five environmental assessments ("EAs") prepared pursuant to the National Environmental Policy Act ("NEPA," 42 U.S.C. § 4321, *et seq.*) as responsive to plaintiff's FOIA request. Defendant has refused to produce the EAs, arguing that such documents cannot be requested under 5 U.S.C. § 552(a)(3) because the documents were "made public during the review period." First Raher Decl., Ex. D, at 30, 32, 34, 36, and 38. BOP's argument is based on an implausible reading of FOIA and is wholly without merit.

BOP argues that records that are available pursuant to § 552(a)(1) or (a)(2) cannot be requested under § 552(a)(3). Although this is true as a general proposition, it simply does not apply to the EAs at issue here. To qualify for this type of exemption, the records at issue must be of a type that are covered by paragraph 1 or 2 of § 552(a). *See* 5 U.S.C. § 552(a)(3)(A) ("*Except with respect to* the records made available under paragraphs (1) and (2) of this subsection . . . each agency . . . shall make the records promptly available to any person.") (emphasis added).

Paragraph 1 covers descriptions of agency organization and processes, rules of procedure, substantive rules of general applicability, and amendments thereto. 5 U.S.C. § 552(a)(1). Nothing in paragraph 1 describes the environmental information that defendant seeks to withhold. In addition, paragraph 1 requires agencies to publish the covered information in the Federal Register. *Id.* BOP has neither proven nor claimed that the EAs were published, in their entirety, in the Federal Register. Paragraph 2 covers final opinions, statements of policy, administrative manuals, and frequently requested records. 5 U.S.C. § 552(a)(2). Again, nothing in this paragraph describes the EAs. Because the EAs are not covered by (a)(1) or (a)(2), they are the proper subject of plaintiff's request under (a)(3).

Even if BOP can shoehorn the EAs into § 552(a)(1) or (2), they still must produce the records in response to plaintiff's FOIA request for three reasons. First, both (a)(1) and (a)(2) provide that agencies "shall make available" the records covered by the two respective paragraphs. The EAs at issue here may have been available at one time, but are no longer available (as evidenced by BOP's refusal to release them), and thus are no longer covered by (a)(3)'s "except-with-respect-to" clause.

Second, BOP's only proof that the EAs were made available to the public is boilerplate language contained in the Supplemental Vaughn Index. Def. Mem., 11. The Supplemental Vaughn Index does not provide any details on when or how the EAs were made available, thus even if BOP's reading of (a)(3) is correct, it has not satisfied its burden of proof.

Third, BOP's interpretation of the statutory text contradicts FOIA's established policy favoring disclosure. If mere notice of EA availability cuts off the public's ability to request such documents under (a)(3), when is this cutoff effective? Immediately upon publication of the notice? A month after publication? At the end of the NEPA comment period? The fact that defendant has not cited a single case in support of its interpretation indicates that its argument is without merit.

VII. Defendant Concedes That Plaintiff Is Entitled to a FOIA Fee Waiver

Plaintiff's FOIA request included a request for a waiver of associated fees. Complaint, Ex. A. Defendant summarily denied the requested fee waiver. *Id.*, Ex. B. In his administrative appeal, plaintiff provided evidence demonstrating his entitlement to a fee waiver. *Id.*, Ex. C. Defendant has since conceded that plaintiff meets the specified requirements for a FOIA fee waiver. Tufte Decl., ¶ 9; Def. Resp. to Pltf. Mot. to Compel (Doc. #16), at 3. Accordingly,

plaintiff is entitled to a determination on summary judgment that he has met the requirements for a FOIA fee waiver.

VIII. Conclusion

Since the date of plaintiff's FOIA request, defendant has consistently acted uncooperatively and intransigently. Although defendant states that it has "produced approximately 3,820 pages" of documents in response to the FOIA Request (Def. Mem., at 12), this statement downplays the fact that BOP has withheld nearly all salient information contained within the documents it produced. Concomitant with its document production, defendant supplied two Vaughn Indices, listing withheld documents (or portions thereof) and sometimes (but not always) setting forth the statutory exemption that allegedly justifies withholding. The cursory descriptions of the withheld documents and the failure of defendant to even provide a statutory basis for some of the withholdings is clear evidence of BOP's uncooperative conduct during the course of this litigation.

As discussed above, defendant has largely failed to satisfy its burden of proof with regards to most of the withheld documents. Because there is simply no evidence supporting most of the withholdings, plaintiff is entitled to summary judgment as requested herein.

Dated this 15th day of April, 2010.

Respectfully submitted,

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