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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

STEPHEN RAHER,

Plaintiff

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

Case No. CV 09-526-ST

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Request for Oral Argument

Plaintiff Stephen Raher, who is pro se, responds to defendant's Motion for Summary Judgment as follows:

I. Introduction

As detailed in the record before this Court, defendant has identified several thousand pages of documents that it admits are responsive to plaintiff's FOIA request. *E.g.*, Def. Mem. in Support of Def. Mot. for Summary Judgment ("Def. Mem."), at 1-3. Plaintiff has explained in his Motion for Partial Summary Judgment that defendant has not produced evidence to justify withholding of a large portion of these documents. Plaintiff submits this response to identify a subset of documents which are not properly subject to summary judgment for either party because there are genuine issues of material fact. Plaintiff attempted to resolve these factual issues by making a modest discovery request. Pltf. Mot. to Compel Discovery (Doc. #12). After briefing and oral argument, this Court denied plaintiff's discovery requests with leave to renew

after the filing of defendant's summary judgment motion. Minute Order Feb. 4, 2010 (Doc. #22). The information discussed in this response concerns areas where plaintiff is reasonably entitled to the discovery allowed by the Court's order of February 4.

II. Defendant Has Not Acted in Good Faith

As a preliminary matter, plaintiff must respond to defendant's repeated assertions that it has acted in good faith when processing plaintiff's FOIA request. In fact, BOP's actions bear several indicia of bad faith and defendant is not entitled to the benefits that normally accompany good-faith agency conduct.

When plaintiff's motion to compel discovery was before this Court, defendant produced correspondence in which it had asked contractors if they had any objections to disclosure of certain information. Tufte Dec., Ex. E. As plaintiff noted on January 26, defendant claims that it made a determination to withhold information from plaintiff *after* having received objections from submitters, yet the Tufte declaration shows that BOP had already decided "to totally deny release" of many documents before it even contacted the submitters. Pltf. Reply to Def. Opp. (Doc. #20), at 2. Although defendant has had over two months to respond to plaintiff's argument, it has failed to do so. Indeed, BOP is evidence in support of its summary judgment motion that indicates it only received objections from two of the five contractors.

Defendant's willingness to deny release of information before even consulting submitters also contradicts earlier public statements made by defendant's authorized spokeswoman. When BOP issued its request for proposals in the "CAR 6" procurement action, it hosted a pre-proposal conference for potential bidders on June 27, 2006. *See* Second Raher Decl., Ex. G. One of the bidders asked BOP if it could obtain basic information, including per diem payment rates,

concerning *existing* CAR contracts. *Id.* at 20. In response to this question, BOP employee Beverly Graham stated that "this information can be requested through a Freedom of Information Act request." *Id.* While Ms. Graham's answer cleverly avoids stating that BOP would actually *release* information in response to such a request, defendant's conduct in this suit shows that it is prepared, on its own initiative, to deny release of such information. Thus, the BOP apparently has adopted a policy of encouraging parties to submit futile FOIA requests that have no chance of being approved. Such cynical behavior is antithetical to good faith.

Even the scope of BOP's document redactions indicate bad faith. For example, BOP has withheld Correction's Corporation of America's taxpayer identification number, despite the fact that the same number appears on the first page of CCA's publicly-available filings with the Securities and Exchange Commission. *Compare* Second Raher Decl., Ex. P *with id.*, Ex. I at 16. Also, BOP has withheld the table of contents from one bidder's proposal under the implausible theory that it contains "confidential business information." *See* Second Raher Decl., Ex. Q; First Raher Decl., Ex. D, at 21.

III. Defendant Has Not Provided Adequate Information Concerning Certain Withholdings

Defendant's Supplemental Vaughn Index describes several categories of documents which were withheld in their entirety. First Raher Decl., Ex. D, at 28-40. These documents can be grouped into four categories: Reeves County final proposal revisions (documents 46 and 47), past performance records (documents 48, 51, 54, 57, 60, and 63), technical proposal records (documents 49, 52, 55, 58, 61, and 64), and environmental proposals (documents 50, 53, 56, 59, 62, and 65). Defendant is not entitled to summary judgment as to these records for two reasons. First, the descriptions of the withheld information do not meet the applicable legal standard.

Second, with the exception of the Reeves County proposal revisions, defendant has not even specified the statutory FOIA exemption(s) which supposedly justify the withholdings.

A. The Supplemental Vaughn Index Contains Inadequate Descriptions

A Vaughn index must contain specific descriptions of withheld documents. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973) ("The need for adequate specificity is closely related to assuring a proper justification by the governmental agency. In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt."). This requirement reflects the policy rationale underlying the use of Vaughn indices. *See Wiener v. Fed. Bureau of Investigation*, 943 F.2d 972, 977 (9th Cir. 1991) (purpose of 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.") (internal quotation marks omitted) (quoting *King v. Dept. of Justice*, 830 F.2d 201, 218 (D.C. Cir. 1987)).

Here, defendant has clearly failed to provide descriptions of the type required under *Vaughn* and *Wiener*. For example, the bidders' technical proposals are "described" merely as "documents [that] were written by the offeror describing how they will undertake the project for designing, creating something new or for changing or modifying an existing procedure, to include their method, system or structure to accomplish this within a specified period of time." *E.g.*, First Raher Decl., Ex. D, at 36. Such verbiage is borderline incomprehensible, does not adequately describe the withheld documents, and fails to satisfy defendant's statutory obligation to disclose "reasonably segregable portion[s] of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b), paragraph following (b)(9).

B. Defendant Does Not Provide a Proper Legal Basis for Certain Withholdings

Defendant has withheld past performance records, technical proposals, and environmental proposals without even citing an applicable FOIA exemption. *See* First Raher Decl., Ex. D, at 28-40. This strongly contravenes the government's duty to provide information that allows the district court to review the soundness of the withholding. *Wiener*, 943 F.2d at 977. It is axiomatic that if an agency fails to provide a legal basis for withholding, the court cannot adequately review the soundness of the withholding. Defendant's conduct here clearly runs contrary to the general policy of not allowing agencies to withhold information based merely on agency assurances that such information is exempt from disclosure. *See Vaughn*, 484 F.2d at 826 ("courts will simply no longer accept conclusory and generalized allegations of exemptions"); *accord Piper v. U.S. Dept. of Justice*, 294 F. Supp.2d 16, 32 (D.D.C. 2003) (when Vaughn index lacks justification for withholding, "the Government has no standing to invoke [FOIA] exemptions.").

Defendant's only legal justification for withholding these documents is a misplaced reliance on certain provisions in the Federal Acquisition Regulations ("FAR"). BOP's reliance on the FAR is insufficient for two reasons. First, administrative regulations, such as the FAR, cannot displace statutory provisions such as FOIA.

Second, BOP has misapplied the FAR provisions which it cites. Specifically, BOP cites three sections of the FAR—§§ 3.104-4, 15.306, and 15.506. First Raher Decl., Ex. D, at 36. Section 3.104-4 provides that "*[e]xcept as specifically provided for in this subsection*, no person or other entity may disclose contractor bid or proposal information or source selection information to any person." Fed. Acquisition Reg. § 3.104-4(a) (emphasis added). The same subsection provides that contractor bid or proposal information must be handled "in accordance

with . . . applicable law." *Id.* § 3.104-4(b). Thus, any protection provided by subsection 104-4 must be consistent with FOIA, which is "applicable law." Moreover, the FAR defines "contractor bid or proposal information" as certain financial information and "[p]roprietary information about manufacturing processes, operations, or techniques." *Id.* § 3.104-4. The information encompassed by the FAR's definition of "contractor bid or proposal information" appears to be coextensive with FOIA's Exemption 4. It is possible that portions of the bidder's technical proposals or past performance records contain information which is properly protected by Exemption 4 and/or the FAR. Yet instead of designating and describing the portions of the technical proposals or past performance records which contain such information, defendant seeks to improperly withhold the records in their entirety. Finally, BOP's application of FAR § 3.104-4 to the environmental proposals is entirely without merit. The FAR only protects confidential information, yet here bidders were instructed that information submitted as part of their environmental proposals "*shall not* be considered 'Proprietary Information.' The Government reserves the right to publicly disclose any information submitted." Second Raher Decl., Ex. E, at 13 (emphasis added).

Defendant also relies on FAR § 15.306(e) to withhold information. This section covers five categories of information. The Supplemental Vaughn Index makes a conclusory determination that the withheld documents contain information covered by three of these categories, but does not make even the most cursory attempt to describe such information. First Raher Decl., Ex. D, at 4, n. 2. Defendant also cites FAR § 15.506, which applies to "postaward debriefing of offerors" and thus appears to be entirely inapplicable here.

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C. Reeves County Revision Documents

The final category of "totally withheld" documents consists of one hundred pages of "final proposal revisions" from Reeves County. Defendant seeks to withhold these documents under Exemption 2, claiming that "release could risk circumvention of security at the prison, by allowing inmates and others to identify staffing patterns, as well as security and operations information." First Raher Decl., Ex. D, at 28. Plaintiff acknowledges that legitimate security concerns can form a proper basis for withholding information; however, defendant has failed to describe the withheld Reeves County records in sufficient detail. BOP should not be able to invoke Exemption 2 absent an articulable bona fide threat to security. *See* Pltf. Mem. in Support of Pltf. Mot. for Summary Judgment, at 25. Accordingly, plaintiff and this Court are entitled to a more specific description of the withheld information and how disclosure would create a legitimate security threat. For this reason, defendant is not entitled to summary judgment as to the Reeves proposal revisions.

D. Plaintiff is Entitled to Discovery

Defendant has not adequately justified its total withholding of the documents described in this section. As explained above, defendant has not acted in good faith. Accordingly, plaintiff is entitled to pursue discovery as to the totally withheld documents. *See Van Strum v. U.S. Envtl. Protection Agency*, 680 F.Supp. 349, 352 (D. Or. 1987) ("[W]here plaintiff or the agency's response raises serious doubts as to the completeness and good faith of the agency's search, discovery is appropriate.").

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IV. Defendant Has Not Conducted an Adequate Search for Evaluation Records

Plaintiff's FOIA request sought, among other things, records related to BOP's evaluation of contractor bids. Complaint, Ex. A. BOP has not produced any records pertaining to bid evaluation, nor has it provided plaintiff with any explanation of why such records would not be available. It simply is not plausible that BOP could have evaluated and awarded a series of large contracts without generating records during the review process. Defendant bears the burden of proving it has conducted a reasonable search. *Citizens' Comm'n. on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995).

Although plaintiff raised this issue in his motion to compel discovery, defendant has not once addressed the question of its inadequate search for evaluation records. Accordingly, plaintiff is entitled to pursue discovery on this issue. *Niren v. Immigration & Naturalization Serv.*, 103 F.R.D. 10, 11 (D. Or. 1984) ("Whether a thorough search for documents has taken place . . . [is a] permissible avenue[] for discovery.").

V. Conclusion

As described herein, defendant has completely withheld large numbers of documents without providing basic descriptions of the contents or legal bases for withholding. The contents of the totally-withheld documents constitutes an essential question of fact, thus making summary judgment inappropriate at this time.

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Dated this 15th day of April, 2010.

Respectfully submitted,

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