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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**STEPHEN RAHER,**
**Plaintiff,**

**v.**

**FEDERAL BUREAU OF PRISONS,**
**Defendant,**

**and**

**THE GEO GROUP, INC.,**
**Defendant-Intervenor.**

**Case No. CV 09-526-ST**

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

Pursuant to the Court's order of November 24, 2010 (Doc. #74), plaintiff submits this response to the supplemental evidence filed by defendants on November 5, 2010.

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## I. Introduction

Plaintiff submitted his FOIA request to defendant BOP over two years ago. The government initially responded by demanding an exorbitant processing fee and then ignoring plaintiff's administrative appeal and attempts to reach an informal resolution. Upon the filing of this action, plaintiff had hopes that the U.S. Attorney's Office would be able to facilitate a reasonable compromise. When that failed, plaintiff looked forward to a substantive legal debate. Yet during the course of this suit, BOP has treated plaintiff and this Court to a parade of vague, legally suspect, and ever-changing justifications for withholding almost all of the salient information that is responsive to the FOIA request. When the Court denied BOP's motion for summary judgment, it issued a clear directive that the government must adhere to the well-established principles embodied in FOIA. Unfortunately, BOP has responded by providing more of the same conclusory and sometimes incoherent arguments as it has from the outset of this case.

As part of its opinion denying BOP's motion for summary judgment, the Court ordered BOP[1] to do four things:

> 1. State the precise reason for withholding each specific document or part of document withheld.
>
> 2. With respect to the information withheld under Exemption 2, describe with particularity how the information is used predominantly for internal purposes and explain how disclosure would present a serious risk of circumvention of agency regulations, statutes, or other legal requirements.
>
> 3. With respect to the information withheld under Exemption 4, provide evidence of actual competition in the relevant market for CAR contracts and CAR contract renewal and explain how disclosure of each document or part of a document withheld would be likely to substantially harm the competitive position of a specific submitter.

[1] Upon granting GEO's motion to intervene, the Court made the terms of the summary judgment order applicable to GEO, to the extent of documents pertaining to GEO or Cornell Companies.

> 4. With respect to the past performance records and technical proposal records, state the precise reason for withholding each document or part of a document and the FOIA exemption under which the withholding is justified.

SJ Opinion, at 24-25.[2] The Court's order further specified that if BOP failed to provide the required information, plaintiff's motion for summary judgment would be granted. *Id.*, at 25.

The defendants' supplemental evidence must be measured against the terms of the Summary Judgment Order as interpreted in the context of the Memorandum Opinion and the relevant case law. The supplemental evidence fails to satisfy the requirements of the Summary Judgment Order because it does not adequately describe the withheld information or correlate the withholdings to applicable FOIA exemptions. Accordingly, plaintiff's motion for partial summary judgment should be granted. In the alternative, if plaintiff's motion is not granted, then this case cannot proceed until plaintiff is allowed to conduct discovery.

## II. BOP Has Not Complied with the Terms of the Summary Judgment Order

In response to the Summary Judgment Order, defendant BOP submitted five declarations. One declarant is an employee of contractor Corrections Corporation of America ("CCA"). The remaining four declarants are all BOP employees.

[2] The documents cited in this memorandum include the following items from the record in this case: Memorandum Opinion and Order (Doc. #48) ("SJ Opinion"); Defendant's Supplemental Response (Doc. #64) ("Def. Supp. Resp."); Supplemental Declaration of LeeAnn Tufte (Doc. #30) ("Supp. Tufte Decl."); Second Supplemental Declaration of LeeAnn Tufte (Doc. #65) ("Second Supp. Tufte Decl."); Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment (Doc. #34) ("Pltf. SJ Mem."); Transcript of Proceedings, June 1, 2010 (Doc. #82) ("SJ Oral Argument Trans."); 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 (Doc. #35) ("Second Raher Decl."); Declaration of Stephen Raher in Support of Plaintiff's Opposition to GEO Group's Motion to Dismiss or Transfer Plaintiff's Amended Complaint (Doc. #81) ("Third Raher Decl."); Supplemental Declaration of Stephen Raher in Support of Plaintiff's Motion for Partial Summary Judgment ("Fourth Raher Decl.").

Plaintiff first addresses the inadequacies of BOP's Vaughn Indices, with a focus on the Second and Third Supplemental Vaughn Indices. Plaintiff then turns to the specific exemptions claimed by BOP and the declarations that the agency filed on November 5.

### A. BOP Has Not Satisfied Part 1 of the Court's Order

Part 1 of the Court's Summary Judgment Order directed BOP to state the precise reason for withholding each specific document. SJ Opinion, at 24. BOP claims that it has satisfied Part 1 through the Second Supplemental Declaration of LeeAnn Tufte and the Second and Third Supplemental Vaughn Indices. Def. Supp. Resp., at 2. In fact, BOP has not complied with this provision of the Summary Judgment Order.

Part 1 of the Court's order seems designed to ensure that the government shoulders its burden of justifying the withholding of information. *See* SJ Opinion, at 2 ("FOIA places the burden on the agency to sustain withholding requested information."). The Court also acknowledged that the government satisfies its burden through the production of a Vaughn Index, and that "[s]pecificity is the defining requirement of a Vaughn index." *Id.*, at 2-3 (quoting *Wiener v. Fed. Bureau of Investigation*, 943 F.2d 972, 979). The language which the court quoted from *Wiener* reflects an overriding concern with counteracting the defeat of the adversarial process that would otherwise occur in FOIA cases. *See Wiener v. Fed. Bureau of Investigation*, 943 F.2d 972, 977 (9th Cir. 1991) ("The party requesting disclosure must rely upon his adversary's representations as to the material withheld, and the court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding agency's arguments."). Accordingly, 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. The index thus functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Id.*, at 977-978 (quoting *King v. Dept. of Justice*, 830 F.2d 210, 218 (D.C.Cir. 1987)) (internal quotation marks, citation, and footnote omitted).

Given the policy rationales underlying Part 1 of the Summary Judgment Order, BOP has clearly failed to satisfy its burden.

### 1. Evidence Concerning the Evaluation Documents Is Legally Insufficient to Justify Withholding

In response to the Court's order of June 1, 2010 (Doc. #44), BOP produced two evaluation documents and the accompanying Second Supplemental Vaughn Index. Fourth Raher Decl, Exh. A (evaluation documents); Second Supp. Tufte Decl., Exh. 1 (Vaughn Index). Aside from four blank pages which the BOP generously "released in full," the two documents described in the Second Supplemental Vaughn Index are mostly redacted. The Second Supplemental Vaughn Index is deficient for two reasons.

First, the Vaughn index does not adequately describe the withheld information. Indeed, other than disclosing titles, the Vaughn Index contains absolutely no description of the documents. Although the documents released by BOP contain many pages which are redacted in their entirety (*see e.g.*, Fourth Raher Decl., Exh. A, at 18-32), they also contain several targeted, or "pinpoint" redactions (*see, e.g.*, Fourth Raher Decl., Exh. A, at 2-4). The very fact that BOP has asserted four blanket exemptions without specifically linking the exemptions to the various redactions makes the Second Supplemental Vaughn Index inadequate. *Schiller v. Nat'l Labor Relations Bd.*, 964 F.2d 1205, 1210 (D.C. Cir. 1992) ("[An] agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant

and *correlating those claims with the particular part of a withheld document to which they apply*.'" (quoting *King v. U.S. Dept. of Justice*, 830 F.2d 210, 224 (D.C.Cir. 1987) (emphasis by *Schiller*)). This infirmity is perfectly illustrated by the Vaughn index language relating to the Exemption 4 withholding. For both documents, the BOP invokes Exemption 4 "to protect *the* financial information as it could cause competitive harm to the submitter of the information." Second Supp. Tufte Decl., Exh. 1, at 2, 3 (emphasis added). Unfortunately, nowhere in the Vaughn Index nor the documents themselves is there any indication of *what* this financial information is, or who submitted it. Accordingly, BOP's lack of description vitiates plaintiff's ability to pursue adversarial testing of the withholdings. *See Wiener*, 943 F.2d at 977-978.

Second, the Second Supplemental Vaughn Index does not sufficiently justify the application of any of the claimed exemptions. BOP asserts substantially identical exemptions for both documents. BOP begins with a claim of "high 2" because disclosure would allegedly "risk circumvention of an agency regulation or statute or impede the effectiveness of our agency's law enforcement activity." Second Supp. Tufte Decl., Exh. 1, at 2, 3. This argument is troubling because it applies to multiple segments of the document and is phrased in the alternative. *Cf. Wiener*, 943 F.2d, at 979 ("The most obvious obstacle to effective advocacy is the FBI's decision to state alternatively several possible reasons for withholding documents, without identifying the specific reason or reasons for withholding each particular document. Effective advocacy is possible only if the requester knows the precise basis for nondisclosure."). Moreover, BOP fails to specify what particular "agency regulation[s] or statute[s]" could be circumvented if the information is released. The only regulation cited in connection with the Exemption 2 withholding is Federal Acquisition Regulation § 15.304—a nonsensical citation. Second Supp. Tufte Decl., Exh. 1, at 2, 3. Section 15.304 of the F.A.R. simply describes the factors which

agencies should consider when awarding a contract. Fourth Raher Decl., Exh. B. It is not at all apparent how release of these inadequately-described documents would impair BOP's ability to consider evaluation factors in the future. Indeed, BOP argues that "[f]uture submitters could circumvent our regulations if they were provided with this sensitive evaluation information and source selection information." Second Supp. Tufte Decl., Exh. 1, at 2, 3. But it is difficult to see how future submitters could "circumvent" § 15.304, a regulation that merely provides guidance to federal agencies. BOP's argument is incoherent and insufficient to justify withholding.

BOP also asserts Exemption 4 in the Second Supplemental Vaughn Index, claiming that release "would cause substantial harm to the competitive position of the submitter on future bidding." *Id.* Exemption 4 only applies to "information obtained from a person." 5 U.S.C. § 552(b)(4). The evaluation documents described in the Second Supplemental Vaughn Index were created by BOP, thus they cannot be withheld under an exemption which only applies to information obtained from third parties.

In fact, the inapplicability of Exemption 4 to these two documents is illustrated by a recent case concerning a FOIA request for information concerning Federal Reserve Bank loans to private banks. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010). When a news organization requested a list of loans which the Federal Reserve made under its emergency lending programs, the government sought to withhold the information under Exemption 4. Although the requested information was in the form of an internally-generated report, the Federal Reserve claimed that it was "obtained from a person" for purposes of Exemption 4 because the information in the reports reflected information contained in the loan applications which were, clearly, obtained from a person. *Id.* at 147 ("The Board [argues that] the loan information contained in the [report] was 'obtained' from the borrowing banks because

the amount, terms, and conditions of each loan to each borrower was in effect determined by the loan request itself."). The Second Circuit Court of Appeals rejected this reasoning, concluding that "the fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA." *Id.*, at 148 (emphasis in original). The rationale of the *Bloomberg* holding is applicable here. Just because the evaluation documents may reflect some information which BOP obtained from third parties does not magically transform the documents into information obtained from a person. Accordingly, because the documents were generated internally, Exemption 4 is categorically inapplicable.

The Second Supplemental Vaughn Index also asserts Exemption 3 as a basis for withholding. BOP's Exemptions 3 arguments are addressed *infra*, at 16-19.

Despite the Court's clear message that vague and conclusory arguments are not acceptable bases for withholding, the Second Supplemental Vaughn Index continues BOP's history of inadequately describing information and withholding documents based on legally insufficient arguments. BOP's conduct is in plain defiance of FOIA, and the Court should order total release of the documents described in the Second Supplemental Vaughn Index.

### 2. Total Withholding of the Past Performance Records and Technical Proposals is Based on Inadequate Vaughn Indices and is Legally Unjustified

BOP's Supplemental Vaughn Index contained entries for twelve documents which were withheld in their entirety without any asserted FOIA exemption. SJ Opinion, at 19. The BOP's second attempt to justify withholding takes the form of the Third Supplemental Vaughn Index. Second Supp. Tufte Decl., Exh. 2. The substantive problems with BOP's claimed exemptions

are discussed elsewhere in this brief. This section focuses on the inadequate descriptions contained in the Third Supplemental Vaughn Index, and the failure of the index to comply with Part 1 of the Summary Judgment Order. Although the Third Supplemental Vaughn Index lists twelve documents, the treatment of each document is quite similar, and plaintiff's objections are generally applicable to all of the twelve items. For the sake of brevity, plaintiff will frame his argument here in terms of Documents 1 and 2 (the past performance records and technical proposal, respectively, for the CAR 5 Reeves County/GEO contract); however, these same arguments are equally applicable to all of the documents listed in the index.

At the June 1 hearing, BOP's counsel admitted that BOP staff did not examine all of the past performance records and technical proposals, but instead relied on a sampling of a small portion of the documents. SJ Oral Argument Trans., at 15:9-18. This failure to review the documents does not appear to have been remedied with the Third Supplemental Vaughn Index, which lacks detailed descriptions of the documents and continues to provide only estimated page numbers. Second Supp. Tufte Decl., Exh. 2. The BOP's practice of not closely examining documents indicates that it has not discharged its duty to evaluate documents for reasonably segregable portions which may be released. *See* 5 U.S.C. § 552(b), paragraph following (b)(9) ("Any reasonably segregable portion of a record *shall be provided* to any person requesting such record after deletion of the portions which are exempt." (emphasis added)).

Indeed, questions of segregability permeate the Third Supplemental Vaughn Index. Although some items are withheld pursuant to one or two exemptions, the vast majority are withheld under claims of Exemptions 2, 3, *and* 4. However, BOP's failure to adequately describe the withheld documents makes these blanket assertions particularly suspect. For example, BOP's claim of Exemption 2 as to past performance records states that "Exemption

(b)(2)(High) was used to protect predominately internal agency information, as the release would risk circumvention of an agency regulation or statute or impede the effectiveness of our agency's law enforcement activity." Second Supp. Tufte Decl., Exh. 2, at 2. Yet BOP attempts to apply this justification to documents such as "GEO Corporate Organization Chart" and "GEO History & Experience." *Id.*, at 4. It is simply inconceivable that a contractor's corporate structure and work history could constitute *internal* government information. BOP apparently feels that it has satisfied the segregability requirement through one sentence contained in the Second Supplemental Tufte Declaration. *Id.* ¶ 17 ("The documents were evaluated for segregability and I 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."). This is precisely the type of blanket justification which was recently held inadequate by the District Court for the District of Columbia. *Edmonds Inst. v. U.S. Dept. of Interior*, 383 F.Supp.2d 105, 109 (D.D.C. 2005) ("The [government] relies for its segregation analysis on a single paragraph in the declaration that states that the withheld documents were evaluated for segregability and that reasonably segregable factual material has been released whenever possible, unless such factual information is inextricably intertwined with [exempt information].") The District Court concluded that "[t]he generalized paragraph on segregability . . . does not alone suffice. One court recently described an almost identical section of a declaration as 'patently insufficient' to meet an agency's obligation to segregate, and this Court agrees." *Id.* At 110 (quoting *Animal Legal Defense Fund v. Dept. of Air Force*, 44 F.Supp.2d 295, 301 (D.D.C. 1999)).

Another fatal problem with the Third Supplemental Vaughn Index is the inadequate descriptions of the totally-withheld documents. A Vaughn Index must "provide a brief but sufficiently detailed description of the content of each document." *Id.* at 109. The agency's

description of a document "need not be long, but should include something more than the nature of the document in question (i.e., email, report) and its title." *Id.* BOP has failed to provide adequate descriptions. For example, its description of the past performance records merely lists sections of documents, such as "History & Experience," "Corporate Organization Chart," "Accreditation," "Standards Accreditation Spreadsheet," and so forth. Second Supp. Tufte Decl., Exh. 2, at 4.

As another example, when addressing the information concerning past contracts, BOP simply identifies the contacts by shorthand notations. *See id.* ("Allen; Aurora; Bridgeport; Broward; Central TX; Central Valley; Cleveland; Coke; Desert View; East Miss; Golden State; Guadalupe; GW Hill; Karnes; Kyle; Lawrenceville; Lawton," etc.). A comparison of this list with GEO's public filings with the Securities and Exchange Commission indicates that many of these contracts are with state and local governments. Plaintiff briefed this issue earlier, noting that Exemption 2 cannot be used to withhold details of a contract between a private contractor and a non-federal entity. Pltf. SJ Mem., at 27; SJ Oral Argument Trans, 55:13-59:13. Yet, because of the BOP's failure to specifically describe the withheld documents, it is impossible for plaintiff to determine which pages are state-contract documents inappropriately withheld under Exemption 2.

Still another example can be found in BOP's claim of Exemption 7(E) protection. The Third Supplemental Vaughn Index claims 7(E) as a justification for withholding the technical proposals, stating that "[t]he technical proposal records contain staffing patterns, institution operations, offender accountability techniques, emergency plans, physical plant details, architectural floor plans, architectural drawings, detention doors and lock schedules, manufacturing data, security hardware schedules, key descriptions, security electronics, secure

ceiling plans, and facility compliance information." Second Supp. Tufte Decl., Exh. 2, at 6. Despite giving this litany of categories, BOP's description of these totally-withheld documents gives no indication of what portion of each document consists of any given category. *Id.*, at 7.

The structure of the Third Supplemental Vaughn Index is also legally deficient. As an example, Documents 1 and 2 appear to contain twenty-eight sections, each of which lists the claimed exemptions by number only. *Id.*, at 4, 7. At the same time, each document's index-entry contains only one blanket paragraph for each claimed exemption. *Id.*, at 2-3, 5-6. This structure appears identical to the approach which was rejected in *Schiller v. National Labor Relations Board*, 964 F.2d 1205 (D.C. Cir. 1992). The *Schiller* court described the NLRB's Vaughn Index as

> Proceed[ing] memorandum by memorandum, describing each one and stating that '[t]his memorandum is exempt from disclosure under' exemptions 2 and 5 (and) (in two cases) 7(E). The index does not correlate the claimed exemptions to particular passages in the memos. The agency affidavit similarly refers to entire documents and not any passages within them.

*Id.*, at 1209 (second alteration in original). The Court of Appeals found this format to be unacceptable because

> The index and affidavit . . . are written in terms of documents, not information, but "[t]he focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material. *Mead Data Central, Inc.*, 556 F.2d at 260.
>
> Rather than asserting that certain exemptions apply to certain documents, the Board should have "correlate[d] the theories of exemptions with the particular textual segments which it desired exempted." *Schwartz v. IRS*, 511 F.2d 1303, 1306 (D.C. Cir. 1975).

*Id.*, at 1209-1210.

A more recent case which counsels rejection of the Third Supplemental Vaughn Index is *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83 (D.D.C. 2009). The most directly relevant portion of *Defenders of Wildlife* is the District Court's consideration of Exemption 7(E),

which BOP has raised for the first time in the Third Supplemental Vaughn Index. The *Defenders* court held that the Border Patrol's 7(E) claim was not supported by adequate descriptions in the Vaughn Index. A typical Vaughn Index entry from the case is described as containing the following language: "exemption (b)(7)(E) was cited to protect information that would disclose techniques and procedures for enforcement investigations and prosecutions and release of this information would risk circumvention of the law. These documents consist of a review of meeting minutes, key points and action items." *Id.*, at 89-90 (internal quotation marks omitted). The District Court concluded that this description was insufficient, noting that "[o]ther than accepting the agency's summary conclusion on its face or reviewing the document itself, the Court has no basis to determine, as it must under exemption 7(E), whether '(1) the information was "compiled for law enforcement purposes," and (2) release of the information "could reasonably be expected to risk circumvention of the law."'" *Id.*, at 90 (citation omitted).

At first glance, BOP's Exemption 7(E) language in this case might seem a bit more descriptive, insofar as it contains a long "laundry list" of information that is allegedly contained in the withheld documents. Second Supp. Tufte Decl., Exh. 2, at 6. But other than the laundry list, the Vaughn Index lacks detail and is ultimately conclusory, stating summarily "[t]hese are records pertaining to the ability of the submitters to house criminals and carry out the mission of the Bureau of Prisons and their law enforcement ability to protect the public." *Id.* Despite the length of the laundry list, it cannot save what is otherwise an insufficient Vaughn Index—the mechanistic recital of information categories does not provide a meaningful opportunity for adversarial testing. For example, BOP says that it has withheld "offender accountability techniques" under Exemption 7(E), yet it does not explain what an "offender accountability technique" is, nor how its release would be harmful. *Id.* As another example, the BOP's 7(E)

laundry list states that the agency has withheld "manufacturing data"—a hopelessly non-descriptive term which does not allow plaintiff or this Court to adequately test the propriety of the claimed exemption. *Id.* Because BOP continues to rely on the same kind of vague and conclusory justifications that were overruled in the Summary Judgment Opinion, this Court should hold that the BOP's Third Supplemental Vaughn Index is inadequate to justify the continued withholding of information from plaintiff.

BOP estimates that the documents described in the Third Supplemental Vaughn Index exceed four thousand pages, yet the defendant fails to provide detailed descriptions of the contents, implausibly claiming that not one single page can be segregated and released. Even more astoundingly, despite the wide variety of information apparently contained within these documents, BOP gives broad, generalized descriptions of each claimed exemption without any reasonable attempt to correlate these exemptions with the withheld information. The Summary Judgment Opinion clearly spelled out the necessity of a detailed Vaughn Index. BOP's submission of the Third Supplemental Vaughn Index indicates a calculated disregard for Part 1 of the Summary Judgment Order.

### 3. BOP's Exemption 3 Arguments are Frivolous

In the Second and Third Supplemental Vaughn Indices, BOP for the first time raises two arguments under FOIA Exemption 3. Exemption 3 excepts information from FOIA if such information is protected from disclosure under another statute. The Ninth Circuit uses a two-part test to evaluate Exemption 3 claims—first determining "whether the withholding statute meets the requirements of Exemption 3" and then determining "whether the requested information falls within the scope of the withholding statute." *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1127

(9th Cir. 2007). As explained below, the BOP's Exemption 3 arguments are baseless and border on sanctionable.

First, BOP argues that it can withhold various documents under 41 U.S.C. § 253b. Second Supp. Tufte Decl., Exh. 1 and 2. As a preliminary matter, the only part of § 253b which could reasonably be interpreted to apply to the present case is subsection (m); accordingly, plaintiff's response assumes that BOP's Exemption 3 theory is premised solely on that subsection of the statute. Although § 253b(m) satisfies the first prong of the Ninth Circuit's Exemption 3 analysis, BOP has failed to satisfy the second prong.

Section 253b(m) was first raised by *plaintiff* who, in an abundance of caution, called the court's attention to the statute during oral argument, under the belief that he was required to do so pursuant to Or. R. Prof. Cond. 3.3(a)(2).[3] SJ Oral Argument Trans., at 31:17-39:9. In its Summary Judgment Opinion, the Court concluded that "41 USC § 253b(m) intersects with FOIA only to the extent it bars disclosure of unsuccessful proposals. It does not purport in any way to limit FOIA protection for successful proposals. In that regard, this court must look only to FOIA for the answer." SJ Opinion, at 23. Despite the clearly worded conclusion of this Court, BOP is now claiming § 253b(m) protection for successful proposals, in direct contravention of the Court's opinion.

Although trial courts are not, strictly speaking, limited by the "law of the case" doctrine, there are well-established reasons for applying a more narrowly-drawn version of the doctrine to proceedings in U.S. District Court. *See* 18B Charles Alan Wright, Arthur R. Miller, and Edward

[3] Plaintiff would note that as a new attorney, he is inclined to liberally interpret O.R.P.C. 3.3(a)(2) in favor of candor and disclosure. BOP has responded to plaintiff's good-faith effort to comply with his professional obligations by perpetrating legal arguments that have already been rejected in this same proceeding. By condoning such behavior, it would appear that the U.S. Attorney's Office is impliedly counseling new lawyers to be as conservative as possible when applying O.R.P.C. 3.3(a)(2) (at least when litigating against the United States).

H. Cooper § 4478.1, at 692-695 (2d ed. 2002). BOP's arguments regarding § 253b(m) do not ask the Court to reconsider its earlier rejection of § 253b(m) as grounds for withholding the documents in this case. Thus, it is not clear whether BOP is implicitly seeking reconsideration of this portion of the Summary Judgment Opinion, or if the agency's arguments regarding § 253b(m) were simply prepared by someone who was unfamiliar with the earlier proceedings in this case.

Without any discussion of the Summary Judgment Opinion, BOP now argues that § 253b(m) justifies withholding information under FOIA Exemption 3. BOP points to no newly discovered facts that would support a reconsideration of this Court's earlier ruling concerning the statute. BOP does not explain why the issue should be revisited at this late stage in the proceedings. Nor does BOP make any legal arguments indicating that the Court's prior ruling is incorrect.[4] For these reasons, BOP's newfound claims of § 253b(m) protection should be overruled. *See* 18B Wright & Miller § 4478.1, at 695 (listing the "factors influenc[ing] a trial court's decision whether to reconsider an earlier ruling.").

The second part of BOP's nascent Exemption 3 argument is 41 U.S.C. § 423. This claim is so unfounded that it seems to have been drafted by someone who did not read the statute. Section 423 prohibits disclosure of "contractor bid or proposal information or source selection information *before the award* of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 423(a)(1). Because the contracts here have already been awarded, § 423 is wholly inapplicable.

[4] Even if there were some error in the Court's interpretation of § 253b(m), plaintiff explained in great detail at oral argument that the vast majority of documents at issue in this case could not be withheld even if § 253b(m) applied. SJ Oral Argument Trans., 32:8-39:9. Because BOP has failed to rebut plaintiff's interpretation of the statute, the government's cursory citations to § 253b(m) should be disregarded.

Even if BOP were to try and shoehorn § 423 into its ill-defined arguments concerning "ongoing procurement" (*see e.g.*, Nace Decl., ¶ 16), it still could not prevail due to § 423's savings clause. 41 U.S.C. § 423(h)(7) ("This section does not limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation."); *see also* 41 U.S.C. § 423(a)(1) (prohibiting disclosure of protected information "other than as provided by law"). Indeed, the Court of Federal Claims arrived at just this conclusion when it held that information within the scope of § 423 must be released in *pre*-award litigation when release was required under the discovery provisions of the Federal Rules of Civil Procedure. *Pikes Peak Family Housing v. U.S.*, 40 Fed. Cl. 673, 681 (1998) ("[Section] 423, properly understood, is obviously directed at situations in which a present or former government procurement officer secretly leaks information concerning a pending solicitation to an offeror participating therein, in hopes of securing post-government employment or other compensation from said offeror. It is clear beyond cavil, therefore, that no wrongful disclosure of procurement information 'other than as provided by law' is threatened here." (citation and footnote omitted)).

It is unclear whether BOP's Exemption 3 arguments are meant to antagonize plaintiff, or if they are simply the result of poor legal research. It is one thing for an agency to make sweeping, "precautionary" arguments at the early stages of an administrative proceeding, or in initial court pleadings. But for BOP to raise new, baseless, and poorly-researched arguments following the Summary Judgment Opinion is simply vexatious. Whatever the underlying reason for this new argument, BOP has failed to support either basis for withholding under Exemption 3, and its arguments should be rejected entirely.

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### B. BOP's Exemption 2 Arguments Are Vague and Unsubstantiated

Part 2 of the Court's Summary Judgment Order requires, with respect to information withheld under Exemption 2, that BOP "describe with particularity how the information is used predominantly for internal purposes and explain how disclosure would present a serious risk of circumvention of agency regulations, statutes, or other legal requirements." SJ Opinion, at 24. Plaintiff would note that because Part 1 of the Summary Judgment Order covers *all* documents in this case, BOP's Exemption 2 arguments must also comply with Part 1. Specifically, each Exemption 2 withholding must be supported by a justification that relates to the "document or part of document withheld." SJ Opinion, at 24.

BOP claims that it has satisfied Part 2 by its submission of the Second Supplemental Tufte Declaration and the declarations of Michael Prater and Thomas Smith. Def. Supp. Resp., at 2. With the exception of the narrow class of information covered by the Prater Declaration[5] (Doc. #67), BOP's Exemption 2 arguments continue to consist of the same type of vague and conclusory statements which this Court unambiguously rejected in the Summary Judgment Order.

#### 1. Smith Declaration

The declaration of Thomas Smith (Doc. #69) is so lacking in detail that it might as well have been drafted for use in an entirely different proceeding. Not once does the Smith

[5] Plaintiff lacks the technical expertise to determine whether the contents of the Prater Declaration are sufficient to justify withholding of information. Nonetheless, for purposes of expediency and for the reasons stated at oral argument, plaintiff will accept the withholding of the very narrow category of information discussed in the Prater Declaration. At the same time, plaintiff notes that BOP's hodge-podge of overlapping Vaughn indices and various declarations makes it difficult to determine the exact location of information which is covered by the Prater Declaration.

Declaration mention a single document at issue in the present case. Indeed, the majority of the declaration is a discussion of the "Correctional Services Manual" and the "Transportation of Prisoners Manual," two documents which are never mentioned anywhere in the Vaughn indices. For example, Smith testifies that "information pertaining to correctional services staffing patterns, the Correctional Services Manual and the Transportation of Prisoners's [sic] Manual is information that should not be released to the public." Smith Decl. ¶ 2. In addition to being entirely conclusory, this argument does not describe the alleged information and does not specify where such information can be located in the Vaughn indices. *Cf. Edmonds v. U.S. Dept. of Interior*, 383 F.Supp.2d 105, 108 (D.D.C. 2005) (agency's justification of withholding must "tailor the exemption claim to a particular portion of each of the withheld documents.").

The failures of the Smith Declaration are particularly frustrating in light of the fact that the inadequacies of BOP's prior Exemption 2 arguments were extensively discussed during oral argument. The Court noted that although some staff information, such as assignment schedules and detailed post information, may implicate legitimate security concerns, those same concerns did not necessarily apply to more general information, such as the total number of employees. SJ Oral Argument Trans., at 52:9-17. BOP's counsel explained that the agency did not "want to start down that road of releasing information about staffing." *Id.*, at 52:20-21. Absolutely nothing in FOIA permits withholding information because release could "lead to" the release of protected information. Indeed, such reasoning makes a mockery of FOIA's policy of disclosure and is squarely at odds with this Court's holding that exemptions must be narrowly construed. SJ Opinion, at 2. Moreover, the BOP's reasoning flies in the face of the current administration's policy that "[t]he Government should not keep information confidential merely . . . because of speculative or abstract fears." Presidential Memorandum, 74 Fed. Reg. 4683 (Jan. 21, 2009).

Despite the inadequacy of BOP's initial arguments, Part 2 of the Summary Judgment Order gave the agency a chance to salvage its position. The Smith Declaration utterly fails to do so. For example, Smith continues the BOP's earlier practice of making vague references to undefined "staff patterns." *E.g.*, Smith Decl. ¶ 3. Not only does this level of generality fail Part 2's requirement that BOP "explain how disclosure would present a serious risk of circumvention of agency regulations," but it is contradicted by other evidence submitted by BOP on the same day. The declaration of CCA assistant general counsel Cole Carter (Doc. #66) includes two exhibits which are the only "staffing patterns" to be found in BOP's evidence. The exhibits include lists of "Total Number of All Positions" by function and a "Staff Reporting Schedule" which lists "Total Staff" by job title. Carter Decl., Exh. 1 and 2.[6] Given the high level of generality indicated by the Carter Declaration, Smith's allegation that release of the information "could help to identify potential areas of staffing vulnerabilities, such as post coverages and/or departmental staffing strengths which could help to effectuate escapes, assaults, contraband induction, and other criminal activities," appears—in the context of this document, at least—to severely misrepresent the nature of the information at issue. Smith Decl., ¶ 3.

Another example of the Smith Declaration's legal insufficiency can be found in the claim that "[c]orrectional facilities such as state and local corrections, private corrections, immigration and detention facilities, would also be faced with these serious security concerns if their staffing patterns, internal security manuals and physical plant information are released." *Id.* ¶ 6. Assuming, for the sake of argument, that the "High 2" exemption is an appropriate interpretation

[6] Plaintiff would also note that, ironically, the Carter Declaration is the only example in this case of redaction that complies with FOIA's segregability requirement. 5 U.S.C. § 552(b), paragraph following (b)(9). Although plaintiff contends that these redactions are unjustified, at least CCA (in the context of this document) has made the effort to segregate allegedly exempt information and release the non-protected information—effort that BOP refuses to take.

of FOIA,[7] then information may be withheld if it "(1) fits within the statutory language and (2) would present a risk of circumvention if disclosed." *Milner v. U.S. Dept of the Navy*, 575 F.3d 959, 964 (9th Cir. 2009). The "statutory language" of Exemption 2 allows withholding of information that is "related solely to the *internal* personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) (emphasis added). "Internal" means "existing within or in the interior of something; of or pertaining to the inside." Oxford English Dictionary (2d ed., 1989, online version, accessed Jan. 16, 2011). Thus, any reasonable application of Exemption 2 to the present case must involve information which is related to rules and/or practices internal to the BOP. Smith's discussion of potential harm to undefined state, local, and private facilities has nothing to do with the internal operations of the BOP and is therefore wholly irrelevant to any valid Exemption 2 claims.

Moreover, Smith's claim that release of general staffing patterns poses a security threat is contradicted by the practices of state corrections agencies. Using state public records statutes, plaintiff was able to obtain contract-facility staffing data from the states of Colorado, Idaho, and Oklahoma. Fourth Raher Decl. Exh. G at 2-4 (Idaho); Exhs. H at 24-27, I at 14-17, and P at 3 (Oklahoma); Exhs. J at 20-24 and K at 17-18 (Colorado). This practice indicates that release of such generalized information does not threaten facility security.

The Smith Declaration attempts to cow this Court into accepting BOP's arguments, with its breathless predictions of "circumventing law enforcement efforts aimed at preventing escapes, and maintaining secure and safe correctional facilities." Smith Decl., ¶ 5. Yet the declaration patently fails to remedy the inadequacies noted by this Court. SJ Opinion, at 20 ("BOP has not submitted sufficient descriptions to permit the court to determine whether any specific part of the

[7] *See Milner v. U.S. Dept. of the Navy*, 575 F.3d 959, *cert. granted*, 130 S.Ct. 3505 (Jun. 28, 2010) (No. 09-1163).

withheld material is used predominantly for internal purposes or would pose a legitimate security threat if disclosed."). BOP has had multiple attempts to present a cogent and detailed Exemption 2 defense, but it has resoundingly failed. The Court should give no weight to the Smith Declaration because of its numerous inadequacies.

### 2. Second Supplemental Tufte Declaration

BOP also claims that it has satisfied Part 2 of the Summary Judgment Order through Paragraphs 4-17[8] of the Second Supplemental Tufte Declaration (which, curiously are the identical paragraphs cited in support of defendants' claims that it satisfied Parts 1 and 4 of the Order—once again demonstrating the lack of focused detail in BOP's supplemental evidence). Def. Supp. Resp., at 2. The Second Supplemental Tufte Declaration is inadequate as a matter of law to justify almost all of BOP's Exemption 2 withholdings.[9]

Paragraphs 4-5, 11-15, and 17 of the Second Supplemental Tufte Declaration are more of the same conclusory statements which have come to characterize BOP's approach to this case. As such, plaintiff has only three brief points to make in response. First, Ms. Tufte joins Mr. Nace in perpetrating the BOP's misguided reliance on the Federal Acquisition Regulations. Second Supp. Tufte Decl., ¶¶ 11, 13, and 15. For the reasons discussed *infra*, at 36-37, Ms. Tufte's citations to the F.A.R. should be disregarded. Second, Ms. Tufte also makes the same ill-founded Exemption 3 arguments to which plaintiff has responded *supra*, at 16-19. Third, Ms. Tufte repeatedly makes the argument that certain information is solely internal for purposes of

[8] BOP actually cites Paragraphs 4 through *18*, however Paragraph 18 is simply a citation to 28 U.S.C. § 1746, which does not require any response from plaintiff.

[9] For the same reasons mentioned *supra*, in footnote 5, plaintiff concedes the issues raised in Paragraph 16 of the Second Supplemental Tufte Declaration, to the extent that they apply to the information described in the Prater Declaration.

Exemption 2 because BOP does not release the information. *See id.* ¶¶ 12, 14. If such circular logic were accepted by the courts, then any agency could manufacture Exemption 2 protection by simply refusing to release information. Tufte's argument ignores the well-established rule that agencies bear the burden of justifying withholding information. SJ Opinion, at 2.

Paragraphs 6 and 7 of the Second Supplemental Tufte Declaration suffer from a variety of procedural and substantive infirmities. In particular, plaintiff can identify two material deficiencies in these paragraphs. First, Ms. Tufte's justifications of certain withholdings do not make sense. For example, she discusses certain "information that identifies weaknesses and deficiencies of submitters . . . and addresses those deficiencies or weaknesses." Second Supp. Tufte Decl. ¶ 6. Yet she also states that "[t]he revised proposal allows for the Submitter to correct the omission/actions in the initial proposal." *Id.* Thus, Ms. Tufte appears to be describing operational problems which were identified and corrected during the procurement process. Because these problems have been ameliorated, Tufte's claim that "providing the detailed specific deficiency and weakness for each Submitter would not only provide security concerns [sic] but also would enable a competitor to obtain an unfair advantage against them" is troublesome. The reference to a hypothetical competitor's "unfair advantage" seems to parrot BOP's Exemption 4 arguments, despite the fact that Tufte's declaration does not purport to address Exemption 4 issues. *See* Def. Supp. Resp., at 2-3. In any event, to the extent that a competitor could use information to obtain an "unfair advantage" by operating a *safer* facility, BOP should *encourage* such behavior, in furtherance of its "mission of protecting inmates, staff, and the community." *See* Second Supp. Tufte Decl. ¶ 9. More fundamentally, however, Tufte's argument is inherently illogical—if the "deficiencies and weaknesses" have been addressed prior to the issuance of a contract, as she implies they have, then those deficiencies have been

corrected and thus releasing descriptions of outdated procedures does not threaten security, since the deficient procedures are no longer in place.

The second notable problem with Paragraphs 6 and 7 is that the only evidence that disclosure would allow circumvention of agency regulations comes in the form of Tufte's own conclusion that some kind of undefined circumvention would occur. *Cf. Defenders of Wildlife v. U.S. Dept. of Interior,* 623 F.Supp.2d 83, 90 (D.D.C. 2009) ("Where the agency's affidavits or declarations merely 'parrot the language of the statute and are drawn in conclusory terms' . . . the Court's ability to conduct its own review of the agency's determinations is severely frustrated." (quoting *Carter v. U.S. Dept. of Commerce,* 830 F.2d 388, 393 (D.C. Cir. 1987))). Compounding the inadequacy, these conclusory findings of potential harm are *not* supported by descriptions of the withheld information which are "sufficiently detailed to permit meaningful review of exemption claims." *See Edmonds Inst. v. U.S. Dept. of Interior*, 383 F.Supp.2d 105, 109 (D.D.C. 2005). Tufte claims that "internal policies" cannot be released because such dissemination would jeopardize prison security. Yet BOP has posted hundreds (or possibly thousands) of pages of internal policies on its own website. Fourth Raher Decl. ¶ 3. Thus, the mere fact that a document contains internal policies is clearly not, in and of itself, justification for Exemption 2 withholding. The only specific example Tufte gives of an "internal policy" which cannot be released without threatening security is a reference to an "internal policy on transporting inmates." Second Supp. Tufte Decl. ¶ 6. Yet the BOP makes its own policy regarding escorted inmate trips available on its website, thus Tufte's simple description of the withheld information is not sufficient to establish Exemption 2 protection. Fourth Raher Decl., Exh. D. It is true that Ms. Tufte references certain details "such as when to deploy extra staff members, who is armed during the escort, [and] how to handle situations and emergencies during

the transportation and escort." Second Supp. Tufte Decl. ¶ 6. While details such as these might be properly withheld, BOP does not explain why these details cannot be segregated and redacted, with non-exempt portions released to plaintiff, as required by FOIA's segregability provision. *See supra*, at 11.

Paragraph 8 of the Second Supplemental Tufte Declaration provides the most instructive example of the inadequacy of BOP's response. Ms. Tufte claims that release of certain information "would jeopardize our ability to safeguard inmates, staff and the public." Second Supp. Tufte Decl. ¶ 8. The only example Tufte gives is "Supplemental Vaughn Index Document #12, [which] contains three pages of a Post Assignment Schedule for one of [the contractor's] correctional facilities. This document clearly identifies the post watch locations that are manned and those that are not during different shifts." *Id.* There are three glaring problems with this argument. First, the Supplemental Vaughn Index states that the information withheld from Document 12 pursuant to Exemption 2 consists of "documents containing information which poses a security concern for . . . the state governments of California, Georgia, and Oklahoma." Supp. Tufte Decl., Exh. 3, at 7. Thus, once again, BOP has erroneously attempted to use Exemption 2 to withhold information concerning non-federal facilities. *See supra*, at 22-23. Second, basic information concerning how many employees work per shift is not specific enough to pose a bona fide security concern, as evidenced by the fact that the Colorado and Idaho departments of corrections have released the same type of information pertaining to their private prison contracts. *See* Fourth Raher Decl., Exh. G at 2-4 (Idaho); Exhs. J at 20-24 and K at 17-18 (Colorado). Third, even assuming *arguendo*, that the post assignment schedule is properly withheld under Exemption 2, BOP has justified withholding only *three pages* of a 78-page document which was withheld in its entirety. Supp. Tufte Decl., Exh. 3, at 7 (Vaughn Index

showing "total denial"). Not only does this particular Exemption 2 claim fail for the aforementioned reasons, but it is only one of many examples of how BOP has failed to comply with Part 1 of the Summary Judgment Order.

Paragraphs 9 and 10 of the Second Supplemental Tufte Declaration do not concern Exemption 2, but rather raise a new Exemption 7 argument. Plaintiff responds to this ill-founded argument *infra*, at 37-40.

The Second Supplemental Tufte Declaration is simply a continuation of the dismissive attitude which BOP has exhibited since the initial mishandling of plaintiff's FOIA request. Although Ms. Tufte has the greatest familiarity with the documents, she refuses to provide meaningful descriptions of the withheld information. Nor are her claims of Exemption 2 protection plausible. For these reasons, her testimony should be given little weight.

### C. BOP Continues to Misconceive the Appropriate Scope of Exemption 4

Part 3 of the Summary Judgment Order required BOP to "provide evidence of actual competition in the relevant market . . . and explain how disclosure of each document or part of a document withheld would be likely to substantially harm the competitive position of a specific submitter." SJ Opinion, at 24. BOP has not complied with this provision of the order.

#### 1. BOP Has Not Proven Actual Competition or Competitive Harm

At oral argument, the Court posed several questions concerning the total number of beds awarded through the numerous iterations of the CAR procurement series, and how the total number of beds awarded per contractor compared to each contractor's available capacity. SJ Oral Argument Trans, 45:9-46:10. BOP expressed a desire to "answer [the Court's] question,"

(*id.*, 46:23-47:2) but none of the supplemental evidence filed on November 5 does so. Instead, BOP continues to rely on extremely vague allegations of competition. For example, Mr. Nace testifies that

> When the BOP first entered into privatization, there were approximately 3 competitors. Since then, the BOP routinely receives multiple competitive proposals from 5-6 providers and has received as many as 15 responses to one private prison solicitation. Clearly, the market has grown three times the number of competitive bids since entering into privatization [sic].

Nace Decl. ¶ 5. Despite Mr. Nace's conclusion, there is nothing "clear" about the picture he paints. Neither Mr. Nace nor any other declarant has given detailed data concerning the number of federal solicitations,[10] the number of successful bidders per solicitation, the number of unsuccessful bidders, and the number of beds solicited and/or offered. Although Mr. Nace briefly mentions numbers of successful and unsuccessful bidders at the end of his declaration, the information he presents is so incomplete as to be useless—he selectively offers information for four phases of CAR series, despite the fact that plaintiff has already established that there have been contracts awarded in at least eight phases. Second Raher Decl., Exh. K. And Paragraph 19 of the Nace Declaration studiously avoids revealing quantities of prison beds, despite BOP's counsel's suggestion that such information would be provided. SJ Oral Argument Trans., 47:23-48:2.

Mr. Nace's testimony concerning the growth in bidders is particularly suspect because there are not fifteen private prison operators currently in existence. Kopczynski Decl. ¶ 3. Thus,

[10] Nace attempts to define the market in such a way that different federal agencies are considered discrete customers. Nace Decl. ¶ 5. Plaintiff contends that such a model is invalid as a matter of law, given that all federal agencies that purchase private prison services are in the executive department, and thus derive their authority from the Constitution's vesting of executive power in "*a* President of the United States of America." U.S. Const., art II, § 1, cl. 1; *see generally*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L.Rev. 1153, 1165-1168 (1992) (discussing the unitary executive theory).

Mr. Nace's refusal to specify the identity of the bidders from which BOP allegedly receives competing proposals frustrates plaintiff's ability to test the validity of the agency's argument. Given the small number of private prison companies in existence, Mr. Nace's figures concerning the number of competitive bidders appear to include local government bidders. This leads to the question of how many local-government proposals are structured along the lines of the Reeves County proposal, wherein a proposal is submitted under the name of a local government, but offers a facility that is operated by a subcontractor such as GEO. *See* Third Raher Decl., Exhs. A and B (Reeves County-GEO contracts); *see also* Carter Decl. ¶ 14 (describing the prevalence of such arrangements). In such cases, it does not make sense to consider the local government as a competitor to the subcontractor. Because Mr. Nace does not provide any details to substantiate his numbers, such questions cannot be answered and his testimony deserves little weight.

As shown in the declaration of Bryce Ward, at best BOP may have demonstrated that "prison operators compete in the relevant market, at least some of the time." Ward Decl. ¶ 6. Although this *may* be indicative of a competitive market, BOP's evidence still does not prove that there is a competitive market, in the economic sense. *Id.* Assuming, for the sake of argument, that BOP could demonstrate actual competition, its Exemption 4 claims still must be overruled because BOP has failed to demonstrate a likelihood of substantial competitive harm and it continues to rely on certain arguments that are invalid as a matter of law.

BOP's vague theories of competitive harm do not withstanding expert testing. Ward Decl. ¶¶ 22-26. Moreover, the fact that most of the information that BOP seeks to withhold is of a type that is available from other sources, it is not "confidential," as required by Exemption 4. *See* Fourth Raher Decl. ¶¶ 4-7.

### 2. Exemption 4 Cannot Be Used to Protect the "Integrity of the Procurement Process"

The documents withheld under Exemption 4 relate to proposals submitted by five contractors. Pltf. SJ Mem., at 4. BOP has not received objections from three of these contractors.[11] Oral Argument Trans., 47:20-25. Yet BOP claims it can withhold these documents (referred to here as the "non-contested documents") because releasing them "would compromise the integrity of our solicitations by creating an unlevel playing field." Nace Decl. ¶ 7.[12] As an initial matter, plaintiff would note that Part 3 of the Summary Judgment Order contemplates that all Exemption 4 withholdings are based on the likelihood of substantial harm to the "competitive position of a specific submitter." SJ Opinion, at 24. One inference that could be drawn from this language is that the Court has already determined that withholding based on BOP's interests is legally inappropriate. Nonetheless, because there is no such explicit ruling on the record, plaintiff will respond to BOP's arguments concerning the non-contested documents. Plaintiff would also note a change from BOP's earlier theory. At oral argument, BOP claimed that it had the "right to . . . claim [Exemption 4] *on behalf of*" non-objecting bidders. SJ Oral Argument Trans., 6:3-5. Absolutely nothing in FOIA's statutory text, *National*

[11] The five contractors listed in plaintiff's summary judgment brief do not include The GEO Group, which is technically a subcontractor to Reeves County. Issues pertaining to GEO are addressed *infra*, at 40-46. Although Reeves County's role in operating the Reeves County Detention Center is still quite unclear in many important respects, as far as the documents at issue in this case, it is appropriate to treat Reeves County as a bidder, because there are clearly documents that pertain to Reeves but not GEO. *See* Second Supp. Tufte Decl., Exh. 2, at 4, 10 (separately listing Reeves documents and GEO documents). Thus, the three non-objecting contractors referenced here are: Reeves County, Management & Training Corporation, and LCS Corrections Services.

[12] Nace also claims that "[n]ot only would release of sensitive procurement records adversely effect [sic] the BOP, it may have serious impact on other federal agencies tasked with procuring privatized housing." Nace Decl. ¶ 5. This argument must be rejected because it is impermissibly speculative and vague. Because Nace does not even attempt to define what type of "serious impact" would result from the release, his argument does not deserve a detailed response from plaintiff.

*Parks*, or any other relevant case suggests that the government can act to protect a submitter's interests in the absence of the submitter requesting such protection. After all, if a submitter cannot be bothered to voice objections, it is hard to imagine how disclosure could be harmful to that submitter.[13] In seeming acknowledgment of this weakness, BOP's supplemental evidence does not pursue this theory. Instead, BOP claims Exemption 4 to protect the government's interest—a use which, on different facts, can be a proper application of *National Parks*. Accordingly, plaintiff proceeds on the assumption that BOP has withdrawn its earlier arguments that it can provide "involuntary" Exemption 4 protection to protect a submitter's imagined interests.

The information that BOP seeks to withhold under Exemption 4 was submitted by bidders who sought to obtain lucrative CAR contracts. Such information is considered to be an "involuntary submission" for purposes of applying the rule of *National Parks & Conservation Association v. Morton* (*National Parks I*), 498 F.2d 765 (D.C. Cir. 1974). *See Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371-372 (9th Cir. 1996). BOP cannot withhold information for the reasons it has given, because such withholding does not further the policy objectives articulated in *National Parks*. It is true that *National Parks* allows the government to withhold qualifying information to protect its own interests. *Nat'l Parks I*, 498 F.2d at 767. However, *National Parks* stressed the importance of narrowly construing Exemption 4 to ensure that "non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* Accordingly, BOP's withholding of the non-contested documents must be measured against the policy objectives of Exemption 4. A careful reading of *National Parks* shows that BOP's interpretation of

[13] In addition, all bidders were given an opportunity to object to disclosure. Tufte Decl. (Doc. #18), Attch. D and E. Submitters who do not respond are deemed to have no objections. 28 C.F.R. § 16.8(f).

Exemption 4 is erroneous.

*National Parks* notes that Exemption 4 furthers two purposes. As relevant to the non-contested documents, Exemption 4 is meant to prevent disclosures that would "impair the Government's ability to obtain necessary information in the future." *Id.* at 770. BOP's withholding of the non-contested documents fails to meet the *National Parks* standard for two reasons. First, the *National Parks* court conducted an extensive examination of Exemption 4's legislative history. This examination indicates that the procurement documents are not within the realm of the information that the government can withhold on its own initiative. *See id.* at 769 (Describing the types of protected information as including: (1) "market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies" and (2) "information . . . extracted, by statute, in the course of necessary regulatory or other governmental functions." (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 non-contested documents are not "extracted by statute," nor do they fit within any of the categories mentioned in *National Parks*. Nor is the BOP's collection of this information related to the production of services which are "considered useful to the cooperating reporters, the public, and the agenc[y]." Accordingly, BOP's theory of Exemption 4 is incongruent with the policy objectives of *National Parks*.

The second problem with BOP's argument is that it has utterly failed to demonstrate *how* release would impair the government's ability to collect such information in the future. Although BOP liberally tosses about conclusory boilerplate language claiming such an impairment, it never provides an explanation. Any judicial consideration of whether release

would impair future data collection must consider any benefit that the submitter receives in return for providing the government with information. Because the prices paid by the BOP are frequently higher than those paid by state governments and the BOP's contractual terms are more favorable (*see infra*, at 41), it is unlikely that a bidder would not participate merely because of the potential for information disclosure. This is particularly true in the case of CCA, a company which—just three months before receiving its first CAR contract—was in danger of insolvency. *See* Fourth Raher Decl., Exh. M, at 2 (CCA's independent auditor's opinion of "substantial doubt about [CCA's] ability to continue as a going concern").

### 3. Carter Declaration

Most of the issues discussed in the declaration of Cole Carter are addressed elsewhere in this brief (particularly *infra*, at 40-46) and in the declaration of Bryce Ward. To avoid redundancy, plaintiff will not repeat his responses here. Instead, plaintiff has only one brief comment regarding the Carter Declaration.

Carter claims that CCA seeks to withhold certain elements of its proposals "because it believes that those elements give CCA a competitive advantage, which it has developed at great expense and through a great commitment of time and energy." Carter Decl. (Doc. #66) ¶ 20. Regardless of what CCA "believes," information is protected by Exemption 4 only if its disclosure would lead to substantial competitive harm. To cause such harm, information must generally be useful to one's competitors. An examination of CCA's proposals to other customers illustrates that such documents likely do not provide any "competitive advantage," unless correctional contracting decisions are made based entirely on vapid corporate jargon. A CCA proposal to the State of Florida is replete with such meaningless statements as "[the prison]

management team works to deliver a training program which promotes integrity, consistency, and compliance with ACA Standards, CCA and applicable FDLE policy, and contract requirements." Fourth Raher Decl., Exh. Q, at 2. Such amorphous descriptions of CCA's programming is not sufficiently detailed to be of any use to a competitor. In the absence of a more thorough description of how disclosure would result in substantial competitive harm, the Carter Declaration is insufficient to justify Exemption 4 protection.

**4. Nace Declaration**

Many portions of the declaration of Matthew Nace have already been discussed. Nonetheless, a handful of Nace's arguments deserve separate attention.

Nace gives a confoundingly vague description of the "past performance documents," followed by a conclusory statement that "release of this information would interfere with our agencies [sic] ability to evaluate and obtain fair competition for future bidding." Nace Decl. ¶¶ 10-11. This argument is deficient for two reasons. First, Nace, like all BOP declarants, does not even attempt to provide meaningful descriptions of the information. For example, saying that withheld information includes a "contractor's record of integrity and business ethics" is not even a cursory description of "the nature of the document in question" (*see Edmonds Inst.*, 383 F.Supp.2d at 109). Instead it is merely a vague expression of a type of information, with no attempt to describe the particular items withheld. Second, it is unclear what FOIA exemption Nace is claiming. His reference to circumvention of regulations suggests Exemption 2, yet BOP does not cite the Nace Declaration in connection with Part 2 of the Summary Judgment Order. Def. Resp., at 2. If Nace is speaking to Exemption 2, his argument fails because he does not explain what regulations would be circumvented, nor how such circumvention would be caused

by disclosure. If Nace is speaking to Exemption 4, his argument fails because he provides no correlation to competitive harm.

Perhaps nothing illustrates Nace's inadequate descriptions better than Paragraph 15 of his declaration, which begins:

> Information in the technical proposal records contain data regarding how the contractors will undertake the project for designing or modifying an existing procedure or creating something new. This includes their methods, systems or structures to be utilized to accomplish this within a specified period of time.

Nace Decl. ¶ 15. If any court ever needs a textbook example of useless boilerplate riddled with unhelpful and vague "descriptions," they need look no further than the Nace Declaration. What "projects" does Nace refer to? What "procedures" are the contractors "designing or modifying"? What is this "something new" that is referenced? None of the answers can be found in the declaration. If Mr. Nace is at all familiar with the requirements of *Vaughn*, then his declaration appears to be a thinly-veiled statement of contempt for the law. Paragraph 15 concludes with an irrelevant reference to the fact that BOP has "not received permission" to release the information, and a legally-inaccurate claim that a regulation trumps the FOIA statute. *Id.*

Although the Nace Declaration is rife with additional examples of vagueness and bureaucratic *ipse dixit*, any further discussion would be tiresome. Due to the numerous inadequacies in the Nace Declaration, this Court should give little or no weight to Mr. Nace's testimony.

### D. BOP's Attempt to Revive Its Previously-Rejected F.A.R. Arguments is Unconvincing and Should be Overruled

BOP's supplemental declarations make repeated references to provisions of the Federal Acquisition Regulations ("F.A.R.") which supposedly prohibit BOP from releasing information.

Nace Decl. ¶¶ 3, 7, 8, 11, 15-17; Second Supp. Tufte Decl. ¶¶ 6, 11, 13, 15. These numerous references to the F.A.R. are simply more evidence of BOP's reliance on resoundingly mediocre legal theories.

It is axiomatic that a regulation cannot trump a statute. *U.S. v. Maes*, 546 F.3d 1066, 1068 (9th Cir. 2008) ("[A] regulation does not trump an otherwise applicable statute unless the regulation's enabling statute so provides."). Not only was this issue previously briefed by plaintiff, but the court adopted plaintiff's analysis at the June 1 hearing. Pltf. Resp. to Def. SJ Mot. (Doc. #38), at 5-6; SJ Oral Argument Trans., 4:24-5:1. Seeming to recognize the futility of relying on the F.A.R., BOP conceded this point at oral argument. SJ Oral Argument Trans, 4:21-23. The fact that BOP is trying to revive this half-baked argument without any acknowledgment that it already conceded the issue is indicative of the bad faith in which it has handled plaintiff's FOIA request and the resulting litigation.

For the foregoing reasons, this Court should overrule BOP's argument and disregard all portions of the supplemental evidence that rely on the F.A.R.

### E. BOP's New Exemption 7 Arguments Are Legally Unjustified

Paragraphs 9 and 10 of the Second Supplemental Tufte Declaration raise a new theory pursuant to FOIA Exemption 7. In particular, Tufte claims that BOP "is a law enforcement agency." Second Supp. Tufte Decl. ¶ 9. While BOP clearly performs some law enforcement functions, it is not at all evident that it is solely a law enforcement agency. BOP's custodial activities (i.e., housing prisoners) are administrative in nature. This distinction is important because "an agency which has a 'mixed' function, encompassing both administrative and law enforcement functions, must demonstrate that it had a purpose falling within its sphere of

enforcement authority in compiling the particular document [to be withheld under Exemption 7]." *Church of Scientology of Calif. v. U.S. Dept. of Army*, 611 F.2d 738, 748 (9th Cir. 1979); *see also Milner*, 575 F.3d at 979-980 (Fletcher, J., dissenting) (describing Exemption 7 analysis for "mixed agencies;" a question not reached by the *Milner* majority).

The insufficiency of BOP's Exemption 7 theory is particularly obvious when considering the agency's claims under Exemption 7(E). This exemption applies to information which contains "techniques and procedures for law enforcement *investigations and prosecutions*." 5 U.S.C. § 552(b)(7)(E) (emphasis added). While some BOP functions are doubtlessly investigative and/or prosecutorial in nature, the majority of the information withheld under Exemption 7(E) appears to be related to the custodial functions of the BOP and/or the contractors. For example, Ms. Tufte cursorily "describes" the withheld information as "containing staffing patterns, institution operations, offender accountability techniques, emergency plans, physical plant details, architectural floor plans, architectural drawings, detention doors and lock schedules, manufacturing data, security hardware schedules, key descriptions, security electronics, secure ceiling plans, and facility compliance information." Second Supp. Tufte Decl. ¶ 10. Setting aside the BOP's ever-present vagueness problems, this "description" presents several problems in the context of Exemption 7(E). An architectural plan or key description (while potentially protected under other FOIA exemptions, depending on several variables which are still unknown based on the current record) pertains to the BOP's mission of housing convicted offenders—there is no logical connection to BOP's limited investigatory functions. *See id.* ("These are records pertaining to the ability of the submitters to *house criminals*") (emphasis added).

Moreover, BOP appears to have ignored the Ninth Circuit's distinction between "law enforcement" materials and "administrative" materials. *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980). The *Hardy* court described the difference as such: "'Law enforcement' materials involve methods of enforcing the laws, however interpreted, and 'administrative' materials involve the definition of the violation and the procedures required to prosecute the offense." *Id.* BOP's supplemental evidence merely indicates that the withheld information pertains to law enforcement activities—the vague and conclusory contents of the Vaughn indices and declarations does not sufficiently prove that any information qualifies as "law enforcement material" under the *Hardy* standard. The distinction is important because "[a]ll administrative materials, *even if included in staff manuals that otherwise concern law enforcement*, must be disclosed unless they come under one of the other exemptions of [FOIA]." *Id.* (emphasis added).

BOP also claims withholding under Exemption 7(F), which protects information that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). As plaintiff clearly admitted at oral argument, the withheld documents could plausibly contain such information. Yet BOP has consistently refused to provide sufficiently detailed descriptions of the information. BOP's continued disdain for the requirements of *Vaughn* indicates that the agency is not willing to make a good-faith effort to segregate bona fide security information from information that the agency (or its contractors) would prefer to keep secret for other reasons. Because the Summary Judgment Order clearly established the consequences that would result if BOP continued to eschew the requirements of FOIA, BOP's eleventh-hour claims of Exemption 7 should be overruled and the government should be ordered to produce the withheld documents. To the extent that there may be bona fide

security information in these documents, plaintiff is willing to receive any alleged Exemption 7 materials under a protective order, which would allow for the adversarial testing that BOP is determined to prevent.

## III. GEO Has Not Complied with the Terms of the Summary Judgment Order

GEO's supplemental evidence consists of a declaration by the company's vice president Kyle Schiller (Doc. #61). Although the majority of Mr. Schiller's declaration pertains to GEO's operations, he does occasionally attempt to address matters about which he is not competent to testify. For example, Schiller claims that he "know[s] and understand[s] the operations and needs of the corrections sector as a whole, including the Federal customers, such as [BOP, ICE, USMS, and the Office of the Federal Detention Trustee]." Schiller Decl. ¶ 3. In addition, Schiller purports to testify as to the BOP's approach to evaluating proposals. *Id.* ¶ 19. Although Schiller tries to justify this testimony by stating it is "[b]ased on my personal experience with at least eleven contract proposals to BOP," he offers no detail or corroborating evidence to make his testimony any more insightful than the evidence already in the record concerning BOP's evaluation methodology. *See* Second Raher Decl., Exh. F, at 2-4 (listing the five criteria upon which BOP based its contracting decisions). Schiller does not claim to be a qualified expert witness, but does mention his membership in the American Correctional Association ("ACA"), as if this is somehow relevant. Schiller Decl. ¶ 4. Regardless of whether the ACA really is "one of the most significant organizations for the corrections industry" (*Id.*), Schiller's membership in no way qualifies him to give opinion testimony, seeing as how ACA membership is open to anyone willing to pay $35. Fourth Raher Decl., Exh. N.

After the preliminary portion of Schiller's declaration, his testimony can be divided into

two sections. First he addresses competition in the private corrections industry. Schiller Decl. ¶¶ 8-20. Second, Schiller discusses "proprietary business" information and alleged trade secrets. *Id.* ¶ 21-55. Plaintiff responds to these two issues in order.

### A. GEO's Arguments Concerning Competition and Competitive Harm Are Overly Vague

As noted by Mr. Ward, the defendants, including GEO, may have shown that "prison operators compete in the relevant market, at least some of the time." Ward Decl. ¶ 6. This, however, is not sufficient. When a contractor bases its theory of competitive harm on a possibility of non-renewal, a court must look beyond nominal "competition" and determine the actual risk of non-renewal. *Nat'l Parks & Conservation Ass'n v. Kleppe* (*National Parks II*), 547 F.2d 673, 681-682 (D.C. Cir. 1976). Although defendants mention certain CAR contracts which were not renewed, they have diligently avoided providing the total bed numbers that would show how the contractors' total awards over the life of the CAR series. *See supra*, at 28-29.

Schiller testifies about the practice of some companies submitting money-losing bids in order to increase market share. Schiller Decl. ¶ 11. This illustrates one plausible explanation for GEO's intense opposition to plaintiff's FOIA request. As the available data concerning per diem payments illustrates, GEO's per diem compensation for the CAR 6 contract is substantially higher than the state per diem rates revealed in the sample of contracts available to plaintiff. *See* Fourth Raher Decl., Exh. O. If this trend were to be sustained on more complete data, then it would indicate that GEO and CCA are using the CAR contracts to cross-subsidize money-losing contracts with state governments. Not only are the per diem amounts higher on the CAR contract, but BOP's pricing structure provides a revenue guarantee (the "Monthly Operating Price"), a feature which is almost entirely eschewed by state departments of correction.

*See* Second Raher Decl., Exh. A, at 43-45. Inter-governmental cross-subsidization of private sector firms is not the type of "competition" that the *National Parks* doctrine is designed to protect.

Schiller also attempts to prove competition by selectively discussing the number of bidders for certain phases of the CAR series. Schiller Decl. ¶ 16. Not only is Mr. Schiller incompetent to testify about what constitutes a "significant loss *for CCA*" (*see id.* (emphasis added)), but he studiously avoids providing any of GEO's bed-capacity data which might shed light on the questions raised at oral argument. *See supra*, at 28-29.

Although Mr. Schiller attempts to show how disclosure of the information would result in substantial competitive harm, he does not produce a cohesive narrative sufficient to explain how such harm would come about. Ward Decl. ¶¶ 18-25. This lack of detail frustrates plaintiff's ability to subject GEO's arguments to adversarial testing. *See Wiener*, 943 F.2d at 977-978.

### B. GEO Has Not Satisfied its Burden of Proving Trade Secret Protection

Mr. Schiller claims that some of the withheld information constitutes trade secrets. Schiller Decl. ¶¶ 34-55. A party "claiming rights in a trade secret bears the burden of defining the information for which protection is sought with sufficient definiteness to permit a court to apply the criteria for protection described in [the Restatement]." Restatement (Third) of Unfair Competition § 39 cmt. d (1995). The criteria that a court must apply encompas "a comparative evaluation of all the relevant factors, including the value, secrecy, and definiteness of the information." *Id.* GEO has failed to prove that the alleged trade secrets are valuable, secret, or definite.

As a preliminary matter, there is a potential problem with the sufficiency of Schiller's descriptions. His discussion of "proprietary business models" is replete with vague references to undefined types of information. Schiller Decl. ¶¶ 21-33. For example, Schiller references "subcontracts with vendors" (¶ 28), "decisions of how to provide substantial equipment" (¶ 29), and undefined "proprietary and confidential formulas" (¶ 32). These amorphous labels do not sufficiently describe the information in such a way that allows the Court to apply the relevant law of trade secrets. It is unclear to plaintiff whether paragraphs 21-33 are merely a general discussion concerning the information that Schiller then proceeds to describe in paragraphs 34-55. If this is the case, then plaintiff concedes that GEO has provided an adequate description, via the latter portion of the declaration (incidentally, this is the type of specific description that BOP refuses to provide in regards to other vendors' information). However, to the extent that there is information covered by paragraphs 23-33 that is not described in paragraphs 34-55, then GEO has failed to provide an adequate description.

Yet, even if GEO has provided an adequate description, its claims of trade secret status fail as a matter of law because the information is neither valuable nor secret. The value of an alleged trade secret "may be established by direct or circumstantial evidence." Restatement (Third) § 39 cmt. e. GEO has provided neither. *See* Ward Decl. ¶¶ 29-32. Direct evidence must show the "impact on business operations" of the alleged secret. Restatement (Third) § 39 cmt. e. Although Schiller provides some general descriptions of the impact on business operations, he does not adequately explain how the purported secrets are materially valuable. *Cf*. Ward Decl. ¶ 25. Circumstantial evidence of value can take the form of "the amount of resources invested by the [claimant] in the production of the information, the precautions taken by the [claimant] to

protect the secrecy of the information . . . and the willingness of others to pay for access to the information." Restatement (Third) § 39 cmt. e.

GEO has provided no evidence, other than some scattered generalities, concerning the resources it has invested in producing the information. *See* Ward Decl. ¶ 27, at 15. Nor has GEO indicated that competitors are willing to pay a non-trivial amount for the information. *Id.* ¶ 31. Finally, GEO has not shown any measures it has taken to protect the secrecy of the information. Even if GEO did produce such evidence (plaintiff admits that GEO's very intervention in this proceeding could be construed as such a measure), GEO's *efforts* to keep the information secret cannot overcome the substantial evidence plaintiff has produced concerning the general *non*-secretive treatment of such information in the industry, as discussed below.

Schiller's description of GEO's alleged trade secrets is almost enough, on its face, to show that the information is *not* eligible for trade secret protection; and, in any event, GEO has certainly not sustained its burden of proof. Schiller claims that "past contract documents" should be treated as trade secrets. Schiller Decl. ¶ 34. Yet all of the past contracts he mentions appear to be between Cornell and state (or local) governments. *See id.* ¶¶ 41-49. Accordingly, such contract documents are presumptively open to public inspection under applicable state government open records laws. In fact, plaintiff's ability to obtain similar or identical information from the states of Colorado, Idaho, and Oklahoma illustrates that such information is generally released pursuant to state statutes. *See* Fourth Raher Decl. ¶¶ 4-7.

Perhaps nothing illustrates the fallacy of GEO's claims better than the Great Plains Correctional Facility (a Cornell prison). Schiller claims that the "staffing plan" from this Oklahoma contract must be withheld because "a competitor would be able to obtain specific insight into GEO's staffing distribution models." Schiller Decl. ¶ 49. Plaintiff obtained the

entire Great Plains contract (unredacted) through a public records request to the Oklahoma Department of Corrections ("DOC"). Fourth Raher Decl. ¶ 5.C. Not only is the staffing pattern non-confidential as a matter of Oklahoma law, but a review of the document reveals nothing particularly valuable about a list of undefined job titles. *Id.*, Exh. P, at 3.

In addition, information concerning general staffing patterns and facility operations cannot be confidential because such facts and activities are plainly observable by inmates and (to a more limited extent) visitors. Although inmates do have limited constitutional rights, they do have a First Amendment right to convey their observations on facility staffing, conditions, and programming to the free world. *See generally*, 2 Michael B. Mushlin, *Rights of Prisoners* §§ 6:2 - 6:8 (4th ed. 2009).

Finally, there are substantial questions concerning the definiteness of the alleged trade secrets. Some of the documents described by Schiller (such as detailed staffing schedules) are likely "definite" within the meaning of trade-secret law. Yet many of the so-called proprietary methods that GEO seeks to protect are, at best, "general skill, knowledge, training, and experience" (*see* Restatement (Third) of Unfair Competition § 42, cmt. d) or, at worst are simply hollow corporate fluff used to obtain contracts. *See generally*, Fourth Raher Decl., Exh. L.

### C. GEO Has Failed to Respond to Plaintiff's Arguments Regarding the Reeves County Documents

Plaintiff has explained why, as a matter of law, none of the documents pertaining to the Reeves County Detention Center ("RCDC") are exempt from FOIA disclosure. Pltf. SJ Mem., at 28-29. Plaintiff's argument is even more compelling in light of Reeves County's admission that contract documents are discloseable under Texas law. *See* Third Raher Decl., Exh. F, at 1 (Tex.

Atty Gen. Op. OR2010-03117 (Mar. 2, 2010)). GEO has not only failed to respond to plaintiff's argument, but has chosen to advance new, misleading arguments.

Mr. Schiller contends that RCDC staff compensation information is protectable as a trade secret. Schiller Decl. ¶ 52.a. Yet compensation information concerning GEO's RCDC management team is contained in the already-released GEO-Reeves County contract. Third Raher Decl., Exh. A, at 18; Exh. B, at 18. Because the non-management staff appear to be *county* employees, their salary data is presumably discloseable under Texas law. *See id*., Exh. A, at § 3.02 (RCDC staffing plan "to be filled with County employees, screened and selected by GEO"). Because GEO has not rebutted plaintiff's argument, this Court should hold that all documents pertaining to RCDC non-confidential, and thus unprotected by Exemption 4.

## IV. BOP Has Not Proven That it Conducted an Adequate Search

Plaintiff's FOIA request encompassed "[a]ny corespondence regarding the solicitation, evaluation, or issuance of" Reeves County's CAR-5 and -6 contracts. Complaint, Exh. A. This request was the third of five unnumbered parts to plaintiff's FOIA request—for simplicity's sake, it will be referred to here as "Item 3" of the FOIA request. Soon after the commencement of this case, plaintiff provided supplemental clarification to the BOP that Item 3 encompassed "communications between BOP employees as well as with any third parties." First Raher Decl., Exh. C, at 1. The Court used the same language when ordering BOP to conduct a search for Item 3 materials. Civil Minutes, Jun. 1, 2010 (Doc. #44). BOP has produced two documents which it claims are responsive to Item 3. Fourth Raher Decl., Exh. A. BOP has produced no evidence indicating that it conducted an adequate search for additional Item 3 information.

When determining whether an agency has conducted an adequate search, a court must

view facts in the light most favorable to the requestor. *Zemansky v. U.S. Envtl. Protection Agency*, 767 F.2d 569, 571 (9th Cir. 1985). Moreover, to prove that it conducted a sufficient search, an agency must "demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents." *Id.* (quoting *Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1476, 1485 (D.C. Cir. 1984)) (internal quotation marks omitted). BOP has not made such a demonstration.

None of BOP's evidence explains the storage and retrieval systems which might contain information responsive to Item 3. Although Ms. Tufte has never hesitated to chronicle her *time* spent processing the FOIA request (*e.g.*, Supp. Tufte Decl. ¶ 4), she never describes critical components of her search *method*. Most notably, Tufte fails to provide information on BOP's systems for organizing email, voicemail, phone call logs, or hard-copy correspondence. Having never described the systems which could reasonably be anticipated to contain responsive information, BOP has thus failed to prove that it conducted a reasonable search of such systems.

Given BOP's repeated protestations that it has "spent many hours on this project" (e.g., SJ Oral Argument Trans, 14:14), it is not implausible to anticipate that BOP's first line of defense will be a claim that a more detailed search would be unduly burdensome. Should BOP attempt such an argument, plaintiff would ask the Court to overrule it without hesitation. *See generally, People for the Am. Way Foundation v. U.S. Dept. of Justice*, 451 F.Supp.2d 6, 12-16 (D.D.C. 2006).

Although plaintiff's motivations for making a FOIA request should be irrelevant to the legal analysis, plaintiff would briefly note that the objective underlying Item 3 is not trivial. It is well-known that the award of government contracts can be guided by informal, covert influence from members of Congress. *See* Fourth Raher Decl., Exh. R. Item 3 was calculated to uncover

any internal evidence BOP might possess regarding such informal influence.

Item 3 itself is not an unreasonable request, nor is it unreasonable for plaintiff to insist that BOP actually conduct an adequate search and provide objective evidence thereof. Because BOP has not produced evidence of a sufficient search, plaintiff contends that BOP has not complied with the Court's June 1 order requiring BOP to conduct an additional document search. Accordingly, plaintiff asks this Court to issue a new order outlining the specific search techniques which BOP must use.

## V. Conclusion

Given the unambiguous language of the Summary Judgment Order, BOP was clearly on notice that failure to provide detailed, legally sufficient grounds for withholding would result in the Court granting plaintiff's motion for summary judgment. For reasons known only to BOP, the agency (and GEO) have failed to produce adequate evidence to justify withholding the vast majority of documents. Accordingly, plaintiff requests that his motion for partial summary judgment be granted. In the alternative, plaintiff must be allowed to conduct discovery in order to address the numerous unresolved factual questions detailed in this brief.

Dated this 28th day of January, 2011.

Respectfully submitted,

/s/ Stephen Raher

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