UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORGANIZATION FOR COMPETITIVE MARKETS, Plaintiff, v. OFFICE OF INSPECTOR GENERAL, USDA, Defendant, and NATIONAL CATTLEMEN'S BEEF ASSOCIATION, Defendant-Intervenor.	)	Civil Action No. 14-1902 (EGS)

PLAINTIFF'S REPLY MEMORANDUM

IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

When USDA's Office of Inspector General ("OIG") first published its beef checkoff audit findings six years ago, it reported a need to "improve the transparency" of the program. Next month will mark six years since Plaintiff submitted its FOIA request in pursuit of that checkoff transparency. After years of OIG processing records, then reprocessing records, asserting new defenses, then withdrawing those defenses, disruptions that ultimately required three briefing schedules, a show cause order, and a needlessly voluminous and repetitive record of withheld records, resolution of this case depends on fairly straightforward and defined issues of FOIA law.

But, unlike Plaintiff, Defendants still seek to avoid having this case decided on the record and law, instead filing opposition briefs permeated with ad hominem attacks, straw man arguments, and non-sequiturs. Plaintiff argued that OIG can't *deliberate* with an agency under audit; Defendant responded as if Plaintiff had argued it couldn't *communicate* with an agency under audit.

Plaintiff argued that FOIA requires disclosure of federal contract *receipts and expenditures*. Defendant responded only that it didn't have to disclose "raw financial data" or employee records.

Plaintiff—numerous times—cited to well-settled precedent that FOIA is a public interest law that is blind to its requestor. Defendants ignored such cases and riddled their briefs irrelevant attacks on Plaintiff, imploring the Court to make its ruling based on Plaintiff's motives (as they wrongly portrayed them) instead of on the record and on the law.

On the merits, though, this case resolves not on diversions or disparagements, but fundamental principles of FOIA law that require narrowly construed exemptions and meaningful justifications for withholding information. Plaintiff OCM has for years been working to bring a greater level of transparency and accountability to the beef checkoff program. As statutory

beneficiaries of the federal checkoffs they are required to fund, FOIA transparency is the singularly most important tool available to producers (and the public generally) to ensure that checkoff funds are being used lawfully.

ARGUMENT

I. JUDICIAL REVIEW OF FOIA CASES

Defendants' briefs misconstrue the burdens relevant to the judicial review standard uniquely applicable to FOIA cases. First, FOIA places the burden of proof "on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). In litigation challenging the sufficiency of "the release of information under the FOIA, 'the agency has the burden of showing that requested information comes within a FOIA exemption.'" *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999) (quoting *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999)). This burden does not shift even when the requester files a cross-motion for summary judgment because "the Government 'ultimately [has] the onus of proving that the [documents] are exempt from disclosure,'" *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d at 904–05 (alterations in original)(quoting *Nat'l Ass'n of Gov't Emps. v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978)).

Despite this foundational principle of FOIA law, Defendants nonetheless attack Plaintiff's motion with claims that it required more affidavits and fact evidence. OIG Br. 6. NCBA even wrongly makes this the opening argument of its opposition brief. NCBA Br. 4-7. But none of the cases NCBA cites in that entire section involved FOIA at all. *Id.* at 6. FOIA is unlike other types of cases because the agency alone knows what responsive records exist and their contents; "[t]his lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973). FOIA's strong presumption in favor of disclosure and statutorily placed burden of proof on

the agency mean that even on a requestor's motion for summary judgment, the government still bears the burden of proof to defend any decision to withhold information. *See Biles v. Dept. H.H.S.*, 931 F. Supp. 2d 211, 218 (D.D.C. 2012)(internal quotations omitted).

Second, the applicable standard of review under FOIA requires that agency decisions to withhold or disclose information are reviewed *de novo*. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C.Cir.1977); *see also Mobley v. Dept. of J.*, 870 F. Supp. 2d 61, 66 (D.D.C. 2012); *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F.Supp.2d 252, 256 (D.D.C. 2004). To accommodate this standard, the agency must provide a complete description of each record that has been withheld, together with a detailed justification explaining how each such record is exempt from disclosure under the claimed exemption. *Vaughn*, 484 F.2d at 824. De novo review also means that the agency is not entitled to the deference Defendants argue for in various parts of their brief. OIG Br. 34, NCBA Br. 23. Defendants rely primarily on the D.C. Circuit's opinion in *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C. Cir. 2010). But *United Techs.* was a *reverse-FOIA* case, which is tried not under FOIA's de novo standard but under APA's narrower arbitrary and capricious scope of review of agency action. *Id.* In FOIA cases, an agency's judgment regarding an exemption is accorded no deference. *Mead Data*, 566 F.2d at 251 ("[T]he agency's opinions carry no more weight than those of any other litigant in an adversarial contests before a court.").

II. Defendants Misconstrue the Nature of Federal Checkoff Programs and Federal Checkoff Funds

Contrary to mischaracterizations that pervade Defendants' briefs and declarations, USDA checkoff programs are federal operations of government speech, financed by federally appropriated funds. The Secretary's role is often referred to as one of "oversight," but more accurately the decisions of two Supreme Court cases establish constitutionally compelled role of

the Secretary at the checkoff helm. In order for these programs to operate lawfully, the Secretary must fully control, and be accountable for, all programmatic activities and expenditures.[1]

At the beginning of the last decade, there were a number of legal challenges from producers about mandatory checkoff funds. In the first of these cases to reach it, the U.S. Supreme Court in 2001 declared that the mushroom checkoff was an *unconstitutional* program of compelled subsidization of private speech. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). In *United Foods*, the Court reasoned that checkoffs were programs of viewpoint-based promotional speech and that checkoff boards were private entities, and as such producers could not be compelled to subsidize the programs. *Id.* at 412-13. But the fate of checkoff programs and mandated funds did not end there. The Court declined to consider an argument that hadn't been made in the lower courts: that the checkoff programs and boards were not private, but instead were federal programs of government speech. *Id.* at 416-17.

In 2005, the constitutionality of checkoff programs once again reached the high court, this time with the government arguing its level of control over, and accountability for, checkoff program operations and messaging—down to every word of every promotion—made it a program of *government speech* that survived First Amendment scrutiny.[2] *Johanns v. Livestock Mktg. Ass'n*,

---

[1] In a recent Supreme Court argument, the Chief Justice sharply questioned the government on the federal nature of commodity marketing boards:

CHIEF JUSTICE ROBERTS: And by the way, it better be the Department of Agriculture that takes these – you said earlier it's the Raisin Committee – or else you're going to have a lot of trouble in your government speech cases, where you always make the point that these committees are, in fact, the government.

MR. KNEEDLER: We're not – we're not saying the committee is not the government.

Horne, et al., Petitioner, v. U.S. Department of Agriculture, 2015 WL 1816698 (U.S.), 34-35 (U.S. Oral. Arg., 2015).

[2] The government itself demonstrated the degree of its oversight and control of the checkoff boards by aligning itself with an IRS determination that checkoff boards are, in fact, "an integral

544 U.S. 550, 562 (2005). The Court agreed, but *only* because of that level of government control and accountability over checkoff programs and their expenditures. *Id.* Thus, a crucial element of the federal checkoffs is the Secretary's ultimate responsibility for the lawful use of checkoff funds and liability for their misuse, including by contractors and subcontractors. *See*, *e.g.*, *Humane Socy. of the U.S. v. Vilsack*, 797 F.3d 4 n.1 (D.C. Cir. 2015); *Humane Socy. of U.S. v. Perdue*, 290 F. Supp. 3d 5, 7 (D.D.C. 2018), *amended in part sub nom. Humane Socy. of U.S. v. Vilsack*, CV 12-1582 (ABJ), 2018 WL 1964305 (D.D.C. Apr. 16, 2018)(enjoining arbitrary and capricious pork checkoff expenditures); *Californians for Humane Farms v. Schafer*, C08-03843 MHP, (N.D. Cal. Oct. 10, 2008)(incorporating USDA Secretary's agreement that "he controls the activities and expenditures" of the federal checkoff board at issue in the case).

To distance checkoff expenditures from the scrutiny of FOIA, Defendants incorrectly claim that checkoff programs do not involve "federally appropriated funds." NCBA Br. 26 (citing one of Defendant's declarations). Not so. When "Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure, that constitutes an appropriation." 1 GAO, *Principles of Federal Appropriations Law* 2-25, 4th ed. (2016 rev.). Such statutes "constitute continuing or permanent appropriations; that is, the money is available for obligation or expenditure without further action by Congress." *Id.* at 2-24. This is exactly the federal appropriations framework on which the beef checkoff—like all other checkoffs—is built.[3] *See* 7 U.S.C. § 2904. That the funds are raised by mandatory assessments on

---

part of the Department of Agriculture." Brief for the Federal Petitioners, *Veneman v. Livestock Marketing Association*, 2004 WL 1905738, 22 (U.S. 2004).

[3] NCBA's brief is riddled with requests that this Court look outside the briefing and record, and instead consider extra-judicial statements it attributes to Plaintiff. NCBA Br. 26-27. In this instance, NCBA references some OCM materials discussing checkoff reform in common parlance, sometimes calling it a "tax" and sometimes (in the very document NCBA cites) calling it a "fee."

producers doesn't diminish the level of FOIA scrutiny applicable to these federal spending programs. If anything, as statutory beneficiaries of the programs they are required to fund, FOIA transparency is the singularly most important tool available to producers (and the public generally) to ensure that checkoff funds are being used lawfully.

III. OIG's Deliberative Process Claims are Legally Deficient

As explained in Plaintiff's opening brief, Defendant improperly redacted or withheld entirely thousands of pages of responsive records pursuant to an exceptionally broad construction of FOIA's deliberative process exemption. Although peppered with mischaracterizations of Plaintiff's positions and spurious case analyses, Defendant's brief at bottom reflects a doubling down on its sweeping application of what should be a narrowly circumscribed privilege. Moreover, Defendant's invocation of the privilege should be accompanied by an explanation detailed enough to allow judicial review of the agency's decision under FOIA's de novo standard. Defendant has failed to justify its overbroad interpretation and application of the deliberative process exemption.

A. OIG misperceives the narrow parameters of the deliberative process analysis.

Defendant makes no effort to identify discrete legal or policy issues being deliberated in any particular redaction, instead pitching a tent around all such decisions as "antecedent to the adoption of the agency position, the final audit report." Def. Br. 4. Defendant then argues for a sort of *compilation* privilege by arguing that "each withheld record played a role in the development of the final audit report, or 'audit process.'" *Id.* But as Plaintiff noted in its opening brief, the *Vaughn* court readily rejected a similar argument to apply the privilege to the entirety of a

---

NCBA then spends another full page arguing the checkoff is not a tax, but a fee. Such litigation tactics are improper and should not be credited. Plaintiffs' legal position has (consistently and always) been that checkoffs are federal funds, subject to spending laws and FOIA disclosure. Whether it is referred to as a federal tax or a federal fee matters not.

management review process. *See Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C. Cir. 1975). Considering the whole of such a process from start to finish as one continuous deliberative process "would be interpreting Exemption 5 to protect too much." *Id.* "If we construed Exemption 5 as broadly as the Government seeks to do here, we would go a long way toward undercutting the entire Freedom of Information Act." *Id.* at 1146. How does Defendant reconcile the 40-year precedent of *Vaughn* with its contrary argument? By ignoring it. Defendant does not grapple with or even cite to *Vaughn* at all in its brief.

In its analysis of identifying "deliberative" information, Defendant does insufficiently little to cabin itself, speaking only generally of "opinions and recommendations" of auditors. Def. Br. 5-6. Opinions and recommendations between who? Opinions and recommendations about which legal or policy matters? We just don't know, but are left only with Defendant's unfettered proposal that the process must be applied in every way it might help protect a general "culture of open dialogue" and "free flow of candid discussion, deliberation, and analysis," and its assertion that "OIG personnel" expect the "substance of their discussions" (ostensibly, even discussions with the entities that it is auditing as an exercise of its governmental oversight duties) will be kept confidential. *See* Def. Mem. at 8, ECF No. 88-1; Decker declaration ¶ 130, ECF No. 88-3. This position is nearly limitless; it would mean that virtually all oversight activity of OIG could be shielded from disclosure to the public. Further, the void of specificity with respect to when and how it applies the privilege is fatal to a *de novo* review of the agency's decision. *See Animal Legal Def. Fund, Inc. v. Dep't of Air Force,* 44 F.Supp.2d 295, 299 (D.D.C.1999)(observing that the need for specificity in Exemption 5 claims is "particularly acute" because 'the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative

process.'" (quoting *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 867 (D.C.Cir.1980))).

Plaintiff also notes an ironic and not insignificant contrast in deliberative process policies argued in various sections of Defendant's brief.[4] Unlike the view expressed early in the brief by OIG (the actual custodian of records and Defendant in this case), in a later section, AMS asserts that a specific subset of its own internal communications about its comments on OIG's "first draft audit" were redacted as "predecisional because they occurred before AMS had decided *how to respond to the draft OIG audit*." Def. Br. 27 (emphasis added). Unlike OIG, which lumps the entire audit process into one long and varied predecisional sanctuary, AMS does not attempt to argue that all of its communications prior to the final audit were predecisional. AMS asserts privilege over only its own *internal* debates on the OIG draft audit report, a process that logically would end when AMS decided on its response and shared it with the auditor (OIG). One defendant. One brief. Two authors and two very different constructions of the deliberative process privilege.

B. <u>OIG incorrectly claims a "deliberative" relationship applies between an auditor and audited entity.</u>

OIG is governed by strict legal authority designed to assure objectivity and *deliberative* independence when conducting audits of other agencies within its executive department. Audits must be conducted in compliance with GAO's Generally Accepted Government Auditing Standards, GAO-12-331G (Dec. 2011)("GAGAS"), which sets specific parameters for performing

[4] Likely, this stems from the noticeable rift between OIG and AMS that has periodically disrupted this case (*see, e.g.*, ECF No. 33) and appears to result in distinctly segmented briefs. OIG is the properly named defendant in this case, and yet—in a move consistent with Plaintiff's concern that the agency effectively delegated its oversight role in part to the entity it was auditing—OIG has allowed AMS to take on briefing the question of whether AMS's actions in reviewing drafts of OIG opinions and conclusions should be shielded by an exemption applicable to OIG's protected deliberations.

audits and preserving an independence firewall between itself and agencies during an audit. Nonetheless, OIG's argues that it shares a "deliberative" relationship with the self-interested agencies it is auditing and that it may claim Exemption 5 privilege for them. OIG is wrong.

1. OIG wrongly – and repeatedly – conflates communication and deliberation.

Defendant's arguments about the relationship between a GAGAS auditor and an audited entity amount to a vastly overbroad interpretation and application of Exemption 5, making no distinction between communications generally and the much narrower category of deliberations. Def. Br. 7-13. While there are many factual and legal problems Defendant's argument, there are two primary flaws that are fatal to Defendant's position as it pertains to its obligations under FOIA and that statute's purpose to bring public light to government action.

First, Defendant fails to perceive the *deliberative* firewall necessary between an auditor and an agency under audit. Contrary to Defendant's claim (at 8) that Plaintiff cited no case for its position, Plaintiff included an emphatic block quote from a district court decision by now-Circuit Judge Wilkins, in which he recognized that when conducting an internal audit of another agency, an Inspector General's independence "in carrying out the audit is paramount." *See Neighborhood Assistance Corp. of Am., v. U.S. Dept. of Hous. and Urb. Dev.*, 19 F. Supp. 3d 1, 21 n. 11 (D.D.C. 2013); Pl. Br. 12, ECF No. 90. The court noted that establishing an independent OIG to avoid the self-interests agencies would have in assessing their own performance was one of the "animating principles" of the IG Act. *Id.*

Neighborhood Assistance "stressed" a distinction between internal audits of another agency and external audits of third parties. *Id.* Unlike in the instant case, *Neighborhood Assistance* involved an external audit and that allowed for a more collaborative relationship than an internal audit would. *Id.* Nonetheless, the first case Defendant invokes to support its argument involved not an internal, but an *external* audit. Def. Br. 9-10. The case involved an external audit by

Amtrak's OIG of the propriety of a contractor's request for payments from the agency. *Moye, O'Brien v. Natl. R.R. Passenger Corp.*, 376 F.3d 1270, 1273 (11th Cir. 2004).

Astonishingly, Defendant claims the *Moye* court found a deliberative process privilege was shared "between an auditor and auditee." Br. 10 This is critically wrong. OIG was the auditor, but the agency (Amtrak) *was not* the auditee. The auditee was the contractor who was being audited to determine whether its claims for payment were proper. *Moye*, 376 F.3d at 1273. Defendant misstates the holding, then presents the case as standing for something it doesn't.

The next case Defendant purports shows a deliberative process privilege between an audit and auditee does not even appear to have involved an audit at all. Def. Br. 10-11. *Breiterman v. United States Capitol Police*, 323 F.R.D. 36 (D.D.C. 2017) was a non-FOIA case that involved a question of privilege to an OIG "advisory opinion and recommendation" to assist the agency with improving operations. *Id.* at 46. Surely Defendant is aware of the material difference between OIG audits—which must be conducted in strict accordance with Government Auditing Standards—and OIG's less formal duties, such as efficiency improvement reports. *See* 5 U.S.C. app. 3 § 4 (requiring that audits, but not other OIG duties, comply with government auditing standards).

The purpose of the narrow deliberative process exemption to disclosure under FOIA is to ensure that decisions regarding essential government duties are robust and not curbed by improper influence. That purpose is not served, and is actually undermined by, Defendant's position here, which allows an audited entity to invade and unduly influence a government audit. And this is especially concerning in the context of an audit by an IG when it is deliberating over the actions of another agency of government, as is reflected in the *Neighborhood Assistance* decision. 19 F. Supp. 3d at 21.

The second major flaw in Defendant's position is that by conflating communication and deliberation, Defendant in many instances argues against a claim that Plaintiff *never asserted* – that OIG isn't permitted even to "communicate" with an audited entity when conducting an audit. Def. Br. 8, 11-13. Defendant's straw man includes reprinting excerpts of various Government Auditing Standards that collectively stand for the unremarkable proposition that an auditor may *communicate* with audited entities. *Id.*

Defendant's confused characterization of Plaintiff's position is utterly confounding, given how precisely Plaintiff argued to the contrary it its opening brief. ECF No. 90, p. 13 ("To be sure, OIG does—and must—communicate with agencies it is auditing.") Unquestionably, the auditing standards recognize an auditor's duty to gather information, but information-gathering is not a give-and-take deliberation on a legal or policy matter. As to deliberation, the Standards caution that "*objective* evaluation of the sufficiency and appropriateness of evidence is a critical component of audits." GAGAS at Sec. 3.62.

Instead of the sections on information gathering, Defendant should have looked at the sections that explain how communications with an audited entity should be viewed by the auditor – with "professional skepticism":

> Professional skepticism is an attitude that includes a questioning mind and a critical assessment of evidence. Professional skepticism includes a mindset in which auditors assume neither that management is dishonest nor of unquestioned honesty.

GAGAS at Sec. 3.61.

The thrust is clear. It means auditors must gather information and evidence from the audited entity, but also must *independently* question that information and evidence. Auditors may question or seek comments from an audited entity, but the responses are not to be assumed honest or dishonest. Communications between auditor and audited entity, then, are viewed as objective

exchanges of information. Any evaluation and decisionmaking about the communications (i.e. deliberations) must then be objectively and independently reviewed by OIG alone. *See Neighborhood Assistance*, 19 F. Supp. 3d at 21 (recognizing the permissibility of an agency providing information or comments, "so long as the OIG auditors then reviewed those issues independently and made their own determinations and findings").

The core purpose of the IG Act was to create an independent and objective auditor while eliminating the inherent bias that attended involvement of program administrators in the decisionmaking process. As applied to communications and materials exchanged between an independent OIG and agency being audited, there is simply no scenario in which a deliberative process between such entities is implicated and so disclosure should be ordered for these materials. *See Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C.Cir. 1992).

2. Audit materials shared with self-interested agencies under audit are not deliberative.

Bucking long-standing Circuit precedent to the contrary, Defendant holds fast to its claim for a flat-out categorical exclusion for all "draft" audit reports. Def. Br. 8-9. As in its opening brief, Defendant again relies on *Hamilton Securities Group Inc. v. Dept. of Hous. and Urb. Dev.*, 106 F. Supp. 2d 23, 30 (D.D.C. 2000), *aff'd sub nom. Hamilton Securities Group, Inc. v. Dept. of Hous. & Urb. Dev., Off. of Inspector Gen.*, 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001). But *Hamilton Securities* did not establish the per se privilege rule that Defendant seeks. Instead, the court followed the *Coastal States* rule that "the deliberative process privilege is ... dependent upon the individual document and the role it plays in the administrative process." *Id.*

The documents at issue in *Hamilton Securities* were wholly internal OIG documents that included personal opinions of lower level auditors and, importantly, had not been cleared for release outside the OIG's deliberative participants. The "draft" reports at issue in this case are

materially different, having been cleared and shared with the audited entity for comment. Plaintiff explained to Defendant during the processing schedule that the only reports being sought are those that OIG internally cleared and provided to AMS for review and comment or that AMS internally cleared and provided back to OIG, which are the materials covered in the *Vaughn* index as Exhibit 58. ECF No. 88-6.

To Plaintiff's citation of leading Circuit cases rejecting a categorical exemption for drafts (ECF No. 90, p. 15), Defendant's response is silence. To the line of cases Plaintiff cited as most analogous to shared draft reports – Circuit decisions that involve an agency sharing materials with a party acting in its own self-interest (*Id.* at 17) – Defendant's response is silence. Consistent with the weight of precedent, the reports and comments shared between auditor and audited entity are not deliberative and should be disclosed.

3. The deliberative process privilege is unavailable for records that may show improper government conduct

As explained in Plaintiff's opening brief, the deliberative process privilege "disappears altogether when there is *any* reason to believe government misconduct occurred." *See In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997)(emphasis added). If OIG and AMS truly were deliberating with each other on policy issues, such as the audit findings, such deliberations would be incompatible with OIG's legal mandate against doing so. The audit report states it was conducted in accordance with GAGAS, which was required by law. *See* Audit Report, p. 12. OIG submitted a declaration confirming that it "independently and objectively performs audits and investigations of USDA's programs and operations." *See* Decker Decl. ¶ 5, ECF No. 88-3.

But when AMS learned that OIG's proposed report findings might be an embarrassment for USDA, the auditor and audited entity worked together to produce a new report (presumably one that was less embarrassing for USDA). On March 7, 2013, OIG sent AMS an "official draft"

of the audit report to AMS officials, stating the "report was revised based on the exit conference with your staff on December 6, 2012" and requesting a written response within 30 days. Ex. 5, ECF No. 90-2. The notice clearly gives the public impression that AMS input was last provided at the early December exit conference and, after internal deliberation, OIG revised and presented AMS the final. That is not true.

After the early December exit interview, OIG gave AMS an "unofficial official" drafts for review and comment. Ex. 2, ECF No. 90-2. AMS' reaction to the proposed official findings was emphatic, telling OIG that there was "a LOT of heartburn over the report as written" and fear that "it will reflect poorly on USDA (as a whole) if released as is." Ex. 3, *Id.* Just one month later, a "rebooted report"[5] was issued, given to AMS for review, and received back at OIG on March 6. Ex. 58, p. 11 (ECF No. 88-6, p. 393). The next day, OIG publicly implied that AMS had not seen or been involved with the audit since December 6, 2012. Ex. 5, ECF No. 90-2.

OIG unsurprisingly argues that Plaintiff has not produced enough evidence to meet the high bar to show misconduct. Def. Br. 14. But Plaintiff has shown exactly what's required at this stage: "a discrete factual basis for the belief that 'the deliberative information sought *may* shed light on government misconduct.'" *Alexander v. F.B.I.*, 186 F.R.D. 154, 164-66 (D.D.C. 1999)(quoting) *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997)(emphasis added). OIG's Exhibit 58 – which is the *Vaughn* relating to shared draft audit reports between OIG and AMS – contains 11 pages of entries of communications and shared materials between the auditor and

[5] OIG, in Footnote 10 of its brief (ECF No. 98), stated Plaintiff "misquoted" the record by referring to the changed report as a "rebooted report" because the phrase didn't precisely match the one used in the particular referenced email. It isn't clear what conclusion OIG implies from this, but to clarify any confusion, Plaintiff attaches a related OIG record, Bates Stamped "OCM 2985," which is a related email to the one attached to Plaintiff's opening brief, in which the new document is referred to as "the rebooted report."

agency under audit. Ex. 58, ECF No. 88-6. All are being withheld as "deliberative." Plaintiff emphasizes, as did the *Alexander* court, that there may be reasonable explanations for the late revisions and worry about embarrassment, but publicly giving the impression that those events never even occurred removes the availability of a privilege claim for the relevant records.

C. OIG's *Vaughn* entries and declarations do not contain the heightened specificity required for deliberative process claims.

Like other FOIA exemptions, claims of deliberative process privilege must be construed narrowly. Unlike many other FOIA exemptions, however, Exemption 5 requires a heightened explanatory standard. *See The James Madison Project, et al. v. Dep't of Justice, et al.*, 302 F. Supp. 3d 290, 298 (D.D.C. 2018); *Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F.Supp.2d 157, 168 (D.D.C. 2011)(noting that under Exemption 5, unlike other exemptions, "an agency must provide in its declaration and *Vaughn* index precisely tailored explanations for each withheld record at issue.)

OIG's deliberative process *Vaughn* entries contain the same boilerplate text in the "justification for withholding" section.[6] *See Vaughn* index, ECF No. 88-5 (Ex. 57 and 59). This is simply not sufficient to justify Exemption 5 withholdings. *See Hunton & Williams LLP v. U.S. Envtl. Protec. Agency*, 248 F. Supp. 3d 220, 242 (D.D.C. 2017)(rejecting boilerplate Exemption 5 language that continued with "only modest variation" for several hundred pages of *Vaughn* entries); *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 189 (D.D.C. 2013)(noting that unlike

[6] OIG's *Vaughn* index includes this same boilerplate "justification" in every one of its entries relating to AMS communications: "Release of this information could hinder free flowing communications between AMS and OIG, which could negatively affect future OIG audit work. *See* Exhibit 57, ECF No. 88-6. Further confusing the issue is OIG's improper designation of communications between OIG and AMS as "internal." *Id.*

other FOIA exemptions, "when an agency claims the deliberative-process privilege under Exemption 5, the factual context surrounding the withheld document is critical").

OIG continues to claim it fears a chilling effect in future communications if its redacted communications are released. Def. Br. 13. But, USDA Departmental Regulations and federal law undermine this unsupported assertion, because they assure that OIG's ability to get all information and documentation it requires for audits is guaranteed. USDA agencies under audit are "required to cooperate with OIG to facilitate the conduct of audits." USDA Departmental Regulation 1700-2, Sec. 3. Department employees are equally required to "cooperate fully with OIG" and to offer sworn statements when requested. *Id.*, Sec. 5(e). Failure to respond to OIG requests—even if against the employee's own interest—is grounds for disciplinary action. *Id.* Officials and employees must provide "all possible assistance" to OIG during audits, including by providing all records relating to matters under review. *Id.*, Sec. 5(c).

IV. Exemption 4 Does Not Support Withholding Financial Records Relating to the Federal Checkoff Program

In arguments laden with personal attacks, myriad mixtures of technical financial claims, and legal positions that distort, or altogether ignore, Circuit precedent, Defendants paint a chaotic litigation scene for this Court to wade through. But cutting away the improper extra-judicial references and lengthy boilerplate submissions, well-established FOIA principles provide a settled and objective framework for resolution of the Exemption 4 issues in this case.

A. The *National Parks* test for mandatory submissions of information controls the checkoff-related records at issue.

In its opening brief, Plaintiff examined both the substance and animating purpose of the controlling tests for determining whether information is "confidential" under FOIA Exemption 4. *See* Pl. Br. 24-27, ECF No. 90. Which test applies turns on a threshold, objective determination of whether the information was provided to the Government on a "voluntary basis" or "under

compulsion." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993). Where information is deemed to be submitted to the government under compulsion, it must be released under FOIA unless its disclosure is likely either to (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1975).

The question of whether information is submitted mandatorily or voluntarily is an objective one, and its resolution does not depend on whether a submitter happens to provide the information in advance of a request, or subpoena or other demand: "actual legal authority [to compel disclosure], rather than parties' beliefs or intentions, governs judicial assessments of the character of submissions." *Ctr. for Auto Safety v. Nat'l Hwy. Traffic Safety Admin.*, 244 F.3d 144, 149 (D.C. Cir. 2001). A corollary rule provides that "information provided to the government because it is required for participation in a voluntary government program is treated as mandatory, as opposed to a voluntary, submission of information." *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F.Supp.2d 13, 35 n. 8 (D.D.C. 2011).

Participation in the beef checkoff program requires keeping records of checkoff contract transactions and account for all funds received and expended. 7 U.S.C. § 2904. The Beef Act further requires that records of all checkoff receipts and disbursements must be made available to the Secretary for inspection and audit. *Id.* The checkoff records at issue in this case were affirmatively "requested" by OIG in order to conduct its audit. Def. Br. 31. And, as Plaintiff detailed in its opening brief, the government has actual authority to compel the records at issue. *See, e.g.,* 7 U.S.C. § 2904; USDA Departmental Regulation 1700-2, Secs. 3, 5; I.G. Act, 5 U.S.C. app. 3 § 6.

Nonetheless, Defendant and Intervenor argue that submission of these mandatory checkoff accounting records to OIG for its audit was done voluntarily and that the more favorable test for submitters announced in *Critical Mass* should apply. Def. Br. 31; NCBA Br. 11. Where Defendants incorrectly hang their hats is on a claim the government must affirmatively *exercise* its authority to compel information before it will be treated as mandatorily submitted. Def. Br. 31; NCBA Br. 11. According to Defendants, then, the agency may by mere caprice decide which businesses will receive a strict or lenient FOIA disclosure test simply by its decision whether to invite information submissions voluntarily or instead to compel submission in the first instance. (By the same caprice, the public's access to the information of some businesses may be more restricted than access to the same information from others depending only on the mood of the government when making the request.) Defendants are wrong.

Such unfettered government discretion is irreconcilable with the D.C. Circuit's intent to develop objective rules that "will lead to a generally predictable application of FOIA." *Ctr. for Auto* Safety, 244 F.3d at 149 (noting that "the distinction between voluntary and mandatory submissions that was delineated in *Critical Mass* was rooted in the importance of establishing clear tests in interpreting FOIA, and we continue in that tradition today").

Defendants support their "actual exercise of authority" argument on a single line of dictum in a footnote of a 2001 district court case. Def. Br. 31; NCBA Br. 11 (citing *Parker v. Bureau of Land Management*, 141 F.Supp.2d 71, 78 n. 6 (D.D.C. 2001)). What Defendants ignore entirely are the numerous cases decided since *Parker* that have not followed Defendants' interpretation, including at least two by the very judge who authored the *Parker* decision. *See, for example, Center for Auto Safety v. U.S. Department of Treasury*, 133 F.Supp.3d 109, 120 (2015)(recognizing the rule that "when an agency has 'actual legal authority' to compel production of information, such

production is not voluntary for the purposes of the FOIA"); *see also Pub. Citizen v. U.S. Dept. of Health and Human Services*, 975 F. Supp. 2d 81, 111 n. 16 (D.D.C. 2013)(same); *Ctr. for Pub. Integrity v. U.S. Dept. of Energy*, 234 F. Supp. 3d 65, 75 (D.D.C. 2017)(holding that where the government requests information "it would otherwise have the legal authority to compel, the resulting productions are involuntary and the *National Parks* test controls").

Whether on the basis of the government's "actual legal authority" to compel submission of checkoff contracts, receipts, and expenditures, or whether pursuant to the requirement that such records be kept and made available as a condition to participation in the federal beef checkoff program, the objective result is the same: *National Parks* controls.

B. Defendants' arguments do not—and cannot—establish a substantial likelihood of competitive harm from disclosure

In assessing the likelihood that release of checkoff-related contract and expenditure records, Plaintiff detailed in its opening brief the unique structure (even among other checkoffs) of the beef checkoff program's contract award system. Pl. Br. 27-31, ECF No. 90. NCBA's Federation division fills 10 of the 20 seats on the contract award committee, which represents enough voting power to block any contract award from going to a competitor.

While Defendants dispute whether the Federation members of the contract committee do or would actually exercise such power, resolution of the competitive harm test turns on NCBA's acknowledgment that "the Federation-elected BPOC members arguably *could* block contracts being awarded to Competitor Entities." NCBA Br. 16. The Court would have to accept a logic-defying premise that NCBA's own Federation division would be likely to cause its parent company

substantial competitive harm if records relating to checkoff contracts and expenditures are released.[7]

There's certainly no evidence on which such a far-fetched conclusion could be made. Despite an esoteric mixture of selective numbers and percentage figures (without offering contextual data), it is undeniable that NCBA is the perennial primary contractor to the federal beef checkoff, receiving the vast majority of the government contracts in excess of tens of millions of federal checkoff funds every year. *See* OIG Audit Report 01099-0001-21, pp. 2-3. In its responding brief, NCBA did not dispute that its 2018 checkoff contracts totaled nearly $50 million.[8] And the total of all other domestic contractors combined was less than $3 million. *Id.* NCBA's Federation division receives 98.6% of its revenues from federal checkoff dollars, which itself comprises 82% of the organization's total funding. *Id.*

The burden of proof to show a *likelihood* of *substantial* competitive harm from the release of the checkoff-related records at issue is on Defendants. Concerns about the incredibly odd structure of the beef checkoff's contract award committee aside, Defendants have not come close to meeting the high burden here.

C. <u>Defendants' Segregation and Redaction Explanations are Insufficient</u>

Defendants' segregation and redaction explanations are legally inadequate for several key reasons. As to the segregation issue, Defendants both claim further segregation is not possible for the thousands of pages of withheld records. Def. Br. 42-45; NCBA Br. 29. Both invoke long lists

---

[7] NCBA claims that committee members must sign affiliation disclosures to join the contract committee. Conspicuously, though, no mention is made of a recusal requirement for awards to affiliated entities. There is none. NCBA's Federation members are permitted to vote on tens of millions of dollars of federal contracts that its own parent company is bidding for.

[8] 2018 Beef Checkoff Authorization Requests, http://www.beefboard.org/producer/170630-FY-2018-Authorization-Requests-Final.asp

of classically internal documents (e.g., payroll, private ledgers, etc.). Def. Br. 43. But if one has the patience to wade through to the end of those colorful lists, one sees the more standard FOIA-type records, like contracts and invoices. *Id.* Of these Defendant makes only the unsupported statement that "the very nature of this information is not of a type that contains segregable material." Contracts and Invoices?

None of the declarations or *Vaughns* explain why records relating to checkoff-contracted transactions cannot be separated from non-checkoff business records. Since the Beef Act requires recordkeeping for all receipts and disbursements of checkoff funds, and requires that such accounting be available to USDA, why is there no ability to segregate and produce those same records that the Secretary has authority to require?[9] *See* 7 U.S.C. § 2904. Beef checkoff contractors are required to maintain records for three years and OIG collected 19,018 transactions "pertaining to beef board checkoff funds." *See* OIG Audit Report, 01099-0001-21, p. 10.

Moreover, NCBA's Federation division's Charter of Principles requires that all checkoff funds be maintained in separate accounts and the "Federation shall cause records to be maintained for all transactions using these accounts and shall cause separate financial reporting to be made for all activity in them." Federation Division of the National Cattlemen's Beef Association, Charter of Principles, Adopted February 5, 2011, Sec. 4.

The burden is "on the agency to prove that no segregable information exists." *Wilderness Soc'y v. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004). Blanket declarations are insufficient. *Id.*; *see also Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d at 257 (D.D.C.

[9] Even public contracts as basic as operating agreements with the Beef Promotion Operating Committee are being withheld in full. *See, for example,* ECF No. 88-33, p. 37, 144. Same with Payment Requests. *See*, *id.* at 134.

2004)(the mere assertion that "allegedly privileged material is so intertwined with the non-privileged material that it cannot be segregated, without demonstrating that this is indeed the case" is inadequate); *Mead Data*, 566 F.2d at 261(agencies must "provide the reasons" for claiming information is not segregable in "order that they may be challenged by FOIA plaintiffs and reviewed by the courts").

Defendants' explanations for its redactions fare no better. *See* ECF Nos. 88-9 – 88-17 (Declarations); ECF Nos. 88-33, 88-34 (Exemption 4 *Vaughn* index). Unsurprisingly, they all make the same generic claims of harm that could be made in *any* Exemption 4 case. They collectively explain the type of harms that are possible under Exemption 4, but not why they are likely. Consider, for example, a company like eBay. Under Defendants' approach, eBay could object to release of vendor contracts because a competitor could purportedly reverse-engineer them and cause the company substantial competitive harm. But eBay's business model depends on established users, switching costs that would be lost from reputational ratings, and economies of scale. So even though a competitor could reverse-engineer a contract, that alone couldn't be sufficient to establish a likelihood of substantial competitive harm.

And this is the problem with Defendants' lengthy boilerplate submissions. There is a well-established rule that declarations are insufficient if they "are conclusory, merely reciting statutory standards, or if they are too vague or sweeping.'" *In Def. of Animals v. U.S. Dep't of Agric.,* 501 F.Supp.2d 1, 5–8 (D.D.C. 2007). FOIA "imposes a substantial burden on an agency seeking to avoid disclosure, and an agency may not rely on "conclusory and generalized allegations of exemption." *Vaughn*, 484 F.2d at 828. The declarations and *Vaughns* in this case are replete with buzzwords, like "reverse-engineer" and "underbid" and expose "purchase activity" and so on, but they all lack meaningful substance. *See, e.g.*, ECF No. 88-34 (same text on virtually *every page* of

the Exemption 4 *Vaughn* entries). The declaration template here is very similar to the one rejected in *Biles v. HHS*:

> "Releasing the requested . . . data would cause harm" "by providing propriety plan information that is not publicly available" that would (1) provide "insight" into "enrollment stability," "market shares," "market strategy," "target market," "market strength," utilization of services by enrollees, "financial details" and "position," "underlying costs," "efficiency of operations," "profit objectives," "cost structure," and "business growth strategies" . . .

931 F.Supp.2d at 223. These buzzword arguments were insufficient to meet the agency's burden of proof in *Biles*, as "mere observations that disclosure will provide 'insight' into certain types of information fail to show *how* such 'insight' creates a likelihood of actual and substantial competitive harm." *Id.*

V. Resolution of this Case Should be Determined on the Court Record and FOIA Law

Defendants litter their briefs with improper and inaccurate attacks directed at OCM and questioning its purpose in seeking transparency for documents, asking the Court to afford them FOIA exemptions out of concern about how the released information might be used. NCBA Br. 2-3, 9, 20-22; Def. Br. 16, 21. This type of personal attack is neither appropriate nor relevant to a FOIA Exemptions 4 or 6 or any others. FOIA is blind to its requestor, its driving purpose being to serve an informed public confidence in its government. "As a general rule, if the information is subject to disclosure, it belongs to all." *Natl. Archives and Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004).

Moreover, OCM isn't speculating as to some imagined or non-existent problem. Both OIG and GAO have said these programs have transparency problems. There's also clear evidence of concern about "vulnerability" of checkoff funds, which many of OCM's members pay, because of AMS' failure to address previously identified problems, as noted in the 2010 independent audit,

which resulted in return of over $200,000 to the checkoff program for legitimate spending. *See* OIG Audit Report 01099-0001-21, p.4. FOIA is a public interest necessity and records production should be no less and no more than what the record and FOIA jurisprudence dictate.[10]

CONCLUSION

Plaintiff asks this Court to grant its motion for summary judgment, to deny Defendant and Defendant-Intervenor's motions for summary judgment, and to compel release of records and information improperly withheld.

Dated: March 22, 2019

Respectfully submitted,

/s/ Matthew E. Penzer

MATTHEW PENZER
Bar No. CO0016
1255 23rd St, NW, Suite 450
Washington, DC 20037
(240) 271-6144
mpenzer@humanesociety.org
Counsel for Plaintiff

[10] Defendants have both ignored Plaintiff's repeated cites to established case law that FOIA is blind to its requestor, but common sense alone would lead to the same conclusion. Even if NCBA's baseless allegations that OCM is a competitor for checkoff contracts were true (even though OCM wouldn't be eligible under 7 C.F.R. § 1260.113 since it isn't a cattle-industry governed entity), what if somebody else made the request? Would the records suddenly become eligible for public release if, say, a grocery store clerk in Rhode Island made the request? Of course, not. Still that hasn't stopped both NCBA and OIG from repeatedly trying to make this case about the participants rather than the record under review and the law.