

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

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

PLAINTIFF’S RESPONSE TO FILINGS OF DEFENDANT AND INTERVENOR AS TO MOTION FOR STAY

In what is now a disturbing pattern in this case, we yet again face a request for delay induced by eleventh-hour actions of Defendant. *See, for examples*, ECF Nos. 59 and 64. In each of these instances, the delay was entirely avoidable though the exercise of simple diligence. The latest request appears to involve records covered by the surprise *Vaughn* index Defendant filed with its summary judgment motion last August after failing to provide them months earlier pursuant to the March 31, 2017, Court-ordered deadline for Exemption 4 claims. See Minute Order, March 25, 2017. (That March deadline was itself issued to finally end the records “processing” stage of this litigation after a year-long processing schedule, repeated instances of last minute surprise disclosures, referrals, reprocessings, and requests for extensions. *See* ECF Nos. 64, 67.)

Now Defendant unapologetically seeks an undefined number of months of additional delay after abandoning a defense it could, and should, have abandoned long before now. ECF No. 73, pp. 2-3. Indeed, Plaintiff expressly raised the need to challenge Defendant's surprise claim last August "that records of the federal beef board—itsself a government entity—are confidential business information."¹ See ECF No. 64, pp. 1-2. Defendant pursued this astonishing claim in its opening summary judgment motion as grounds to withhold thousands of pages of federal records relating to expenditure of public funds, despite the unambiguous precedent prohibiting such withholding. See, for example, Exemption 4, DOJ FOIA Guide, 2014 Ed., pp. 272-73 (advising that "information generated by the federal government itself is not 'obtained from a person' and is therefore excluded from Exemption 4" and citing cases). And yet, Defendant maintained its defense of its broad application of Exemption 4 in its original summary judgment brief filed in August 2017.² In its latest filing, Defendant provides no information that would explain its reliance on an insupportable claim of exemption or why it took six additional months to abandon it on the eve of another briefing deadline.³

¹ In pursuit of efficient and fair resolution of this matter, Plaintiff's counsel has participated in conference calls and email correspondence with Defendant and candidly related concerns about various FOIA issues during the course of this case (e.g., *Vaughn* index sufficiency, the test and application for deliberative process test, the legal limits of records referrals, non-responsive redactions, and specifically relevant here, the application of Exemption 4 to the expenditure of federal funds, etc.).

² It is worth noting that the *only* reason Defendant is filing a second summary judgment brief—which task appears to be the trigger for the agency's lawyers to finally, and rightly, abandon the legally erroneous application of Exemption 4—is because Defendants surprised Plaintiff with new production materials, exemption justifications, and an entirely new *Vaughn* index at the time of the filing of their first brief, which necessitated the prior stay.

³ One of the declarations submitted by Defendant implies that it is abandoning "certain FOIA exemptions" in beef board records other than Exemption 4. See ECF No. 73-2. Presuming Defendant intends to promptly produce the information previously withheld pursuant to these other FOIA exemption it is no longer asserting, they are not addressed here in response to the

Plaintiff, of course, does not object to Defendant's decision for a "potential" release of governmental records, but only to the avoidable delays that have plagued this case. In its notice to the Court, Defendant provides no release determination (despite FOIA's requirement to have done so within 20 working days of Plaintiff's 2013 request), offers no schedule or deadline for reprocessing the records, and provides no description of how many of the "potential release" pages might contain confidential information or when the agency will release the ones that do not. Defendant merely asks this Court to allow it yet another, open-ended processing period with "monthly" status reports beginning on April 1.⁴ Such a barebones request to again put this FOIA case on hold without even a showing of good faith cause or diligence should be viewed with great scrutiny, and any relief fashioned narrowly. Defendant's lack of such showing is particularly troubling in consideration that it was operating under this Court's July 14, 2017, indication that it would be "very reluctant" to grant more extension time.

Defendant's repeated late disclosures, reprocessing decisions, and redaction revisions are especially troubling in a FOIA context where, as here, federal checkoff activities and expenditures have generated national discussions about transparency within commodity promotion programs and sparked program reform efforts.⁵ The records at issue also further FOIA's purpose of bringing public scrutiny to government operations relating to the USDA Inspector General's independence generally from the Department agencies it is charged with

requested Exemption 4 stay.

⁴ Although styled as a notice, Defendant's submission is in all respects a motion to stay the case and for a processing extension.

⁵ *See, for example*, Press Release, Sens. Lee, Booker Introduce Commodity Check Off Reform Bill, (July 14, 2016), <https://www.lee.senate.gov/public/index.cfm/press-releases?ID=EB9163C0-2D4C-4F15-AA72-0C17E32FA459>.

auditing, and from AMS specifically in conducting its audit of federal checkoff activity and financial expenditures. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 41 (D.D.C. 1997) (noting that “[in] perhaps no sphere of governmental activity would [FOIA’s] purpose appear to be more important than in the matter of government contracting”). Plaintiff notes these issues only to bring particular context to the significant interest in a resolution to this case, especially in the “FOIA context, because the statutory goals—efficient, prompt, and full disclosure of information—can be frustrated by agency actions that operate to delay the ultimate resolution of the disclosure request.” *August v. Fed. Bureau of Investigation*, 328 F.3d 697, 699 (D.C.Cir.2003) (quoting *Sen. of the Com. of Puerto Rico v. U.S. Dept. of J.*, 823 F.2d 574, 580 (D.C. Cir. 1987)).

To be clear, Plaintiff does not ask this Court to simply order release of information that may be lawfully covered by Exemption 4. At the same time, the mere invocation of the “potential” that some “subset of records” in the case might have such information should not operate to bring the entire case to a halt. Plaintiff would ask this Court to fashion an order that preserves Intervenor’s right to review and make objections to the release of information it believes should be withheld under Exemption 4, but there should be a defined and reasonable framework for that process.

Further, as Defendant’s decision to abandon its Exemption 4 claims for the federal beef board’s financial records came just days before its summary judgment was due, the legal issues unrelated to this subset of records are presumably ready to be addressed. For example, thousands of pages of audit-related documents and communications have been withheld in this case pursuant to a claim of deliberative process under Exemption 5. These records are not at all impacted by USDA’s latest decision to drop its Exemption 4 defense beef board financial

records. Nor are they relevant to NCBA's interests in records implicating Exemption 4.

Plaintiff asks that the motion to stay be resolved in a way that preserves the rights of all parties and allows those issues that are ripe for resolution to proceed. Plaintiff proposes the following for the Court's consideration:

- 1) That Defendant promptly release all records, or segregable portions of records, for which it is no longer asserting an exemption and which do not contain information potentially subject to Intervenor's Exemption 4 interest;
- 2) That Defendant be given a brief and finite time frame in which to make its compliance determination on the records being reprocessed as the result of its changed position as to application of Exemption 4, and to provide an appropriate *Vaughn* index to Plaintiff for any information that it decides will continue to be withheld after reprocessing;
- 3) That motions for partial summary judgment proceed and a briefing schedule ordered to address withheld records and information not implicated by Defendant's current reprocessing request.
- 4) That this Court order any further relief it deems appropriate to ensure fair and efficient resolution of this case.

Dated: March 2, 2018

Respectfully submitted,

/s/ Matthew E. Penzer

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