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)

Defendant USDA's Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply to Plaintiff's Opposition to USDA's Motion for Summary Judgment

On November 14, 2018, Defendant United States Department of Agriculture (USDA), Office of Inspector General (OIG), and Defendant-Intervenor National Cattlemen's Beef Association (NCBA), moved the Court for summary judgment. (ECF 87 and 88.) On January 9, 2019, Plaintiff Organization for Competitive Markets (OCM) filed its Cross-Motion for Summary Judgment and Opposition to USDA-OIG and NCBA's Motions for Summary Judgment. (ECF Nos. 90 and 91). In opposition to Plaintiff's Cross-Motion for Summary Judgment, and in support of USDA-OIG's Motion for Summary Judgment and Memorandum of Points and Authorities in Support of USDA-OIG's Motion for Summary Judgment, USDA-OIG states the following:

I. Plaintiff's Misrepresentations of Factual Background

The pertinent facts of this case are set forth in USDA's Memorandum of Points and

Authorities in Support of its Motion for Summary Judgment (ECF No. 88-1), the sworn declarations of Alison Decker, Paul Feeney, and Mark R. Brook (ECF Nos. 88-3, 88-4, and 88-7), and the Statement of Material Facts as to Which There is No Genuine Dispute by Defendant USDA-OIG (ECF No. 88-2). In contrast, Plaintiff's account of the factual background of this case (ECF No. 91 at 1-7) is misleading and distracts from the relevant and narrow issue that remains in light of Plaintiff's limited Opposition: whether USDA properly withheld information pursuant to Exemptions 4, 5 (deliberative process privilege), and 6 in response to Plaintiff's Freedom of Information Act (FOIA) request. As set forth in its Motion for Summary Judgment, USDA has properly fulfilled all of its obligations to Plaintiff under FOIA, and summary judgment should be granted in its favor.

II. Argument

A. OIG Properly Applied Exemption 5 and the Deliberative Process Privilege

Contrary to Plaintiff's assertion, OIG has not withheld records under a *per se* application of Exemption 5 and the deliberative process privilege. *See* Pl.'s Mem. at 8-10, ECF No. 90. Instead, OIG's *Vaughn* Indices and the Decker Declaration specifically describe the withheld records and the bases for withholding them. *See* ECF No. 88-6, Ex. 57 (*Vaughn* index for audit records other than draft audit reports); ECF No. 88-6, Ex. 58 (*Vaughn* index for draft audit reports); and ECF No. 88-3 (Declaration of Alison Decker).[1]

1. The limited records withheld pursuant to Exemption 5 and the deliberative process privilege fit squarely within the privilege.

[1] OIG provided a supplemental declaration from Paul Feeney (ECF No. 88-4) and an associated *Vaughn* index (ECF No. 88-5, Ex. 3) to cover nine pages of email records between OIG employees and Cattlemen's Beef Promotion and Research Board ("Beef Board") employees. The discussion that follows in this Opposition and Reply primarily references the Decker Declaration and associated *Vaughn* indices, Exs. 57 and 58, because those cover nearly all of the (b)(5) withholdings (all but the nine pages) in this matter. However, discussion in this filing similarly applies to the nine pages. *See* Def.'s Mem. at 4-9, 11-14 (ECF No. 88-1) (discussing application of Exemptions 5 and 6 to the records referenced in the Feeney Decl. and associated *Vaughn* index).

Plaintiff does not dispute that the audit records at issue in this matter qualify as "inter-agency or intra-agency memorand[a]", the threshold for asserting Exemption 5. 5 U.S.C. § 552(b)(5); *see generally* Pl.'s Mem. at 8-21. Rather, Plaintiff argues that OIG takes too expansive a view of Exemption 5 and the deliberative process privilege and implies that some of the withheld records may not be predecisional and deliberative (Plaintiff does not identify or discuss a single *Vaughn* entry in making this argument[2]). *See* Pl.'s Mem. at 8-11. In fact, the limited records withheld pursuant to Exemption 5 and the deliberative process privilege fit squarely within the deliberative process privilege.

a. The specific audit records withheld in this matter are predecisional.

Pursuant to Exemption 5 and the deliberative process privilege, OIG withheld draft audit reports (*Vaughn* index at ECF No. 88-6, Ex. 58) and certain draft auditor coaching notes (defined at Decker Decl. ¶ 16), portions of internal emails (internal to OIG or USDA), meeting and handwritten notes, internal memoranda of conversation (internal to OIG or USDA), and other drafts, such as draft audit plans (*Vaughn* index at ECF No. 88-6, Ex. 57) that fall squarely under the privilege. Plaintiff does not argue that a particular record or category of record is not predecisional. Rather, Plaintiff simply argues that OIG takes an overly expansive view of the "audit process" as predecisional.

A record is "predecisional" if it "was generated as part of a definable decision-making process". *Hamilton Sec. Group, Inc. v. U.S. Dep't of Hous. and Urban Dev.*, 106 F. Supp. 2d 23, 30 (D.D.C. 2000) (citation omitted), *aff'd per curiam sub nom. Hamilton Sec. Grp., Inc. v. U.S. Dep't of Hous. & Urban Dev., Office of Inspector Gen.*, 2001 WL 238162 (D.C. Cir. 2001). A

[2] Plaintiff has had OIG *Vaughn* indices since August 2016. Decker Decl. ¶ 162.

final agency decision is not required for a record to be predecisional. *Id.* at 30.

OIG's *Vaughn* Indices and the Declaration of Alison Decker demonstrate that each record withheld under Exemption 5 and the deliberative process privilege was antecedent to the adoption of the agency position, the final audit report, and that each withheld record played a role in the development of the final audit report, or "audit process". As discussed in more detail below (in addressing Plaintiff's "boilerplate" *Vaughn* index claim), the *Vaughn* indices and the Decker Declaration contain sufficient information to enable the Court to evaluate the asserted Exemption 5 (including the records' predecisional quality). *See* ECF No. 88-6, Exs. 57 and 58 (*Vaughn* indices); Decker Decl. ¶¶ 126-138; *see also* USDA-OIG Directive IG-7316, *THE AUDIT PROCESS; Performance Audits – Audit Reporting*, §§ A, B, and C (Feb. 3, 2000) (Supp. Decker Decl. Ex. 1) (hereinafter "*OIG Audit Process Directive*") (defining the role of each OIG draft audit report and the "body of evidence compiled during the audit" in OIG's audit process); USDA Departmental Regulation (DR) 1700-2, *OIG Organization and Procedures*, §§ 3, 5a(1), 7c, 7d, 7g, 13b, 13c, 14a (June 17, 1997) (hereinafter "*OIG Procedures DR*") (available at https://www.ocio.usda.gov/document/departmental-regulation-1700-002) (defining the role of information and records, including draft audit reports, exchanged between OIG and other USDA components during the audit process).[3][4]

b. The specific audit records withheld in this matter are deliberative.

A "deliberative" record "reflects the give and take of the deliberative process and contain[s]

[3] Notably, Plaintiff does not establish that any particular record in the *Vaughn* indices is not predecisional, which is critical information for the Court to make a determination on Plaintiff's claim. *See, e.g., Center For Medicare Advocacy, Inc. v. U.S. Dept. of Health and Human Services*, 577 F. Supp. 2d 221, 235-37 (D.D.C. 2008).

[4] If Plaintiff were to argue that a particular record was not predecisional, Plaintiff would remove the record from the scope of its broad FOIA request. *See* ECF No. 88-6, Ex. 1 (Plaintiff's FOIA request).

opinions, recommendations, or advice about agency policies. *Hamilton Sec. Group*, 106 F. Supp. 2d at 31 (internal quotation marks and citation omitted); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1279-81 (11th Cir. 2004) (cited in *In re United States*, 321 Fed. Appx. 953, 959 (Fed. Cir. 2009) and *In re Anthem, Inc. Data Breach Litig.*, 236 F. Supp. 3d 150, 161-62, 164 (D.D.C. 2017)).

OIG's *Vaughn* Indices and the Declaration of Alison Decker demonstrate that each record withheld under Exemption 5 and the deliberative process privilege reflects the opinions and recommendations of OIG auditors and that release of this information would tend to cause specific harm(s) to OIG's statutorily-mandated audit process. With regard to draft audit reports, OIG's *Vaughn* index contains precisely tailored explanations that describe the draft and OIG's assessment of the specific harms to OIG's audit process that would tend to result from release of the draft audit reports. *See* ECF No. 88-6, Ex. 58. The Decker Declaration provides further information about the deliberative nature of the draft audit reports. Decker Decl. ¶ 133. Additionally, both the *Vaughn* index and the Decker Declaration explain why segregation of factual information in the specific draft audit reports was not possible under the deliberative process privilege. *See* ECF No. 88-6, Ex. 58; Decker Decl. ¶ 133; *Hamilton Sec. Group*, 106 F. Supp. 2d at 33 (citations omitted); *Wadelton v. Department of State*, 106 F. Supp. 3d 139, 154 (D.D.C. 2015) (citation omitted); *Breiterman v. United States Capitol Police*, 323 F.R.D. 36, 45 (D.D.C. 2017) (citation omitted); *Center For Medicare Advocacy*, 577 F. Supp. 2d at 237 (citation omitted).

With regard to other audit records, OIG's *Vaughn* index contains precisely tailored explanations that describe the records and OIG's assessment of the specific harms to OIG's audit process that would tend to result from release of the records. *See* ECF No. 88-6, Ex. 57. The

Decker Declaration provides further information about the deliberative nature of these audit records. Decker Decl. ¶ 132-138. Additionally, both the *Vaughn* index and the Decker Declaration explain the two levels of line-by-line review conducted by OIG in order to identify all releasable or segregable content. After OIG's FOIA staff reviewed the responsive records line-by-line to make deliberative process privilege (and other exemption determinations), an OIG auditor performed a line-by-line harm assessment. If the auditor did not identify a specific harm from release, OIG made a discretionary release of the record to the Plaintiff. *Id.* Any factual information withheld reflected the auditor's process, was entwined in draft auditor opinions or recommendations, and/or was not reasonably segregable. *See* ECF No. 88-6, Exs. 57 and 58 (*Vaughn* indices); Decker Decl. ¶¶ 126-138; *Hamilton Sec. Group*, 106 F. Supp. 2d at 33 (refusing to require that HUD OIG segregate and produce factual portions of a draft audit report); *Moye, O'Brien*, 376 F.3d at 1281, n.8 (refusing to require Amtrak OIG to segregate factual materials, instead upholding a comprehensive deliberative process privilege protection for all the draft audits and related memos and emails); *see also OIG Audit Process Directive*, §§ A, B, and C (demonstrating the deliberative nature of each OIG draft audit report and the "body of evidence compiled during the audit" in OIG's audit process); *OIG Procedures DR*, §§ 3, 5a(1), 7c, 7d, 7g, 13b, 13c, 14a (demonstrating the deliberative nature of information and records, including draft audit reports, exchanged between OIG and other USDA components during the audit process).[5][6]

[5] Notably, Plaintiff does not discuss why any particular record in the *Vaughn* indices is not deliberative, which is critical information for the Court to make a determination on Plaintiff's claim. *See, e.g.*, *Center For Medicare Advocacy*, 577 F. Supp. 2d at 235-37.

[6] In Plaintiff's responses to USDA's Statement of Material Facts as to Which There is No Genuine Dispute, Plaintiff summarily states "Denied." and cites generally (no pincite) to its own summary judgment brief in response to Alison Decker's description of OIG's harm assessment process. ECF 90-3, ¶ 99. Alison Decker, Assistant Counsel to the Inspector General and OIG's FOIA Officer since 2009, and who oversaw the processing and production of OIG records in response to Plaintiff's FOIA request, signed a declaration that described this process. ECF 88-3, ¶¶ 132-138. In FOIA litigation, a declaration of an agency official who is knowledgeable about the way in which information is processed and is familiar with the documents

Contrary to Plaintiff's claim that OIG broadly asserted Exemption 5 (Pl.'s Mem. at 10), OIG released considerable amounts of deliberative process privileged (DPP) content to Plaintiff on a discretionary basis. Of the over 15,000 pages which OIG processed, responding directly to Plaintiff in the administrative or litigation phases, OIG identified approximately 2,100 pages of non-draft audit report records containing content withheld under Exemption 5.[7] Supp. Decker Decl. ¶¶ 5-6. Several hundred of these pages were withheld in full under the attorney-client privilege (ACC) and the attorney work product (AWP) privilege. *Id.* Of those remaining pages containing only DPP content, OIG conducted a line-by-line harm assessment review and made discretionary releases for considerable amounts of DPP content in pages partially released to Plaintiff. *Id.*

OIG's withholding of OIG internal audit records faces no specific challenge from Plaintiff. Plaintiff narrowly focuses on records that OIG exchanged with AMS, both to argue that the deliberative process privilege cannot apply to such exchanges between the USDA, Federal Government agency components OIG and AMS, and to allege that such exchanges constitute misconduct that would bar assertion of the privilege. However, both the law and the facts of this case stand in opposition to Plaintiff's assertions.

2. OIG can and did "deliberate" with AMS.

Referencing the Inspector General Act of 1978 ("IG Act") and related authorities, Plaintiff develops a theory that employees of an Office of Inspector General cannot "deliberate" with the

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at issue satisfies the personal knowledge requirement of Rule 56(c) of the Federal Rules of Civil Procedure. *Barnard v. Dep't of Homeland Sec.*, 531 F. Supp. 2d 131, 138 (D.D.C. 2008) (note that Rule 56(e) is now (c)). Plaintiff's other "Denied" responses in the Statement of Material Facts, within paragraphs 1 to 115, are similarly flawed, but may be clarified by reference to OIG's corresponding and specific citations (to, *e.g.*, the sworn Decker Declaration and its Exhibits).

[7] OIG withheld in full over 5,000 pages of draft audit reports under the deliberative process privilege. Supp. Decker Decl. ¶¶ 5-6. Many of these pages of draft audit reports were duplicate records as OIG did not attempt to de-duplicate this subset of records. *Id.*

employees of an agency under audit. Pl.'s Mem. at 10-17, ECF No. 90. Plaintiff cites to no case that states OIG (or any Government auditing body) employees cannot deliberate with agency employees under audit. *See id.* Additionally, in order to advance its theory, Plaintiff repeatedly asks the Court to alter the facts of this case and treat AMS as a private (non-Governmental) third party, which AMS is not. *See id.* at 11 ("a regulated industry"), 13 ("a taxpayer"), and 17 (the automotive industry). Relevant court decisions hold in the opposite of Plaintiff's assertion.

Plaintiff attempts to skew *Hamilton Sec. Group* in its favor by selectively omitting certain facts in Plaintiff's discussion of the case. In *Hamilton Sec. Group*, plaintiff Hamilton Securities made a FOIA request for "a copy of the draft audit report of the Federal Housing Administration's loan sales program…." 106 F. Supp. 2d at 25.[8] The U.S. Department of Housing and Urban Development OIG argued that the draft audit is protected under the deliberative process privilege of Exemption 5 of the FOIA. *Id.* at 29. The court agreed, finding that "the draft audit report is protected from disclosure by Exemption 5 of the FOIA because it is both predecisional and deliberative, and disclosure of the draft audit report would threaten the integrity of the agency's policymaking processes." *Id.* at 32; *see also id.* 30-32 (distinguishing the draft audit report from the records at issue in *Coast States*). In reaching its decision that the draft OIG audit report was protected in its entirety (including factual information) by Exemption 5, the court specifically states that drafting an audit report at the OIG involves OIG submitting the draft to the auditee for comment. *See id.* at 30 ("The [*OIG Manual*] describes the development and presentation of audit findings and recommendations, including development of draft findings, *auditee comments*, supervisory review, *more auditee comments*, and final review and recommendations.") (citation

[8] The FOIA request in *Hamilton Sec. Group* was apparently construed as a request for the most developed or latest draft of the audit report. *See* 106 F. Supp. 2d at 25. Here, Plaintiff's request is broad, encompassing all drafts. Thus, OIG's withholdings under Exemption 5 are not "overly broad" as Plaintiff claims, but, rather, the withholdings logically reflect the broad scope of Plaintiff's request.

omitted and emphasis added). Plaintiff omits this fact in its discussion.

Furthermore, *Hamilton Sec. Group* is not the only case that supports USDA OIG's withholding of draft audit reports under Exemption 5 and the deliberative process privilege. *See, e.g.*, *Exxon Corporation v. DOE*, 585 F. Supp. 690, 702 (D.D.C. 1983) (finding that "the [draft audit] clearly is of a predecisional, deliberative nature" and holding that a draft audit is protected by the deliberative process privilege); *Breiterman*, 323 F.R.D. at 49 (holding that drafts of a U.S. Capitol Police (USCP) OIG report on the USCP disciplinary process "are a quintessential example of deliberative material" and Plaintiff's "desire to obtain the drafts does not outweigh the public interest in protecting them from disclosure", which is "a significant public interest in allowing agency employees to develop policy recommendations without being inhibited by the risk that their preliminary thoughts will be publicly disclosed."); *Pac. Gas & Elec. Co. v. United States*, 71 Fed. Cl. 205, 213 (2006); *Nevada v. U.S. Dept. of Energy*, 517 F. Supp. 2d 1245 (D. Nev. 2007). None of these cases support Plaintiff's position that auditee comments negate the deliberative process privilege protecting draft audit reports.

While Plaintiff's focus is limited to the draft audit reports that OIG submitted to AMS for comment, to the extent that Plaintiff's position would extend to other records, including email communications with AMS and CBB or memoranda of conversations involving AMS and CBB employees, Plaintiffs arguments are equally unfounded. Regarding audit notes, internal memoranda, communications, and other audit work papers prepared by OIG auditors regarding an OIG audit that may reflect "back and forth" with agency officials, courts consistently hold that such records are protected by the deliberative process privilege.

For example, in *Moye, O'Brien*, plaintiff made a FOIA request to Amtrak that sought documents associated with twelve routine financial audits which Amtrak's OIG had performed

with regard to the BBC-MEC's Northeast Corridor Electrification Project contract. 376 F.3d at 1273-74. The FOIA request sought a broad array of documents, including final audit reports and associated drafts, notes, internal memoranda, and other audit work papers. *Id.* Amtrak issued a blanket denial of plaintiff's FOIA request, asserting that all of the requested documents were exempted from disclosure under Exemption 5. *Id.*

The Eleventh Circuit found that all of Amtrak OIG's audit work papers and internal memoranda were both predecisional and deliberative because Amtrak's evidentiary submissions established that the entire body of collaborative work performed by Amtrak's OIG auditors document and contain the comments and notes authored by all levels of auditors working on the BBC-MEC audit assignment. *Id.* at 1278-79. Relying on the Inspector General Act of 1978, as amended, the Eleventh Circuit noted Amtrak's OIG is charged with the responsibility under the Inspector General Act, to "provide policy direction for, and to conduct, supervise, and coordinate audits and investigations," to recommend policies for promoting efficiency and economy, and to prevent and detect fraud and waste. 5 U.S.C. app. 3, §§ 3, 4. 376 F.3d at 1279. The court did not find that seeking comment from the audited entity effectively waived the deliberative process privilege, as Plaintiff claims here. *See id.* The *Moye, O'Brien* court is not the only court to find the deliberative process privilege applicable to communications between and auditor and the auditee. For example, in *Breiterman*, the court held that certain records "used to prepare the OIG Report" (evaluation of the USCP disciplinary process), including interview notes, draft reports, workpapers that "summarize facts gathered in the report and reflect an exercise of judgment as to what issues are most relevant to the pre-decisional findings and recommendations that were ultimately included in the OIG Report", and email communications between OIG and component under evaluation, USCP, were protected by the deliberative process privilege. 323 F.R.D. at 49-

50 (citation and internal quotation marks omitted). The court's discussion of an email communication is particularly helpful in countering Plaintiff's claim here that OIG and AMS cannot deliberate:

> The [Capitol Police Board] also asserts the deliberative process privilege for a 19–page email communication with OIG, and avers that the email is a "Department Response to Draft Report OIG–2017–01." [citation omitted]. The email predates the finalization of the OIG Report, and therefore is predecisional. The document is also deliberative. It contains the USCP's response to OIG's evaluation and information that the USCP proposed be included in the OIG Report, and thus reflects the "give-and-take of the consultative process." *Petroleum Info. Corp.*, 976 F.2d at 1434; *In re Anthem*, 236 F.Supp.3d at 164 (withholding emails where they were "at their core, the back-and-forth deliberative process required for an agency to reach a decision.").

Id.; *see also Wadelton*, 106 F. Supp. 3d at 154 (holding that questions sent by U.S. Department of State OIG to State employees pursuant to an OIG investigation "are themselves predecisional and deliberative, as they shed light on which facts OIG felt required development and the manner in which OIG went about developing those facts" and that the answers from State employees are "privileged to the extent they recount or reflect predecisional deliberations.") (citations and internal quotation marks omitted).

While Plaintiff's position regarding OIG and AMS deliberations is unsound as a matter of law, it is similarly unsound as a matter of fact. USDA OIG recognizes that it must be an independent and objective component within USDA. However, USDA OIG auditors are required to have the "give and take" with components under audit (component employees are hereinafter referred to as "agency officials"). As the Plaintiff correctly states, OIG auditors follow the U.S. Government Accountability Office (GAO) *Government Auditing Standards*, which state, in part:

> 7.37 When the audited entity's comments are inconsistent or in conflict with the findings, conclusions, or recommendations in the draft report, or when planned corrective actions do not adequately address the auditors' recommendations, the auditors should evaluate the validity of the audited entity's comments. If the auditors disagree with the comments, they should explain in the report their reasons for disagreement. Conversely, the auditors should modify their report as necessary if they find the comments valid and supported with

sufficient, appropriate evidence.

GAO-12-331G, at 173-74 (Dec. 2011); *see also id.* § 7.33 ("Providing a draft report with findings for review and comment by responsible officials of the audited entity and others helps the auditors develop a report that is fair, complete, and objective."). Agency officials are knowledgeable about the subject matter under audit and OIG auditors must deliberate with them to understand the strengths, weaknesses, and possible improvements to the program or operation under audit. *See, e.g.*, *OIG Procedures DR*, § 7c. ("USDA employees and officials are expected to render all possible assistance during audits and investigations by providing records and explaining controls, systems, and practices relating to matters under review. If requested by OIG, officials will assign technical advisors to assist OIG staff."). Additionally, should an agency accept the final audit recommendations, it is the agency officials who will implement the recommendations and, therefore, auditors will necessarily have considered the agency officials' views before issuing the final audit report. *See id.* § 7a. ("Full responsibility is vested with agency officials for establishing, executing, and assuring compliance with policies, plans, and procedures; … and for appropriate action on conditions needing improvements, including those reported by OIG.").

Plaintiff argues that, because OIG may obtain information from auditees through compulsion, OIG and auditee communications cannot be deliberative and compulsory communications cannot be chilled. *See* Pl.'s Mem. at 14-15. However, the authorities in the IG Act related to *access* to information *internally* (inside USDA) have no relationship to the *release* of information *externally* that is subject to the deliberative process privilege. *See Moye, O'Brien*, 376 F.3d at 1279-81.[9]

[9] Additionally, Plaintiff is incorrect that OIG can subpoena a USDA component. *See* IG Act § 6(a)(4) ("*Provided*, That procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies; ….").

Furthermore, OIG's mission and its audit function benefit from agency officials proactively bringing issues and information to OIG's attention. *See, e.g.*, IG Act § 7 (titled "Complaints by employees; disclosure of identity; reprisals"), § 8M(b)(2) (titled "Reporting of fraud, waste, and abuse."); GAO *Government Auditing Standards* at 153 ("Testimonial evidence obtained under conditions in which persons may speak freely is generally more reliable than evidence obtained under circumstances in which the persons may be intimidated."). OIG's effectiveness would be greatly hampered if its only means of identifying issues and obtaining information was through demands.

Thus, the receipt of information from the component of the audit is a feature and not a mark on the audit process. In receipt of the various kinds of information from various sources, auditors weigh the quality of the evidence and conduct verification procedures:

> 6.61 There are different types and sources of evidence that auditors may use, depending on the audit objectives. Evidence may be obtained by observation, inquiry, or inspection. Each type of evidence has its own strengths and weaknesses. The following contrasts are useful in judging the appropriateness of evidence. However, these contrasts are not adequate in themselves to determine appropriateness. The nature and types of evidence to support auditors' findings and conclusions are matters of the auditors' professional judgment based on the audit objectives and audit risk.

Government Auditing Standards, at 152. Auditors can seek and receive information and at the same time remain independent and objective. That is, in fact, that statutory mandate that OIG fulfills.

3. Plaintiff's Allegations of OIG Auditor Misconduct are Unfounded and Fail the High Threshold to Negate the Deliberative Process Privilege.

Plaintiff alleges misconduct by OIG and argues that such misconduct negates OIG's withholding certain records under Exemption 5 and the deliberative process privilege. Pl.'s Mem. at 17-19. As a factual matter, Plaintiff's allegations are unfounded and courts have dismissed allegations of similar quality. Additionally, the allegations fail to meet the high bar required to

negate the deliberative process privilege.

The "governmental misconduct exception" to the deliberative process privilege is narrow. This Circuit has observed that the word "misconduct" implies "nefarious motives." *In re Subpoena Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1425 n.2 (D.C. Cir. 1998); *see also Enviro Tech Int'l, Inc. v. U.S. EPA*, 371 F.3d 370, 377 (7th Cir. 2004); *Nat'l Whistleblower Ctr. v. U.S. Dep't of Health & Human Servs.*, 903 F. Supp. 2d 59, 68–69 (D.D.C. 2012) (application of the governmental misconduct exception limited to cases of "extreme government wrongdoing."). Recognizing that "[t]he exception runs counter to the purposes that animate the deliberative process privilege," courts have explained the need to apply the exception narrowly:

> If every hint of marginal misconduct sufficed to erase the privilege, the exception would swallow the rule. In the rare cases that have actually applied the exception, the 'policy discussions' sought to be protected with the deliberative process privilege were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government. The very discussion, in other words, was an act of government misconduct, and the deliberative process privilege disappeared.

ICM Registry, LLC v. U.S. Dep't of Commerce, 538 F. Supp. 2d 130, 133 (D.D.C. 2008); *see, e.g.*, *Tax Reform Research Gp. v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976) (concluding that privilege did not apply under FOIA Exemption 5 where documents concerned recommendation to use the powers of the IRS in a discriminatory fashion against "enemies" of the Nixon administration). Plaintiff must provide "a discrete factual basis for the belief that the deliberative information sought may shed light" on illegal, nefarious, or severe government misconduct. *Alexander v. F.B.I.*, 186 F.R.D. 154, 164 (D.D.C. 1999) (internal quotation marks omitted) (citation omitted).

First, Plaintiff argues that that if OIG auditors were "deliberating" with agency officials, such deliberation violates the IG Act and the *Government Auditing Standards*. Pl.'s Mem. at 17-18. This argument is addressed above; it is appropriate and mandatory for OIG to deliberate with a USDA component under audit and courts routinely uphold the deliberative process privilege

under these circumstances. *See Moye, O'Brien*, 376 F.3d at 1279-80; *Breiterman*, 323 F.R.D. at 49-50; *Wadelton*, 106 F. Supp. 3d at 154. In *Neighborhood Assistance Corporation of America* ("*NACA*"), a case quoted at length by Plaintiff, the plaintiff there made a similar argument as the Plaintiff here: "[Plaintiff] NACA argues that 'OIG's audit of NACA was not conducted in an 'independent' manner as required by law.' … This 'impropriety,' according to NACA, is nothing less than 'the hallmark of the audit.' … Because NACA's argument essentially hinges on its contention that either HUD or HUD–OIG, or both, violated the [IG Act], the Court begins there." *NACA v. U.S. Dept. of Hous. and Urb. Dev.*, 19 F. Supp. 3d 1, 18 (D.D.C. 2013). The court went on to dismiss the plaintiff's argument. *Id.* at 18-19 ("The IG Act does not impose an absolute bar on agency involvement with an Inspector General audit; the Act only prohibits the agency from *interfering* with such an audit. *See* 5 U.S.C.App. § 3(a) …. Involvement and interference are not coterminous."). Thus, OIG's deliberating with AMS (i.e., seeking information and comments) is not discrete evidence of illegal, nefarious, or severe government misconduct.

Plaintiff then selects certain statements from documents that OIG released Plaintiff (in response to the subject FOIA request) to suggest OIG intended to mislead the public about discussions with AMS. Pl.'s Mem. at 18-19. Plaintiff believes that the cover letter that transmitted the "official draft" to agency officials on March 7, 2013, "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", despite AMS having provided comments in the interim. *Id.* at 18.[10] However, the cover letter does not foreclose interim work.[11] On the contrary, an exit conference is a formal discussion of the findings and recommendations and provides the agency

[10] In making its argument, Plaintiff misquotes an OIG record, stating an email attachment was titled, "rebooted report". Pl.'s Mem. at 18; *but see* Pl.'s Ex. 4 ("beef board finding reboot").

[11] Plaintiff's concern here regarding public perception may be an indication that OIG was too liberal in its discretionary releases.

with the opportunity to provide additional information that may result in changes or modifications to the draft report. OIG is consistently and publicly transparent about the opportunities for agencies under audit to comment on draft content and the consideration OIG gives to such comments. For example, in a response for the record submitted to a U.S. House subcommittee, OIG discussed the audit process (including various drafts) and the several opportunities for comment from the agency "that may result in changes/modifications to the draft report". H.R. Rep. No. 28-273, at 139-140 (Feb. 15, 2017); *see also OIG Audit Process Directive*, §§ A, B, and C; *OIG Procedures DR*, §§ 3, 5a(1), 7c, 7d, 7g, 13b, 13c, 14a.

Additionally, Plaintiff asks the court to take the statement from an AMS employee, "[t]here is still a LOT of heartburn over the report as written, and I'm afraid it will reflect poorly on USDA (as a whole) if released as is", and imply that OIG employees committed misconduct. Pressures by interested parties is not evidence that OIG auditors lost their objectivity. As demonstrated by the Exhibit 6 to Plaintiff's counsel's declaration, the auditors were even-keeled conducting the audit in an area fraught with interested parties. Plaintiff should be acutely aware of these pressures at Plaintiff itself attempted to direct the outcome of the audit. *See* OCM, "The Beef Checkoff – Who Pays, Who Benefits?" (April 1, 2011) (Plaintiff states that it "push[ed]" OIG to perform the audit and Plaintiff discusses its claims that "will undoubtedly be detailed in the final OIG report"). OIG is not aware of, nor has Plaintiff put forth, evidence ("discrete factual basis", the legal standard) that auditors responded inappropriately to such pressures. Plaintiff's unfounded allegations of misconduct are part of an effort to continue its FOIA fishing expedition[12] with the goal of substantiating its vision for the OIG audit findings. The deliberative process privilege is

[12] *See* Plaintiff's press release during this motion for summary judgment schedule. OCM, "OCM Beef Checkoff Transparency Lawsuit Moves Forward" (Nov. 15, 2018) ("'If they have done nothing wrong they should just release the audit and financial expenditure documents,' [OCM founding member Fred] Stokes concluded.").

not negated because Plaintiff disagrees with the final audit. "It is well settled that a 'presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *NACA*, 19 F. Supp. 3d at 15 (quoting *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2012)).

Plaintiff also gives much weight to a record released to Plaintiff by OIG (in response to the subject FOIA request) in which an OIG employee is summarizing inquiries received from someone affiliated with The Kansas City Star. Pl.'s Mem. at 4 and Ex. 1 to Plaintiff's counsel's declaration. The OIG employee summarizes a telephone call in which the person claimed to have heard an "AMS official" say to a small meeting, "OIG's made some pretty strong statements that we don't like" and "we've gotten OIG to water them down". *Id.* First, this "evidence" from Plaintiff should be rejected outright in light of its quality. *See NACA*, 19 F. Supp. 3d at 16. Second, even taken at face value, an AMS employee's opinion is not a discrete factual basis of illegal, nefarious, or extreme government misconduct on the part of OIG, as discussed above.

Finally, Plaintiff takes issue that the OIG audit report did not repeat the findings of a 2010 independent audit of the Beef Board (Plaintiff calls the two audits "seemingly irreconcilable"). Pl.'s Mem. at 4. As Plaintiff knows (the independent audit is posted on Plaintiff's website), the 2010 independent audit and OIG audit were different in scope. The focus of OIG's audit was USDA-AMS and AMS' oversight of the Beef Board. *See* USDA-OIG, *Agricultural Marketing Service Oversight of the Beef Promotion and Research Board's Activities*, Audit Report No. 01099-0001-21. The focus was not the Beef Board and OIG was not auditing the 2010 independent audit of the Beef Board. *Id.* At the same time, OIG did not disregard the independent audit, as evidenced by OIG discussing the independent audit in OIG's audit report. *Id.* at 4. Two different audit scopes is not a discrete factual basis of illegal, nefarious, or extreme government wrongdoing.

See Nat'l Whistleblower Ctr., 903 F. Supp. 2d at 68–69; *NACA*, 19 F. Supp. 3d at 15.

4. The Detail in OIG's *Vaughn* Indices Surpasses that Required by Law and Has the Elements Desired by Plaintiff.

Plaintiff argues that the Exemption 5 Vaughn indices and Declaration of Alison Decker provide insufficient detail regarding the withheld records and their basis for withholding. Pl.'s Mem. at 19-21.

OIG has met its burden to provide sufficient information to enable the court to evaluate the asserted exemption. *See Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 165 (D.D.C. 2011) (materials supporting withholding must "give the reviewing court a reasonable basis to evaluate the claim of privilege" (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006)). Specifically, for each record indexed in the *Vaughn* indices, OIG has (1) explained the "function and significance of the document(s) in the agency's decisionmaking process," (2) described "the nature of the decisionmaking authority vested in the office or person issuing the disputed document(s)," and (3) described "the positions in the chain of command of the parties to the documents." *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) (internal quotation marks and citation omitted). In addition to the *Vaughn* indices (ECF No. 88-6, Exs. 57 and 58), OIG provided a declaration to further justify its withholdings under various FOIA exemptions. Decker Decl. (ECF No. 88-3). The Decker Declaration outlines OIG's understanding of the relevant exemptions, which are then applied to the specific withholdings in the *Vaughn* indices. *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 257 (D.D.C. 2004) (declarations may aid the determination of whether the claimed exemptions are properly invoked).

For each record in OIG's *Vaughn* indices, the "Document Description" column provides the following information: (1) specific type of record (e.g., "draft audit plan"); (2) date of record; (3) title of record; (4) names of persons involved (including "to" and "from"), their positions,

Government agencies, and offices; and (5) description of the content of the record. The "Exemption/Status" column provides the applicable exemption (*e.g.*, "(b)(5) DPP"). The "Justification for Withholding" column explains (1) whether the document was withheld in part or in full; (2) whether releasable information was segregable and reasoning; (3) additional description of the person(s) involved and role in this audit process; (4) additional description and purpose of the record and explanation of why the record is predecisional; (5) additional description of the record and why the record is deliberative; and (6) the specific harm(s) that could result from the information. *See* Decker Decl. Exs. 57 and 58 (ECF No. 88-6); Feeney Decl. Ex. 3 (88-5).[13]

Although this level of detail in the *Vaughn* indices exceeds that which is required, *Arthur Andersen & Co.*, 679 F.2d at 258, OIG provided further information in the Decker Declaration (as well as in the Feeney Declaration). The Decker Declaration further describes the records, the role of the records in OIG's audit process, and the harms that could result from disclosure of the records withheld under Exemption 5 and the deliberative process privilege. *See* Decker Decl. ¶¶ 126-138; *see also* Feeney Decl. ¶¶ 5-7, 8-18. Thus, OIG has provided sufficient information to evaluate the assertion of Exemption 5 and the deliberative process privilege to the particular records.

Notably, Plaintiff does not analyze any of the *Vaughn* entries, nor list for the Court any problematic *Vaughn* entries. Instead, Plaintiff quotes half of a sentence from the Decker Declaration to argue that the information provided by OIG is inadequate. Pl.'s Mem. at 20. In analyzing a similar approach by a plaintiff, one court found: "Plaintiffs' further attack on the conclusory nature of Defendant's *Vaughn* index borders on the frivolous because it is supported by highly selective quotations from the *Vaughn* index." *Wadelton*, 106 F. Supp. 3d at 149.[14]

[13] These *Vaughn* indices are actually the second versions of OIG's Vaughn indices. At the request of Plaintiff, OIG added additional information to its *Vaughn* indices in 2016. Decker Decl. ¶¶ 158-62.

[14] Plaintiff also takes issue that AMS withheld one draft audit report based on a consultation with OIG. *See* Pl.'s Mem. at 20. The Decker Declaration (¶¶ 126-38), the *Vaughn* entry (AMS013649-AMS013660), and

Additionally, Plaintiff is incorrect that any same or similar sentences in OIG's *Vaughn* entries are "boilerplate". Some words or phrases, such as the type of harm that could result from release, will appear multiple times. When the auditor reviewed (b)(5) material for discretionary disclosures, he noted either no harm would result from release (in which case the record was released) or the kind(s) of harm caused by disclosure. Decker Decl. ¶¶ 134-138. Those notes are in the *Vaughn* index and described with further detail in the Decker Declaration. *Id.* To the extent a category of record or identified harm appears multiple times (no two of OIG's Vaughn entries are the same), such *Vaughn* content is appropriate. *See Judicial Watch, Inc.*, 449 F.3d at 147.

In a footnote, Plaintiff further argues that OIG's analysis regarding segregability is insufficient. Pl.'s Mem. at 21 n.8. Plaintiff mentions drafts and factual information. Again, Plaintiff does not discuss any particular *Vaughn* entry or sworn statement in the Decker Declaration. *See* Pl.'s Mem. at 21 n.8. Regarding draft audit reports, OIG's *Vaughn* index (ECF No. 88-6, Ex. 58) and the Decker Declaration (¶ 133) provide the analysis that Plaintiff seeks. *See Hamilton Sec. Group*, 106 F. Supp. 2d at 33 (citations omitted). Regarding other audit records, OIG's *Vaugh*n index (ECF No. 88-6, Ex. 57) and the Decker Declaration (¶¶ 132-138) similarly provide the information Plaintiff seeks. *See Moye, O'Brien*, 376 F.3d at 1281, n.8.

B. OIG Properly Withheld the Personal Information of Lower-Level Government Employees Under Exemption 6.

Plaintiff does not challenge that the personal information of lower-level Government employees (GS-13 and below) withheld by OIG under Exemption 6, including names, titles, e-mail addresses, phone numbers, medical information, family information, and information pertaining to an employee's personnel file, regards particular individuals and, therefore, meets the

Def.'s Mem. (at pages 4-9, 26) provide sufficient information to enable the Court to evaluate the asserted Exemption 5 on the draft audit report. *See Elec. Frontier Found.*, 826 F. Supp. 2d at 165.

threshold to warrant protection under Exemption 6. *See* Def.'s Mem. at 12, ECF No. 88-1. Additionally, Plaintiff does not challenge that substantial privacy interests cognizable under the FOIA are generally found to exist in such personally identifying information. *See id.* Instead, Plaintiff argues that the substantial privacy interest cited by OIG is unfounded, and that Plaintiff's interest in "transparency in federal checkoff programs" outweighs the privacy interests of lower-level Government employees. *See* Pl.'s Mem. at 34-35.[15]

As stated in OIG's Memorandum, Plaintiff has publicly alleged misconduct by those associated with the audit, including referring to high-level Federal Government employees by name; lower-level Federal Government employees have a significant privacy interest in the withholding of their names and other identifying information under Exemption 6. *See* Def.'s Mem. at 13; Decker Decl. ¶ 146, n.35. Plaintiff's concluding statement, "[t]he problem with this program is not the hard-working staff employees doing their assigned jobs within the agency" (page 35), is contradicted by other parts of Plaintiff's same brief (*see, e.g.*, pages 17-19), Plaintiff counsel's declaration (ECF No. 90-2), and years of Plaintiff's public statements and communications to OIG employees (*see e.g.*, Decker Decl. ¶ 146, n.35; Plaintiff's Nov. 15, 2018 press release during this briefing schedule), which have alleged misconduct by OIG auditors and other employees. The auditors and other Government employees whose personal information OIG withheld under Exemption 6 were relatively young in their careers, as evidenced by their grade levels (GS-13 and below), when Plaintiff began making its public statements regarding misconduct in the OIG audit. Those lower-level employees continue to have a significant privacy interest in their names and other personally identifying information. *See Hall v. U.S. Dep't of Justice*, 552 F. Supp. 2d 23, 30

[15] This appears to be Plaintiff's first assertion of an interest in the disclosure of lower-level Government employees' personally identifying information. Plaintiff did not state an interest in this information in Plaintiff's four administrative appeals and in its Complaint. *See* Def.'s Mem. at 13-14.

(D.D.C. 2008).

Plaintiff also argues that according to the Exemption 6 statute, "it is the 'production' of the documents which must 'constitute a clearly unwarranted invasion of personal privacy.' 5 U.S.C. § 552(b)(6); *see Arieff v. U.S. Dept. of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983)." Pl.'s Mem. at 35. Distinct from the facts in *Arieff*, the personally identifying information withheld in response to Plaintiff's FOIA request would not require speculation to link the individuals to Plaintiff's unfounded claims of misconduct. The identities of the lower-level employees are the last piece of information needed to target the harassment (as already demonstrated by Plaintiff's use of senior level employees' identities). Therefore, the lower-level Government employees have a substantial privacy interest in the personally identifying information withheld in this matter. *See Judicial Watch, Inc. v. Dep't of the Army*, 402 F. Supp. 2d 241, 251 (D.D.C. 2005) (granting defendant's motion for summary judgment as to information withheld pursuant to Exemption 6; finding that it is "likely" that the documents would be published on the Internet and that media reporters would seek out employees, and stating "[t]his contact is the very type of privacy invasion that Exemption 6 is designed to prevent"); *Hall*, 552 F. Supp. 2d at 30.

Plaintiff also states that OIG "arbitrarily" drew the line at GS-13 and below for withholding information under Exemption 6. Pl.'s Mem. at 34. However, OIG deliberately chose GS-13 because the GS level represents a certain height of authority in OIG. OIG recognizes that the higher the level of the employee, the greater the public interest in disclosure, and OIG has appropriately accounted for this in its disclosures and withholdings under Exemption 6.

After making the arguments discussed above, Plaintiff then backtracks and states, "plaintiff is willing to accept title, posting, and job grade for lower-level employees in lieu of specific names". Pl.'s Mem. at 35. First, this information is substantially in OIG's *Vaughn* indices. *See*

ECF No. 88-6, Exs. 57 and 58; ECF No. 88-5, Ex. 3. Second, any additional personally identifying information of low-level government employees sought by Plaintiff would shed insufficient light on the activities or operations of government so as to justify the invasion of privacy. *See Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (stating that an inquiry regarding the public interest "should focus not on the general public interest in the subject matter of the FOIA request, but rather on *the incremental value of the specific information being withheld*") (emphasis added). Thus, the substantial privacy interest of the lower-level employees outweighs the transparency (if any) disclosure of their personal information would bring to Federal checkoff programs. *See US Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989).[16]

Additionally, it should be noted that this new request by Plaintiff for a *Vaughn* index of all Exemption 6 withholdings demonstrates that Plaintiff was not engaging in good faith discussions when Plaintiff agreed to OIG's *Vaughn* indices production. *See* Decker Decl. ¶ 158-162. OIG has appropriately applied Exemption 6 and upheld the agreement with Plaintiff.

Redactions Made By AMS

I. AMS Correctly Applied Exemption 5 to Protect Predecisional Deliberations.

OIG and AMS each performed independent redactions, including redactions made pursuant to the deliberative process privilege. Pages 20 through 27 of Def.'s Mem. addresses

[16] In one OIG Office of Investigations record, the personally identifying information of all Government employees (including GS-14 and above) was withheld under Exemption 6 because of the significant privacy interest in being involved in unsubstantiated allegations of misconduct in an investigative record. *See Amuso v. United States DOJ*, 600 F. Supp. 2d 78, 97 (D.D.C. 2009); Def.'s Mem. at 13. The significant privacy interests implicated in this Office of Investigations record outweigh the transparency (if any) disclosure of this personal information would bring to Federal checkoff programs. *See US Dep't of Justice*, 489 U.S. at 772-73; *Schrecker*, 349 F.3d at 661; Def.'s Mem. at 13-14.

information AMS redacted pursuant to the deliberative process privilege. [17] Def.'s Mem., ECF 88-1, p. 20-26. Because information redacted by AMS pursuant to the deliberative process privilege was quite limited, Def.'s Mem. provides a table setting forth the exact Bates number of the information AMS redacted pursuant to the privilege. *Id.*, p. 20-21. Def.'s Mem. also goes through, *seriatim*, each "Type of Record" containing such redactions and expounds upon what information is redacted, and why the privilege is applicable. *Id.*, p. 21-26. Furthermore, the declarations and *Vaughn* Index submitted by AMS as attachments to Def.'s Mem. contain descriptions of information redacted pursuant to the privilege and the bases for the redactions. *Id.*, p. 20-26 citing Brook Decl., ECF 88-7 and *Vaughn* Index at ECF 33, 34. Pl's Mem. does nothing to repudiate the clear conclusion that AMS properly applied the deliberative process privilege.

A. A Significant Amount of Information AMS Redacted Does Not Pertain to the OIG Audit.

OCM asserts that "OIG" has made over-broad applications of the deliberative process privilege because OIG "implied" that the privilege applies to "all records prior to the public release date of the final audit report" and took the position that "all information generated plays a role in the final audit report, so all is protected by the deliberative process exemption." Pl.'s Mem., ECF 91, p. 9-10. However, this argument is inapplicable to the information that AMS, as opposed to OIG, redacted as purely internal communications by CBB, or shared between CBB and AMS, created separate and apart from the OIG audit. The location of this information is as follows:

Bates Location of Record	
AMS002028-2032 (and its duplicate at AMS018560-18564)	AMS0013371-13377 and AMS013736-13742
AMS013475-13479	AMS002028-2032 (and its duplicate at AMS018560-18564)
AMS013760	OCM 2174-2177

[17] At the request of OIG, and for the purpose of simplifying the production of records to OCM, AMS placed redactions on AMS013649-AMS013660. Although the redactions were placed on the record by AMS, they are OIG redactions and arguments supporting the redactions are addressed by OIG.

OCM 4594	4596-4597

Def.'s Mem., ECF 88-1, p. 22-26, addresses in detail each of these records and why the deliberative process privilege is applicable to information redacted therein.

B. The Deliberative Process Privilege Clearly Applies to Information Redacted by AMS That Was Created As a Result of the OIG Audit.

Turning to the remaining information wherein AMS applied the deliberative process privilege – information that was created as a result the OIG Audit – the information is confined to the following locations:

Type of Record	Bates Location of Record
Emails exchanged between CBB and AMS	AMS 013661-AMS013664 (duplicate at AMS014450-AMS014451)
Memoranda from CBB to AMS	OCM 700, OCM 8155, OCM 8174, OCM 8183, OCM 8188, OCM 8214, OCM 8219, OCM 8221, OCM 8226, OCM 8242, OCM 8264, OCM 8269, OCM 8417-8420, OCM 8447
Emails exchanged between CBB and OIG	AMS013457-13459, OCM 1071-1072, OCM 1075-1076, OCM 1081-1083, OCM 1153-1154, OCM 1181-1182, OCM 1185 (duplicate of OCM 1182), OCM 1266-1267, OCM 1513-1514, OCM 1520-1521

The deliberative process privilege clearly applies to the redactions AMS made to the records.[18] *See* Def.'s Mem., ECF 88-1, p. 21-23.

1. Emails Exchanged Between CBB and AMS.

Within these records, AMS made only two unique redactions, specifically to information within a chain of two emails located at AMS013661-AMS013662 (and its duplicate at AMS014450-AMS014451). Second Declaration of Mark Brook ("Second Brook Decl.") at ¶ 3,

[18] OCM also argues that Exemption 5 is inapplicable to communications between an auditing OIG and agencies under audit. OCM Opp., ECF No. 91, p. 10-19. However, turning to the instances wherein AMS redacted information created as a result of the OIG audit, only one category involves communications with OIG - namely "Emails exchanged between CBB and OIG". Def.'s Mem., ECF 88-1, p. 20-21 citing Brook Decl., ECF No. 88-7 ¶ 71 and *Vaughn* Indexes attached thereto at ECF No. 88-33 and ECF No. 88-34. The rest of the records involve purely internal communications between CBB and AMS. *Id.* Further, as set forth above by OIG, the deliberative process privilege is applicable to communications OIG and AMS.

attached hereto as Exh. 1. First, AMS redacted the contents of a December 11, 2012 (5:19pm), email from CBB to its attorney wherein CBB requests that the attorney conduct a legal review of a proposed budget table template – provided in the body of the email – that CBB was considering using in conjunction with the collection of information related to specific contracted work that was approved for beef checkoff funding. *Id.* ¶ 4. Second, AMS also redacted the contents of a December 13, 2012 (11:23am) email – the second email in the chain – from CBB's attorney to AMS regarding types of CBB information that could potentially be provided to OIG to aid OIG with its audit. Brook Decl., ECF 88-7 ¶ 76; Second Brook Decl. ¶ 5.

Looking at the email chain together, AMS redacted information within the December 13, 2012 email from CBB's attorney to AMS as deliberative. Brook Decl., ECF 88-7 ¶ 76; Second Brook Decl. ¶ 6. Further, since the contents of the December 11, 2012 email between CBB and its attorney was forwarded to AMS as part of the December 13, 2012 email, this email was also redacted as a crucial part of the December 13, 2012 deliberative communication with AMS. Brook Decl., ECF 88-7 ¶ 76; Second Brook Decl. ¶ 6. The communication is predecisional because it occurred while AMS was still in the process of deciding the types of CBB information that could potentially be provided to OIG to aid the audit. Brook Decl., ECF 88-7 ¶ 76; Second Brook Decl. ¶ 6. The communication is deliberative because it consists of opinions regarding types of CBB information that could potentially be provided to OIG. Brook Decl., ECF 88-7 ¶ 76; Second Brook Decl. ¶ 6; *Mead Data Cent. Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (information may be withheld if it "would indirectly reveal the advice, opinions, and evaluations circulated… as part of [the] decisionmaking process"). The release of the information could have a chilling effect on discussions between CBB and AMS. Brook Decl., ECF 88-7 ¶ 76.

2. Memoranda from CBB to AMS.

Redactions were made to memoranda provided by CBB to AMS. Def.'s Mem., ECF 88-1, p. 20-21, 23 citing Brook Decl., ECF 88-7 ¶ 71, 77. The memoranda are all part of one larger memorandum that AMS requested CBB provide AMS in response to OIG's first draft audit regarding AMS oversight of the CBB. Second Brook Decl. ¶ 7. The memoranda were created by CBB in response to AMS's request that CBB provide its opinions and assessments of the draft OIG audit. *Id.* ¶ 9. AMS was obtaining CBB's views in conjunction with AMS formulating its own opinions on the draft OIG audit. *Id.* The memoranda are CBB's response to AMS's request. *Id.* In the memoranda, CBB provides AMS its opinions on OIG's draft audit, what information within the draft audit CBB believes to be information that AMS may want to address and why, and specific information selected by CBB to support its opinions and assessment of the audit. Def.'s Mem., ECF 88-1, p. 23 citing Brook Decl., ECF 88-7 ¶ 77; Second Brook Decl. ¶ 9; *McKinley v. Bd. of Governors of Fed. Res. Sys.*, 849 F. Supp. 2d 47, 63-64 (D.D.C. 2012) ("purely factual" material was protected under deliberative process privilege because "[defendant] culled selected facts and data from the mass of available information"); *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) ("the legitimacy of withholding does not turn on whether the material is purely factual in nature…, but rather on whether the selection or organization of facts is part of an agency's deliberative process[,]"). The communications are predecisional because they occurred before AMS had decided how to respond to the draft OIG audit. Def.'s Mem., ECF 88-1, p. 23 citing Brook Decl., ECF 88-7 ¶ 77. The release of the information could chill discussions between CBB and AMS. *Id.*

3. Emails Exchanged Between CBB and OIG.

Within these records, because of duplicates, redactions were made to only five unique pages of records, located at AMS013457, OCM 1072, OCM 1185, OCM 1266, and OCM 1513, and even then the redaction were only partial redactions:

Emails Exchanged Between CBB and OIG	
AMS013457-13459	Redactions on AMS013457 only
OCM 1071-1072	Redactions on OCM 1072 only
OCM 1185	Redactions on OCM 1185 only
OCM 1266-1267	Redactions on OCM 1266 only
OCM 1513-1514	Redactions on OCM 1513 only
OCM 1075-1076	Redactions duplicative of 1071-1072
OCM 1081-1083	Redactions duplicative of AMS013457-13459
OCM 1153-1154	Redactions duplicative of AMS013457-13459
OCM 1181-1182	Redactions duplicative of OCM 1185
OCM 1520-1521	Redactions duplicative of OCM 1513-OCM 1514

Second Brook Decl. ¶ 10.

Within these five pages of records, redactions were only made to six unique emails (OCM 1185 is a chain of three emails wherein redactions were made to two of the three emails). *Id.* ¶ 11 The six unique emails are communications exchanged between CBB and OIG arising out of OIG's review of CBB's internal methods and processes. Def.'s Mem., ECF 88-1, p. 21-22 citing Brook Decl., ECF 88-7 ¶ 74; Second Brook Decl. ¶ 11. OIG's objectives in performing its audit of AMS oversight of the CBB was to "determine if AMS' oversight procedures were adequate to ensure beef checkoff assessments were collected, distributed, and expended in accordance with the [Beef] Act and Order, and to determine if the relationships between the beef board and other beef industry-related organizations were compliant with the relevant Act and Order." OIG Audit Report 01099-0001-21, p. 1, at https://www.usda.gov/oig/webdocs/01099-0001-21.pdf. In making this determination OIG "[r]eviewed the beef board's methods for contract monitoring [and] assessing internal controls" and "[i]nterviewed beef board officials to evaluate processes used for the

collection of assessments, oversight of contracted industry-governed organizations, and issuance of policies and guidance." *Id.*, p. 10.

During OIG's review, CBB and OIG exchanged communications regarding these methods and processes. Second Brook Decl. ¶ 12. All communications in the emails occurred in February 2012 (one email) and July 2012 (five emails), before OIG released any results of its audit of AMS's oversight of the CBB. Def.'s Mem., ECF 88-1, p. 21-22 citing Brook Decl., ECF 88-7 ¶ 74; Second Brook Decl. ¶ 12. All communications were exchanged between CBB and OIG for OIG's use in rendering its audit findings and recommendations. *Id.*, p. 21-22 citing Brook Decl., ECF 88-7 ¶ 74. The release of this information in these emails could have a chilling effect on the discussions between CBB and OIG in the future. *Id.*, p. 22 citing Brook Decl., ECF 88-7 ¶ 74.

In AMS013457 (July 18, 2012, 4:31pm, email from to CBB to OIG) and OCM 1072 (July 18, 2012, 4:56pm, email from CBB to OIG), AMS redacted CBB's assessment as to how well certain CBB contractor compliance review procedures have worked, and why. Second Brook Decl. ¶ 13; *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 867 (D.C. Cir. 1980) (deliberative process privilege "covers…subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"). The redacted information also consists of CBB's summaries of its contract compliance review procedures wherein CBB culled information from a larger subset of information about its internal contract review procedures. Second Brook Decl. ¶ 13; *Ancient Coin Collectors Guild*, 641 F.3d at 513 ("the legitimacy of withholding does not turn on whether the material is purely factual in nature…, but rather on whether the selection or organization of facts is part of an agency's deliberative process[,]").

OCM 1266 (June 21, 2012, 5:25pm, email from CBB to OIG) consists of CBB's response to a direct question from OIG regarding what actions CBB contemplated in response to CBB's

own review of contractor related expenses and third-party inquiries also arising out of contractor expenses. Second Brook Decl. ¶ 14. AMS redacted CBB's summary of potential alternatives CBB considered, and CBB's opinion as to why it believed the chosen response was the best. *Id. Citizens for Responsibility & Ethics in Wash. v. DOJ*, 658 F. Supp. 2d 217, 233-34 (D.D.C. 2009) (records created after an agency decision had been made could be protected because they contained discussions of predecisional deliberations). OCM 1513 (February 15, 2012, 3:47pm, email from CBB to OIG) consists of CBB's responses to direct questions from OIG regarding whether CBB was allowing certain costs associated with a contractor of the Beef Checkoff Program[19] to be reimbursed as beef checkoff expenditures. Second Brook Decl. ¶ 15. AMS redacted CBB's position as to how it was currently treating the costs, CBB's explanation as to why it was currently treating the cost that way, and CBB's request for OIG's view on whether CBB's current position is accurate given the information CBB provided to OIG in its explanation. *Id.; Citizens for Responsibility & Ethics in Wash. v. DOL*, 478 F. Supp. 2d 77, 82 (D.D.C. 2007) (upholding deliberative process protection because agency was "considering generally" whether to support particular proposal).

OCM 1185 is a chain of three separate emails - all from July 2012 - dated July 5, July 10, and July 17. Second Brook Decl. ¶ 16. The emails are part of an email chain between CBB and OIG. *Id.* The redacted information is contained in the July 5 and July 10 emails. *Id.* Within the July 5 and July 10 emails, AMS redacted two OIG-made statements regarding specific Beef Checkoff Program contractor lease expenses. *Id.* In the July 17 email, the third email of the chain, *and also part of OCM 1185*, CBB informs OIG that the OIG statements in the July 5 and July 10

[19] Where not otherwise defined, capitalized terms used are as defined by USDA's Statement of Material Facts and Memorandum in Support of its Motion for Summary Judgment. *See* ECF No. 88-1 and 88-2.

emails - and redacted by AMS in this case - merit additional discussion with OIG. *Id.* Due to OCM 1185 being a chain of emails, release of the OIG statements would reveal information that – in the opinion of CBB – was of significant enough importance to merit additional discussions with OIG. *Id.; Coastal States Gas Corp.*, 617 F.2d at 867 (deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency").

II. AMS Clearly Demonstrated that Exemption 4 Applies to Information Redacted As Confidential Business Information.

A. Information Was Properly Redacted As Having Been Voluntarily Submitted.

As set forth in the *Vaughn* Indexes and declarations submitted with Def.'s Mem., AMS redacted the information the Beef Checkoff Contractors and QSBCs voluntarily submitted to OIG in response to OIG's request for their cooperation. USDA Memo., 88-1, 29-30, 37-38 (citing and collecting supporting paragraphs from the AMS, Beef Checkoff Contractor, and QSBC declarations). OIG did not exercise any authority – including the issuance of subpoenas or threats to compel – requiring that the Beef Checkoff Contractors or QSBCs cooperate with OIG. *Id.*, p. 30, 38 (citing and collecting supporting paragraphs from the AMS, Beef Checkoff Contractor, and QSBC declarations). Indeed, the Beef Checkoff Contractors state that they would not have voluntarily provided their information to OIG had they known it would later be subject to disclosure in response to a FOIA request. *Id.* p. 30.

OCM is correct that the voluntary nature of a submission is determined by whether the agency had "actual legal authority," not simply the "parties' beliefs or intentions." Pl.'s Mem., ECF 91, p. 25 citing *Ctr. for Auto Safety v. Nat'l Hwy Traffic Safety Admin.*, 244 F.3d 144, 149 (D.D.C. 2001). However, as stated in Def.'s Mem., "[t]he agency must also exercise that authority in order for a submission to be deemed mandatory." USDA Memo., 88-1, 227 citing *Parker v.*

Bureau of Land Management, 141 F.Supp.2d 71, 78 n. 6 (D.D.C. 2001). In *Parker*, the court noted that *Ctr. for Auto Safety* "did not hold that whenever an agency has the authority to require certain information, the submission of such information should be deemed mandatory, but that in the absence of such authority, a submission cannot be considered mandatory." 141 F. Supp. 2d at 78 citing *Ctr. for Auto Safety*, 244 F.3d at 149. Additionally, *Parker* states that, "in certain circumstances an agency may decline to require information that it has the authority to compel and instead pursue voluntary compliance." *Id.*

Here, in obtaining information from the Beef Checkoff Contractors and QSBCs, OIG pursued voluntary compliance, rather than exercising any authority or threatening to compel submission. USDA Memo., 88-1, 20-30, 37-38 (citing and collecting supporting paragraphs from the AMS, Beef Checkoff Contractor, and QSBC declarations). This situation is inapposite to the case of *Frank LLP v. Consumer Fin. Protec. Bureau*, cited in Pl.'s Mem. Pl.'s Mem., ECF 91, p. 25 citing 288 F. Supp. 3d 46 (D.D.C. 2017). Unlike the agency in *Frank LLP*, OIG did not a "civil investigative demand" – which "the D.C. Circuit treats…as functionally equivalent to administrative subpoenas." *Frank LLP*, 288 F. Supp. 3d at 60-61.

OCM also misses the mark in its theory that even without OIG's subpoena power, information was involuntarily submitted because the Beef Act requires the information be made available to the Secretary pursuant to a purported requirement that a contractor of the Beef Checkoff Program keep records of all of its transactions and account for all checkoff funds received and expended and make such accountings available to the Secretary. Pl.'s Mem., ECF 91, p. 25-26. First, except for the Pennsylvania Beef Council ("PA QSBC") in its limited role as facilitator the Northeast Beef Promotion Initiative ("NBPI"), none of the QSBCs that provided

information to OIG are contractors of the Beef Checkoff Program.[20] Def.'s Mem., 88-1, p. 36-42.

Second, assuming *arguendo* that a contractor of the Beef Checkoff Program is required to make its information available to the Secretary, OCM does not point to any instance in this case wherein the Secretary actually requested that a Beef Checkoff Contractor (or a QSBC) provide their information at issue in this case to OIG, nor does OCM point to any instance wherein OIG sought such a request be made by the Secretary.[21] Conversely, the Beef Checkoff Contractors and QSBCs voluntarily provided their information in direct response to OIG's request for the information. USDA Memo., 88-1 p. 29-30, 37-38 (citing and collecting supporting paragraphs from the AMS declaration, Beef Checkoff Contractor declarations, and QSBC declarations). Therefore, the entire premise of OCM's theory that the records were not provided voluntarily because they were purportedly required to be provided under the Beef Act is meritless.[22]

In addition to having been voluntarily submitted, as provided in Def.'s Mem., the Beef Checkoff Contractors and QSBCs explicitly state that their respective information redacted by AMS is their commercial and financial information, and not the type of information that they publicly disclose because disclosure would adversely impact their operations. Def.'s Mem., ECF 88-1, p. 30-31, 37-38 (citing and collecting supporting paragraphs from the AMS, Beef Checkoff Contractor, and QSBC declarations). Consequently, pursuant to Exemption 4, AMS properly

[20] As part of NBPI, PA QSBC enters into annual contracts with MICA, who bids annually for Beef Checkoff Program contracts for NBPI programs. Def.'s Mem., 88-1, p. 47 citing PA QSBC Decl., 88-17 ¶ 12, 30.

[21] OCM's attempts to work around this fact by concocting a theory that, if requested by OIG in conjunction with an audit, the Secretary would purportedly be required to "fully cooperate and provide all possible assistance", including providing "all records relating to matters under [OIG] review". OCM Opp., ECF No. 91, p. 26 citing USDA Department Regulation 1700-2, Sec. 3, 5. However, even assuming this is true, OCM fails to point to any instance wherein OIG requested assistance from the Secretary in obtaining information redacted in this case and can only speculate as to what assistance OIG would have requested.

[22] Further, even if a contractor is purportedly required to keep records of all of its transactions and account for funds received and expended and make such accountings available to the Secretary, some information redacted as voluntarily submitted goes beyond transactional information. *See* e.g., *Vaughn* Index, ECF 33 at AMS013694-13735 (ANCW Organizational Policies and Procedures and Bylaws documents) and AMS014242-AMS014416 (USMEF Internal Accounting Manual).

redacted the information as voluntary submissions.

B. AMS Clearly Establishes Disclosure of the Business Submitters' Information Would Cause Substantial Competitive Harm.

Under the competitive injury prong of Exemption 4, AMS must establish that "the submitters (1) actually face competition, and (2) substantial competitive injury would likely result from disclosure." *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999). Moreover, "[w]hen determining whether Exemption 4 applies, actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." Essex *Electro Engineers v. Secr'y of the Army*, 686 F.Supp.2d 91, 94 (D.D.C. 2010). When reviewing an agency's determination of substantial competitive harm, courts "recognize that predictive judgments are not capable of exact proof" and will "generally defer to the agency's predictive judgments as to the repercussions of disclosure." *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C. Cir. 2010).

1. Organizations seeking contracts with the Beef Checkoff Program face 'actual' competition.

OCM asserts that AMS submitted a declaration, i.e. the Brook Decl., "baldly stating that competition is 'fierce' among the organizations competing for [Beef Checkoff Program] contracts, but provided zero details to substantiate that". Pl.'s Mem., ECF 91, p. 29 citing Brook Decl., ECF 88-7 ¶ 99. OCM is simply incorrect in its mischaracterization of the AMS declaration. First, "fierce" competition is not required for purposes of Exemption 4's competitive injury prong, what is required is only "actual competition". *Biles v. HHS*, 931 F. Supp. 2d 211, 223 (D.D.C. 2013) ("low levels" of competition is sufficient to establish 'actual' competition for purposes of Exemption 4's competitive injury prong because " '[a]ctual competition' does not require high levels of competition, but only 'actual' competition.").

Second, the AMS declaration establishes there is actual competition among organizations seeking contracts with the Beef Checkoff Program. Specifically, the AMS declaration provides:

- "The Beef Act requires that the Beef Checkoff Program contract with established national nonprofit industry-governed organizations to implement programs of promotion, research, consumer information and industry information." Brook Decl., ECF 88-7 ¶ 44. "The BPOC [Beef Promotion Operating Committee], subject to USDA approval, can select among competing bids from qualified contractors and enter into contracts or agreements to carry out program activities on behalf of the Beef Checkoff Program. *Id*. ¶ 45.

- "Established non-profit industry-governed organizations that have contracted to perform Beef Checkoff Program work include but are not limited to, NCBA, USMEF, ANCW, MICA, the National Livestock Producer's Association, the North American Meat Institute, and the American Farm Bureau Federation Foundation for Agriculture." Brook Decl., ECF 88-7 ¶ 99.

- "Given that a limited number of organizations are eligible for contracts to perform work for the Beef Checkoff Program, there is a fierce amount of competition among these organizations for an award of such a contract." [23] Brook Decl., ECF 88-7 ¶ 99 citing to ANCW Decl., ECF 88-10 ¶ 6, 17; USMEF Decl., ECF 88-11 ¶ 6, 17; MICA Decl., ECF 88-12 ¶ 6, 21; NCBA Decl., ECF 88-9 ¶ 17-20.

Third, in support of its statement that there is competition among entities competing for Beef Checkoff Program contracts, the AMS declaration cites specific paragraphs of Beef Checkoff Contractor declarations, submitted as part of Pl.'s Mem., wherein the Beef Checkoff Contractors describe the actual competition they face in competing for Beef Checkoff Program contracts. Brook Decl., ECF 88-7 ¶ 99 (citing and collecting supporting paragraphs from the Beef Checkoff Contractor declarations). For example, the paragraphs from the ANCW, USMEF, and MICA declaration cited in the AMS declaration (at Brook Decl., ECF 88-7 ¶ 99) provide that:

- They all "[p]resent[] bids seeking contracts to perform work arising out Beef Checkoff Program…[and that] [o]ther entities submit competitive bids" seeking contracts to perform work arising out Beef Checkoff Program and that they each "compete with the Competitor Entities for contracts to perform work arising out of the Beef Checkoff Program." ANCW Decl., ECF 88-10 ¶ 6-7; USMEF Decl., ECF 88-11 ¶ 6-7; MICA Decl., ECF 88-12 ¶ 6-7.

[23] In the event that the AMS Decl. was not clear, competition for the award of Beef Checkoff Program contracts occurs annually and the entities participating in the competition can, and do change, from year to year. Second Brook Decl. ¶ 17.

- They all "function[] in a highly competitive marketplace…[wherein they] submit[] bids to perform work arising out of the Beef Checkoff Program. It is a competitive bidding process and involves a number of other organizations and entities, including the Competitor Entities." ANCW Decl., ECF 88-10 ¶ 17; USMEF Decl., ECF 88-11 ¶ 17; MICA Decl., ECF 88-12 ¶ 21.

- They all "compete annually [against Competitor Entities] for contracts to perform work arising out of the Beef Checkoff Program". ANCW Decl., ECF 88-10 ¶ 17; USMEF Decl., ECF 88-11 ¶ 17; MICA Decl. ECF 88-12 ¶ 21.

- They all "seek[] to protect [their] competitive position against the Competitor Entities. At the same time, the Competitor Entities seek to keep contracts from being awarded to…[other Competitor Entities] while they all compete with each other for new and expanded contracts." ANCW Decl., ECF 88-10 ¶ 17; USMEF Decl., ECF 88-11 ¶ 17; MICA Decl., ECF 88-12 ¶ 21.

The statements from the NCBA declaration (i.e. the "Second Evans Decl.") cited in the AMS declaration describe the actual competition NCBA faces in competing annually for Beef Checkoff Program contracts:

- "NCBA competes for [Beef Checkoff Program] contracts in several specific areas including promotion, research, consumer information, industry information, and foreign marketing. Because of the nature of this annual competition for bids, NCBA's share of contract dollars fluctuates year-to-year, although NCBA has received a majority of the total contracts awarded each year. Competitor Entities [as defined therein] have been successful in competing with NCBA for contracts; for example, the Farm Bureau Foundation for Agriculture has begun contracting with the BPOC in recent years for contracts previously awarded to NCBA." NCBA Decl., ECF 88-9 ¶ 18.

- "[D]isclosure of [NCBA's] information would harm NCBA competitively and would be invaluable to NCBA's competitors and potential competitors as they sought to be substituted for NCBA as a contractor with BPOC." NCBA Decl., ECF 88-9 ¶ 20.

Finally, the PA QSBC declaration, also cited in the AMS declaration, provides that, in its capacity as facilitator of the NBPI, bids "annually" for contracts with the Beef Checkoff Program and in this process "faces annual competition from a number of other entities for the award of contracts and program funding." PA QSBC Decl., ECF 88-17 ¶ 11-12, 30 (cited in Brook Decl., ECF 88-7 ¶ 119-122). In sum, the AMS declaration, and the declarations cited therein, establish

that entities seeking contracts with the Beef Checkoff Program face 'actual' competition.[24]

2. OCM's theory that there is a "Voting Lock" or "Structural Monopoly" on the award of Beef Checkoff Program contracts is simply inaccurate.

As set forth above, NCBA faces actual competition in its pursuit of Beef Checkoff Program contracts. Nonetheless, OCM alleges a conclusory and misguided theory that because 10 of the 20 members of the BPOC [Beef Promotion Operating Committee] are "Federation" members, NCBA somehow has control over the award of Beef Checkoff Program contracts, thereby eliminating any competition NCBA might otherwise face regarding the award of a Beef Checkoff Program contract. Pl.'s Mem., ECF 91, p. 28-30.

The BPOC, subject to USDA approval, selects among competing bids from qualified contractors and enter into contracts or agreements to carry out program activities on behalf of the Beef Checkoff Program. Brook Decl., ECF 88-7, ¶ 45. The BPOC consists 20 members. *Id.* The CBB selects 10 of its members to serve on the BPOC. *Id*. The BPOC's other 10 members are individuals from the Federation of State Beef Councils (the "Federation"). *Id.* The Federation is formally known as "the Beef Industry Council of the National Live Stock and Meat Board, or any successor organization to the Beef Industry Council, which includes as its State affiliates the qualified State beef councils." 7 C.F.R. § 1260.112. Currently, the "Federation" refers to the Federation of State Beef Councils and is comprised of the over 40 qualified state beef councils that collect the $1-per-head beef checkoff assessment. Second Brook Decl. ¶ 18. The Federation is the successor organization to the Beef Industry Council of the National Live Stock and Meat Board, and is currently an unincorporated division of NCBA. *Id.*

[24] Although not addressed by OCM, due to their status as the Qualified State Beef Council in their State, all the QSBCs, including the PBC, assert that they face actual competition unrelated to the competition for Beef Checkoff Program contracts. USDA Memo., 88-1, 39-40 (citing and collecting supporting paragraphs of QSBC declarations).

OCM's conclusory theory that NCBA has voting control over the award of Beef Checkoff Program contracts is simply inaccurate. Pl.'s Mem., ECF 91, p. 28-30. First, even if NCBA did control the votes of the Federation-elected BPOC members, it would not be enough to guarantee NCBA an absence of competition. OCM itself admits that it takes the positive support of at least 14 members of the BPOC - beyond merely the 10 Federation-elected members - to recommend the award of a Beef Checkoff Program contract. *Id.* Even if all Federation-elected members of the BPOC vote as a bloc, contracts could not be awarded solely with support of the Federation-elected members of the BPOC. The two-thirds requirement is a check and balance ensuring that that no contract award can be made to NCBA or any entity, without approval from both Federation-elected and non-Federation BPOC members alike. As a further check on the BPOC, its contract funding decisions are subject to approval by the CBB and USDA. Second Brook Decl., ¶ 19.

Second, OCM presents no actual evidence that all 10 Federation-elected members vote as a bloc to award contracts to NCBA. Conversely, the Third Supplemental Decl. of Douglas Evans ("Third Evans Decl.") sets forth that from FY08 to FY19 the value of NCBA's percentage of contracts with the Beef Checkoff Program has been decreasing, rather than increasing or staying the same, as one would expect if Federation-elected members always vote to award a contract to NCBA. Third Evans Decl., ¶ 16-22, attached hereto as Exh. 2. Likewise, contrary to OCM's theory, as recently as FY17, FY18, and FY19, Federation-elected BPOC members have voted against NCBA contract proposals, and for non-NCBA proposals. Second Brook Decl. ¶ 20; Third Evans Decl. ¶ 25-31.

3. The declarations and *Vaughn* Indexes submitted by AMS provide detailed justifications why release of redacted information "creates a likelihood of actual and substantial competitive harm."

In supporting redactions to information, "[f]unction rules over form in this area, and so

regardless of how a defending agency decides to justify its withholdings in *Vaughn* indices and supporting declarations, the agency must supply 'a relatively detailed justification' that specifically identifies 'the reasons why a particular exemption is relevant and [that] correlat[es] those claims with the particular part of a withheld document to which they apply.' " *Southern Alliance for Clean Energy v. U.S. Dept. of Energy*, 853 F. Supp. 2d 60, 67 (D.D.C. 2012) (quoting authority omitted). A court will endorse an agency's decision to withhold records if the agency's justification for invoking a FOIA exemption "appears logical or plausible." *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007).

OCM inaccurately attempts to couch AMS's non-disclosure justifications as falling short because they:

- "All echo the same formulaic statement that competitors would be able to discover their pricing[25] and undercut them for future bids." Pl.'s Mem., ECF 91, p. 27.
- "[M]ake the same basic claims of a competitive market and that others could discover confidential information and underbid them for business if the information is disclosed." *Id.*, p. 31.
- "[A]re replete with buzzwords like 'reverse-engineer' and 'underbid' and expose 'purchase activity' and so on, but they all lack meaningful substance." *Id.*, p. 32.

OCM's portrayal of AMS's justifications are overly-simplistic and very inaccurate. Taken together, the two *Vaughn* Indexes and ten (10) declarations provided by AMS in support of redactions provide much more than "mere observations that disclosure will provide 'insight' into certain types of information", and instead describes in detail how disclosure of the specific redacted information "creates a likelihood of actual and substantial competitive harm." *Biles*, 931 F.Supp.2d at 223; *see Vaughn* Indexes, ECF 88-33 and ECF 88-34; Brook Decl., ECF 88-7 ¶ 96-

[25] The case of *Racal-Milgo Government Systems, Inc. v. SBA*, 559 F.Supp. 4, 6 (D.D.C. 1981) OCM cites at ECF No. 91, p. 27, predates D.C. Circuit decisions that make clear pricing data can be withheld under Exemption 4. *See, e.g., Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 41 (D.C. Cir. 2008) ("Pricing information…falls within Exemption 4…if its disclosure would…'cause substantial harm to the competitive position of the person from whom the information was obtained.' ").

102, 113-122; ANCW Decl., ECF 88-10 ¶ 6-10, 16-22; USMEF Decl., ECF 88-11 ¶ 6-10, 16-23; MICA Decl., ECF 88-12 ¶ 6-10, 20-28; NCBA Decl., ECF 88-9 ¶ 17-20, 59-207; KS QSBC Decl., ECF 88-13 ¶ 10-11, 27-43; MI QSBC Decl., ECF 88-14 ¶ 11, 23-30; NE QSBC Decl., ECF 88-15 ¶ 9, 23-26; TX QSBC Decl., ECF 88-16 ¶ 9, 22-25; PA QSBC Decl., ECF 88-17 ¶ 8, 27-41.

By way of an exemplar, the *Vaughn* Index entry for AMS085-349 (located at ECF 88-33), describes the record to which redactions were applied, the information withheld from the record, and why disclosing the information would constitute substantial competitive harm:

Bates Range	**Description of Record**	**Explanation for Withholding**
AMS085-349	ANCW business ledgers from year 2008 that contain detailed operating expenditures, promotional campaign expenses, travel expenses, and personally identifiable information such an employee names, salaries, and pension information that is not publically known.	(b)(4) These records are ANCW's confidential business information in detailed accounting ledgers. This ledger contains journal entries for accounting transactions including employee payroll, employee benefits, operating expenses, rent, travel, contract payment data, membership dues, advertising and promotional expenses, building and facilities maintenance, insurance, legal and accounting fees, and other invoicing information… Further, release of this information would cause ANCW competitive harm. ANCW faces actual competition in the competitive contracting process with the BPOC and the CBB. If this information is disclosed, competitors would be able to undermine ANCW in this competitive contracting process. Competitors would **[1] learn details about ANCW's business relationships, suppliers and customers. [2] Competitors would learn about ANCW's business structure and practices and be able to copy them with little investment. [3] Competitors could also use this information to tailor their bids and underbid ANCW as they compete for contracts…** (emphasis added).

In further support of redactions described in the *Vaughn* Index entry for AMS085-AMS349, the ANCW Decl. (ECF 88-10) expounds on the competitive harms set forth in the *Vaughn* Index entry. Specifically, the ANCW Decl., provides:

- "If the information redacted in AMS0001-1436 and AMS007996-8001 and OCM 15651-OCM 15652 of the ANCW Exempted Records was disclosed, it would allow the Competitor Entities **to review the minutia of ANCW's operations, down to individual line-item payments. For example, the Competitor Entities would be provided the identity of suppliers, vendors, and contractors, along with certain terms of contracts and membership payments. Disclosure of this information would allow the Competitor Entities to challenge and thwart ANCW's competitive position by poaching contractors, vendors**." ANCW Decl., ECF 88-10 ¶ 20 (emphasis added).

- If "any of the information redacted in the ANCW Exempted Records was disclosed, it would enable anyone, but particularly the Competitor Entities, **to copy ANCW's business and operations model at the expense of enormous time ANCW has spent developing its operation.** This is especially true of the information contained in AMS013694-13735." ANCW Decl., ECF 88-10 ¶ 19 (emphasis added).

- "Disclosure of the information redacted in AMS0001-1436 and AMS007996-8001 and OCM 15651-OCM 15652 in the ANCW Exempted Records would also allow a competitor an unrestricted look at ANCW detailed (and non-public) financial information such as cash flow, revenues, workforce labor costs, vendor contracts and purchasing activity. A competitor can use each piece of this redacted information, individually or collectively, to its benefit, in the marketplace by **gauging ANCW's financial strength and potentially underbidding ANCW for contracts to perform work arising out of the Beef Checkoff Program.**" ANCW Decl. ECF 88-10 ¶ 21 (emphasis added).

- "Disclosure of any of the information redacted in the ANCW Exempted Records would allow others, including Competitor Entities**, to use the information to underbid ANCW and structure bids specifically tailored (by pricing, staffing, budgets, and vendors) to win contracts for which ANCW is competing**." ANCW Decl., ECF 88-10 ¶ 18 (emphasis added).

Finally, in support of its decision to redact the information delineated in the *Vaughn* Index entry for AMS085-AMS349, the AMS declaration (ECF 88-7) both incorporates the *Vaughn* Index and cites directly to the statements made in the ANCW Decl., while even further expounding on the competitive harms described in the Vaughn Index entry for AMS085-AMS349:

- "AMS also determined that disclosing the redacted information could allow competitors to **undercut and poach the relationships that the Beef Checkoff Contractor has with their contractors, vendors, and suppliers**." Brook Decl., ECF 88-7 ¶ 101 (emphasis added) citing ANCW Decl., ECF 88-10 ¶ 20.

- "Likewise, AMS determined that disclosing the redacted information would also allow approved organizations competing for Beef Checkoff Program contracts to duplicate the Beef Checkoff Contractor's business model. Brook Decl. ¶ 100 citing ANCW Decl., ECF 88-10 ¶ 19. The Beef Checkoff Contractors have invested significant resources in their management,

personnel and other operational structures. Brook Decl. ¶ 100 citing ANCW Decl. ECF 88-10 ¶ 19. AMS determined that releasing the redacted information could expose internal operations of the Beef Checkoff Contractor, allowing competitors **to duplicate Beef Checkoff Contractor's business models at the expense of the time and effort the Beef Checkoff Contractor spent in developing these business models.**" Brook Decl., ECF 88-7 ¶ 100 (emphasis added) citing ANCW Decl., ECF 88-10 ¶ 19.

- "AMS determined that revealing the redacted information would allow competitors of the Beef Checkoff Contractor to use the information against the Beef Checkoff Contractor to **underbid** them as they compete for contracts, including but not limited to contracts with the Beef Checkoff Program. For example, competitors of the Beef Checkoff Contractor **could use the redacted information to underbid the Beef Checkoff Contractor by**: 1) reverse engineering the business model of the Beef Checkoff Contractor and structuring their businesses and competing bids accordingly; 2) gauging the financial strength of the Beef Checkoff Contractor and structuring competing bids accordingly; and 3) ascertaining the approaches and processes the Beef Checkoff Contractor takes in submitting competitive bids and structuring competing bids accordingly." Brook Decl., ECF 88-7 ¶ 99 (emphasis added) citing ANCW Decl., ECF 88-10 ¶ 16-22.

Ultimately, through the *Vaughn* Indexes and submitted declarations, AMS clearly establishes in great detail that disclosure of the information redacted pursuant to Exemption 4 would cause substantial competitive harm.

III. AMS Met Its Burden Of Demonstrating That No Segregable Information Exists.

"[A]n agency may satisfy its segregability obligations by (1) providing a *Vaughn* Index that adequately describes each withheld document and the exemption under which it was withheld; and (2) submitting a declaration attesting that the agency released all segregable material." *Muttitt v. Dep't of State,* 926 F. Supp. 2d 284, 302 (D.D.C. 2013) citing *Loving v. U.S. Dept. of Defense,* 550 F.3d 32, 41 (D.C. Cir. 2008). Once this information is provided, "[a]gencies are entitled to a presumption that they complied with [FOIA's] obligation to disclose reasonably segregable material." *Sussman v. US Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Such a presumption may be overcome by a "quantum of evidence," which means that the plaintiff must, at least, "produce evidence that would warrant a belief by a reasonable person" that segregable material exists. *Bloche v. U.S. Dept. of Defense,* 279 F. Supp. 3d 38, 81 (D.D.C. 2017) quoting

Sussman, 494 F.3d at 1117.

AMS has satisfied its segregability obligations. First, the AMS declaration states that:

- "A review was conducted by AMS to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied. All information exempted from disclosure pursuant to the FOIA exemptions [] was correctly segregated and non-exempt portions were released." Brook Decl., ECF 88-7 ¶ 135.

- "Further, many responsive records contain no reasonably segregable, non-exempt information. Any segregable material in these records, to the extent it exists, is so inextricably intertwined with the exempt material that the release of any non-exempt information would produce only incomplete, fragmented, unintelligible sentences and phrases that are devoid of any meaning. The segregable information in these responsive records, to the extent that any exists, does not contain any meaningful information responsive to the FOIA request." *Id.*, ¶ 136.

Second, as discussed, AMS submitted over 200 pages of *Vaughn* Indexes, and ten individual declarations, describing in great detail the withheld information and the rationale for application of Exemption 4 to the information. These submissions make clear that no meaningful information can be further segregated. Further, much of the information withheld consists of Beef Contractor and/or QSBC accounting journals and ledgers, balance sheets, portions of financial statements, payroll documents, internal manuals and organization charts, expense reports, budget and staffing metrics, internal budge evaluations and audit evaluations, contracts, invoices, and non-public tax information. *See* Def.'s Mem., 88-1, p. 31-32, 40. The very nature of this information is not of a type that contains segregable material.

OCM asserts that AMS has not met its segragability burden because "[n]one of the declarations or *Vaughns* explain why records relating to checkoff-contracted services cannot be separated from non-checkoff business records." Pl.'s Mem., ECF 91, p. 33. OCM suggests that pursuant to a purported requirement that a Beef Checkoff Program contractor keep records of all of its transactions and account for checkoff funds received and expended and make such accountings available to the Secretary, USDA should have the "ability to segregate and produce

those same records that the Secretary has authority to require[]". *Id.* citing 7 U.S.C. § 2904.

OCM's assertion is misplaced. Assuming *arguendo* that the Beef Act requires contractors[26] of the Beef Checkoff Program to keep records of all of transactions and account for funds received and expended and make such accountings available to the Secretary, it does not follow that the information provided in this case loses the protections of Exemption 4, and must now be disclosed. First, OCM ignores the fact that the Beef Checkoff Contractor and QSBC information at issue in this case was provided directly to OIG, rather than the Secretary, in response to OIG's request for their cooperation. USDA Memo., 88-1, 29-30, 37-38 (citing and collecting supporting paragraphs from the AMS, Beef Checkoff Contractor, and QSBC declarations).

Second, OCM's position fails to take into account that nothing in 7 U.S.C. § 2904 expressly supersedes Exemption 4 or mandates public disclosure of the Beef Checkoff Contractor or QSBC information submitted to OIG. *See generally* 7 U.S.C. § 2904; *Environmental Integrity Project v. E.P.A.*, 864 F.3d 648, 649 (D.C. Cir. 2017) (5 U.S.C. § 559 of the Administrative Procedure Act, "of which FOIA is a part", requires that "FOIA exemptions apply unless a later statute expressly supersedes or modifies those exemptions", and agency properly invoked Exemption 4 since "Exemption 4 of the FOIA was enacted in 1967" and "Section 308 [of the Clean Water Act] enacted in 1972" did not "expressly supersede Exemption 4.").[27]

Ultimately, OIG referred to AMS for FOIA processing information pertaining to the Beef

[26] As set forth above, except for the PA QSBC in its role as facilitator of NBPI, none of the QSBCs that provided information to OIG are contractors of the Beef Checkoff Program. Def.'s Mem., 88-1, p. 36-42.
[27] "Exemption 4 of the FOIA was enacted in 1967". *Environmental Integrity Project*, 864 F.3d at 649. Section 7 U.S.C. § 2904 was enacted in 1985 as part of the Beef Promotion and Research Act of 1985. Pub.L. 99-198, Title XVI, § 1601(b), Dec. 23, 1985, 99 Stat. 1599. Although legislation for a beef checkoff was first enacted in 1976 and again in 1978, both enactments were still subsequent to Exemption 4's enactment. 90 Stat. 529 (1976); 92 Stat. 433 (1978). Further, both enactments required approval by a specified number of beef producers voting in a national referendum before an order implementing the checkoff assessment would be made permanent, and in neither instance was the required approval obtained. Second Brook Decl. ¶ 21.

Checkoff Contractors and the QSBCs. Brook Decl., ECF 88-7 ¶ 90, 107. Pursuant to the submitter notice process in E.O. 12600 and 7 C.F.R. § 1.12, the Beef Checkoff Contractors and the QSBCs were provided, as necessary, the opportunity to review their information. *Id.* ¶ 30, 33. After considering input from the Beef Checkoff Contractors and QSBCs, AMS conducted a review of the information in order "to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied." *Id.* ¶ 135; Second Brook Decl. ¶ 22. Consequently, AMS met its segregability obligations.

IV. OCM Concedes AMS's Application of Exemption 6.

In its Opposition, OCM objects only to the withholding of the names of "certain public officials." Opp. Memo, ECF 90, p. 41. All of the discussion in that section of OCM's Opposition focuses on USDA employees. *Id.* Pursuant to Exemption 6, AMS only redacted information pertaining to private individuals. Def.'s Mem., ECF 88-1, p. 18-20. Accordingly, it is apparent that OCM has waived any objection to AMS's application of Exemption 6.

CONCLUSION

For the foregoing reasons and those stated in USDA's Motion for Summary Judgment, USDA respectfully requests that the Court grant its Motion for Summary Judgment, deny OCM's Cross-Motion for Summary Judgment, and enter judgment in favor of USDA.

Respectfully submitted,

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