UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff moves for summary judgment. There are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law. This motion is accompanied by a memorandum, declarations, and exhibits.

Pursuant to Local Civil Rule 7(f), Plaintiff respectfully requests an oral hearing.

A proposed order is attached.

Dated: January 9, 2019

Respectfully submitted,

/s/ Matthew E. Penzer

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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

AND IN OPPOSITION TO DEFENDANT AND DEFENDANT-INTERVENOR'S

MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

When USDA's Office of Inspector General ("OIG") published its report after a two-year audit of the federal beef checkoff program administered by the USDA's Agricultural Marketing Service ("AMS"), one of the key findings was a need to "improve the transparency" of program documents. Agricultural Marketing Service Oversight of the Beef Research and Promotion Board's Activities, OIG Audit Report 01099-0001-21, March 2013. More than five years later, Plaintiff is still battling for that improvement.

Through the Freedom of Information Act ("FOIA") request at issue in this case, the Organization for Competitive Markets ("OCM") sought records relating to an OIG audit of the beef checkoff program that reviewed AMS management and program contracting matters. OCM made this request after a prior independent audit of the program revealed a significant amount of improper expenditures, which ultimately had to be returned to the program. More than five years after making the request, however, thousands of pages of audit and checkoff spending records continue to be withheld, largely pursuant to two erroneous claims of privilege: deliberative process (FOIA "Exemption 5") and confidential business information (FOIA "Exemption 4").

Cutting through the excuses and rhetoric that have pervaded the filings in this case, its resolution turns on just two issues: the degree of independence USDA's Inspector General ("OIG") maintains from other agencies and the quality of FOIA's assurance in the transparency of government activities and expenditures. OIG operates under a strict federal regime that mandates objectivity and independence from the agencies it audits in order to detect things like waste, misuse of funds, or even fraud. 5 U.S.C. app. 3 § 2, 4. Yet in this case, OIG is refusing to disclose records comprising communications and materials shared with AMS—during an audit of AMS—claiming that the auditor and agency being audited are engaging in deliberative process. Such a position is

incompatible with both the IG Act itself and with FOIA. Agencies undergoing an audit are required to *cooperate* with OIG. What agencies undergoing an audit may not do is *collaborate* with OIG.

And in the context of Exemption 5, that makes a world of difference. Certainly, OIG may independently gather from AMS the data and other information OIG needs for its audit. But in that circumstance, there could be no deliberative process between the two. If, however, OIG and AMS truly were deliberating with each other on the audit findings, such deliberations would be incompatible with OIG's legal mandate against doing so. And FOIA jurisprudence does not permit the deliberative process privilege to shield such activity from public scrutiny.

These principles are put to the test here because of highly unusual "irregularities" documented during the course of this audit: a journalist saying he'd heard an AMS official say the agency got OIG to "water … down" some negative audit findings, OIG providing an "unofficial official draft" to AMS in advance of the standard process, an AMS official responding that there was a "LOT of heartburn" at AMS over the report, a "rebooted" report surfacing the following month, and more. Whatever the reasons for the unusual circumstances here, bringing transparency to them via FOIA is entirely consistent with the purposes of that law.

The other primary issue in this case is the government's refusal to disclose thousands of pages of records relating to the federally funded beef checkoff program pursuant to FOIA's Exemption 4. One of the primary concerns of these programs has been lax oversight and misuse of federal funds it raises from an appropriation assessed on producers. Yet Intervenor claims catastrophe would occur from release even of the most basic checkoff contract info. NCBA fails to explain, however, how there can be a threat to competition when that organization has received in 2017 alone $35 million beef checkoff revenues—the four other bidders got less than $1.5 million—and has a voting lock on the committee that decides checkoff contract awards. Further,

FOIA case law makes clear that financial records that are necessarily required by government agencies in order to satisfy their regulatory obligations, such as audits by agency Inspector General's offices are generally not exempt from disclosure.

Plaintiff OCM has for years been working to bring a greater level of transparency and accountability to the beef checkoff program. The tortuous history of this case—marked by delay after delay, broad-stroke claims of exemption, three briefing schedules, and more—demonstrates how badly that transparency is needed, and why a further order from this Court is necessary to ensure both the letter and purpose of the FOIA is not rejected by the agency.

FACTUAL BACKGROUND

This case has been before the Court on multiple occasions, so only a brief recitation of the facts will be offered. The beef checkoff program is distinct from other checkoffs in that it includes a committee (the Beef Promotion Operating Committee) that exclusively decides contract awards. The Secretary has final approval over every activity and expenditure of all checkoff programs, but only those contract award recommendations that first survive the Operating Committee are presented for final approval. The Operating Committee consists of 10 members from the Beef Board and 10 members from the National Cattlemen's Beef Association ("NCBA"), an industry trade association. Of the tens of millions of checkoff contracts available for award each year, none may get final agency approval without 14 votes of the Operating Committee. Not surprisingly, NCBA has received the vast majority of checkoff contract awards every year.

Although checkoff programs are all prohibited from using funds for lobbying or political advocacy, many producers feel the programs suffer from loose oversight and entanglement with industry trade associations. And in the case of the beef checkoff, a 2010 audit performed by a

major accountancy firm, Clifton Gunderson, found improper expenditures that ultimately resulted in NCBA returning more than $200,000 to the checkoff program.[1]

The following year, OIG initiated an audit of AMS oversight of the beef checkoff program, including its contracting practices. An unusual twist came in 2012 when Pulitzer Prize-winning journalist, Mike McGraw, reported overhearing a conversation about the OIG audit at NCBA's annual convention in which an AMS official said OIG "made some pretty strong statements that we don't like" but that they'd "gotten OIG to water them down." *See* Ex. 1, Email from Kansas City Star journalist to OIG, Sept. 17, 2012, ECF No. 90-3. Although unclear on the specifics, the possibility of an OIG report compromised by pressure from an agency under audit was understandably concerning to OCM and many other farmers.

OIG publicly issued its 19-page audit report in March 2013 with little in the way of findings other than a recommendation for better management review and—ironically, in light of this litigation—for greater transparency in the program's spending records. Given that OIG's audit covered the same fiscal period the Clifton Gunderson audit covered, OCM submitted a FOIA request in April 2013 to OIG to understand how two seemingly irreconcilable audits of the same federal spending program could be produced. ECF No. 88-6, pp. 1-3. OCM also requested a fee waiver request based on the public interest in the information and in the government's oversight of the beef checkoff program. *Id.*

[1] *See, for example,* "Audit Finds Problems in Cattlemen's Spending" New York Times, August 2, 2010 (at http://www.nytimes.com/2010/08/03/business/03beef.html).

DELAY AND NON-DISCLOSURE: THE FOIA REQUEST AND LITIGATION PROCEEDINGS

For 18 months after the request was submitted, OCM attempted to work with OIG on its request. ECF No. 88-6. After several partial responses with sweepingly broad redactions, four administrative appeals (which OIG demanded for each partial response), and still no estimated completion date, OCM filed this action on November 12, 2014. ECF No. 1. But the 18-month pre-filing delay was only the beginning of what would become a years-long pattern, marked by repeated instances of last-minute surprise disclosures, referrals to non-custodial entities (sometimes of just part of a page), reprocessings, and requests for extensions. *See, for example,* ECF Nos. 64, 67.

It would take another five months before OIG was able to propose a production schedule, which itself covered another 12 months. ECF No. 12. Over the course of the next year, OIG produced extensively redacted records, and withheld many in their entirety. Despite itself being the custodian of the records requested, OIG referred a substantial portion of the records to AMS, the entity that was the subject of the audit. ECF Nos. 15-26. On May 9, 2016, OIG represented in a status report that the referred records were "still being reviewed" by AMS and expected they'd be produced in the next 30 days. ECF No. 27.

Plaintiff had discussions with OIG about producing *Vaughn* indexes, including one the separately related to audit reports that had been shared by OIG with AMS (relating to the audit of AMS). ECF No. 29. Upon initial receipt of OIG's *Vaughn* documents, Plaintiff's counsel raised questions about the legal sufficiency of their content. OIG revised some aspects and agreed to produce them to Plaintiff on July 5 and 15, 2016. *Id.*

On August 23, 2016 a status hearing was held to finalize production for all records, including the ones referred to AMS. *See* ECF No. 32. OIG's representatives appeared, represented

that all non-referred records had been processed, and all parties agreed to a 30-day deadline for the remainder. *Id.* What OIG didn't tell the Court was that on the same day as the hearing it notified AMS that it was referring more than 9,000 additional pages (that without explanation it suddenly decided was responsive to Plaintiff's request). ECF No. 33-2, p.3.

Then, in October 2016, AMS filed a declaration indicating that it had not understood it was supposed to be reviewing the records transferred during the previous year's production schedule (not including the 9,000 additional pages that OIG had just referred to AMS). *Id.* This declaration was entirely inconsistent with OIG's statement months earlier that AMS was nearly done processing the records. *See* ECF No. 27.

In October 2016, this Court granted intervention to NCBA for the limited purpose of objecting to release of any confidential business information that might be in the relevant records. ECF No. 39. The Court set a March 31, 2017, deadline for all parties to complete records processing and either produce the remaining records or a *Vaughn* index for any claims of exemption. Minute Order, March 25, 2017. On May 15, 2017, Defendant represented that it had complied, completing its production and providing a *Vaughn* index for any records withheld, and the parties proposed a briefing schedule. ECF No. 57.

On August 11, 2017, Defendant and NCBA filed their opening summary judgment motions and briefs. ECF Nos. 61, 62. At the same time, without telling OCM's counsel, Defendant attempted to send (to an incorrect address) several thousand pages of records with new Bates numbers directly to OCM. ECF Nos. 64, 67. Also, despite its representation to the Court months earlier that all *Vaughn* indexes had been produced, Defendant's motion included one that had not previously been produced (and that raised a new claim that the federal beef board records were being withheld under Exemption 4, despite the fact that the exemption doesn't apply to government

entities). *Id.* This Court vacated the summary judgment motions and ordered that any "improperly processed information" be reviewed and completed by the end of November. Minute Order, October 24, 2017. Defendant reported to the Court on November 30, 2017, that it had reprocessed the records at issue and another batch that OIG had referred to AMS for processing more than two years earlier, but which OIG hadn't previously produced. *See* ECF No. 68.

A second briefing schedule was ordered. But, days before the deadline for filing its opening brief, Defendant decided to abandon its claim that the federal beef board could assert Exemption 4. ECF No. 73. Intervenor moved to delay the second briefing schedule, and, after a hearing, the Court granted a limited final extension to August 31, 2018, with a show cause order to the Secretary of Agriculture and a warning that the order would not be modified "absent a catastrophe." ECF No. 78.

A third briefing schedule was then ordered, and on November 14, 2018, Defendant and Intervenor filed motions for summary judgment.

STANDARD OF REVIEW

In FOIA cases, agency decisions to withhold or disclose information under FOIA are reviewed *de novo*. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C.Cir.1977). FOIA places "the burden ... on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). In litigation challenging the sufficiency of "the release of information under the FOIA, 'the agency has the burden of showing that requested information comes within a FOIA exemption.'" *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999) (quoting *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999)). This burden does not shift even when the requester files a cross-motion for summary judgment because "the Government 'ultimately [has] the onus of proving that the [documents] are exempt

from disclosure,'" *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d at 904–05 (alterations in original)(quoting *Nat'l Ass'n of Gov't Emps. v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978)).

The court should affirmatively grant a FOIA requester's motion for summary judgment "[w]hen an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption." *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C.Cir.1992).

ARGUMENT

I. OIG's Expansive Application of Exemption 5 is Not Supportable.

Defendant has improperly redacted or withheld entirely thousands of pages of responsive records pursuant to an exceptionally broad construction of FOIA's deliberative process exemption. To sustain these claims, Defendant has the burden to prove the redacted information is both (1) pre-decisional, and (2) deliberative. *See Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978)(en banc); *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). For information to be pre-decisional it must be "actually antecedent to the adoption of an agency policy." *Jordan*, 591 F.2d at 774. To be deliberative information must be a "direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn*, 523 F.2d at 1144. Defendant has misconstrued both prongs of the analysis, has applied the deliberative process claim to communications between non-deliberating entities, and has provided boilerplate *Vaughn* index entries that aren't even close to the "precisely tailored explanations" for each document required to assert a deliberative process privilege. *See Nat'l Sec. Counselors v. CIA*, 960 F.Supp.2d 101, 188 (D.D.C. 2013).

A. Defendant misconstrues the deliberative process analysis.

OIG makes little effort to construe the specific prongs of the deliberative process test and apply them to specific redactions, instead opting for a wholesale exemption for the entire "audit process" from start to finish. *See, generally,* Def Memo at 4-9, ECF No. 88-1 (seeking "application of the deliberative process privilege to the OIG audit process"). Thus, OIG implies that all records prior to the public release date of the final audit report are all "predecisional because they occurred before OIG had completed its audit." *Id.*, *see also id.* at 21 (claiming that communications between the Beef Board and OIG are privileged).

It is hardly surprising that OIG cites no case to support such an expansive reading of the deliberative process exemption.[2] More than four decades ago the *Vaughn* court readily rejected a similar argument to apply the privilege to the entirety of a management review process. *See Vaughn*, 523 F.2d at 1145. Considering the whole of such a process from start to finish as one continuous deliberative process "would be interpreting Exemption 5 to protect too much." *Id.* "If we construed Exemption 5 as broadly as the Government seeks to do here, we would go a long way toward undercutting the entire Freedom of Information Act." *Vaughn*, 523 F.2d at 1146; *see also EPA v. Mink,* 410 U.S. 73, 87 (1973)(quoting S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)(noting that FOIA's strong policy of disclosure means that "Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'").

As to the second prong of the deliberative process analysis—whether information is "deliberative"—OIG is equally unrefined and insufficient to meet its burden. OIG takes the

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[2] OIG did not comply with this Court's standing order (ECF No. 60) to include a Table of Authorities with its memo. Direct review of the two sections on deliberative process in OIG's memo, however, does not reveal citation to any case that supports the position that the entire OIG audit from start to finish, including all drafts and all communications about those drafts, may be encompassed entirely by the deliberative process privilege.

position generally that all information generated plays a role in the final audit report, so all is protected by the deliberative process exemption. Decker Dec. ¶¶ 128-131, ECF No. 88-1. But such a sweeping construction would expand the deliberative process dangerously far beyond its narrow and strictly construed borders.

Material is deliberative if it "reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 866 (D.C.Cir.1980). OIG appears to take a uniquely expansive view of this inquiry that would eliminate the "give-and-take" pre-qualification and make *all* communications throughout the agency (and even outside the agency) deliberative. OIG argues in its memo and declaration that it fosters a "culture of open dialogue" and "free flow of candid discussion, deliberation, and analysis" and that "OIG personnel" expect the "substance of their discussions" will be kept confidential. *See* Def. Mem. at 8, ECF No. 88-1; Decker declaration ¶ 130, ECF No. 88-3. While OIG is certainly entitled to the narrow protection FOIA extends to truly deliberative communications about legal or policy matters, it does not extend complete confidentiality to *all* personnel for *all* discussion, deliberation, and analysis. This Circuit has spoken to this issue repeatedly. The deliberative process test is objective, exclusive, and narrow. Any benefit OIG feels it could reap from implementing a broad guarantee of confidentiality to all its personnel for all discussions they may have would come at a severe cost to FOIA's core principles of assuring open government. If OIG would like a wholesale FOIA exemption for its governmental activities, that request should be directed to Congress not this Court.

B. Exemption 5 is inapplicable to communications between an auditing OIG and agencies under audit.

OIG's expansive view of the privilege that protects deliberative processes isn't cabined to its internal decisionmakers, but seeks to extend deliberative status to entities outside of OIG, and

even to the agencies OIG is charged with auditing for, among other things, "preventing and detecting fraud and abuse" in their operations. 5 U.S.C. app. 3 § 4(a)(3). Despite its independent role as auditor of other USDA agencies and their programs, OIG has redacted or withheld entirely information from thousands of pages of communications with AMS, claiming these materials comprise "deliberations" with the agency. *See* Def Mem at 7, ECF No. 88-1; Decker Dec. ¶¶ 128-131; *Vaughn* Index, ECF No. 88-6, Ex. 57. But AMS cannot be "deliberating" with OIG in these communications—when AMS reviewed and commented on draft audits it was not functioning as auditor. Instead, AMS's role was more akin to a regulated industry being given an advance copy of a proposed rule with a request for comment. Such review can help inform the agency's final decision, but the usefulness of the input doesn't transform the subject of the agency action into a deliberator, or the communications into give-and-take deliberations.

OIG's claims of exemption for such records also fails because it is contrary to federal law and to OIG's core mission as an independent auditor of self-interested agencies. *See, for example*, Inspectors General: Reporting on Independence, Effectiveness, and Expertise, GAO-11-770 (Sep. 2011)("Independence is one of the most important elements of a strong performing IG function, helping to ensure that the IGs' work is viewed as impartial by both their agencies and the Congress. In addition, IGs must be independent in order to effectively carry out their mission to help prevent and detect fraud, waste, abuse, and mismanagement and promote economy, efficiency, and effectiveness." p. 1.). There can be no legitimate concern that release of input provided by AMS during an audit will somehow chill OIG's deliberations in the future, due to the necessary independence of OIG from other agencies within USDA and the fact that such agencies are legally required to cooperate with, and provide information for, OIG audits.

1. The relationship between an auditing Inspector General and an agency under audit is not "deliberative."

Agencies undergoing an audit are required to *cooperate* with OIG. What agencies undergoing an audit may not do is *collaborate* with OIG. "When an Inspector General is conducting an audit of its own agency, the need for independence from agency officials in carrying out the audit is paramount." *Neighborhood Assistance Corp. of Am., v. U.S. Dept. of Hous. and Urb. Dev.*, 19 F. Supp. 3d 1, 22 n. 11 (D.D.C. 2013). "Indeed, this was one of the core animating principles underlying" the IG Act's passage:

> There is a natural tendency for an agency administrator to be protective of the programs that he administers. In some cases, frank recognition of waste, mismanagement or wrongdoing reflects on him personally. Even if he is not personally implicated, revelations of wrongdoing or waste may reflect adversely on his programs and undercut public and congressional support for them. Under these circumstances, it is a fact that agency managers and supervisors in the executive branch do not always identify or come forward with evidence of failings in the programs they administer. For that reason, the audit and investigative functions should be assigned to an individual whose independence is clear and whose responsibility runs directly to the agency head and ultimately to the congress. This legislation accomplishes that, removing *the inherent conflict of interest which exists when audit and investigative operations are under the authority of an individual whose programs are being audited*.

Id. (citing S. Rep. 95–1071)(emphasis in case text).

The Inspector General Act, among other things, establishes an "independent and objective" office authorized to "conduct, supervise, and coordinate audits and investigations relating to [agency] programs and operations" in order to promote "economy and efficiency in the administration of, or prevent[ ] and detect[ ] fraud and abuse in, its programs and operations." 5 U.S.C. app. 3 § 2, 4(a)(1), (3); *U.S. v. Inst. for College Access & Success*, 27 F. Supp. 3d 106, 110–11 (D.D.C. 2014). The Act requires OIG to comply with GAO's Government Auditing Standards, U.S.C. app. 3 § 4(ba)(1)(A), which direct that "auditors should be independent from an audited

entity" during the auditing process. GAO-12-331G Government Auditing Standards, Sec. 3.05 (Dec. 2011); *see also, U.S. Nuclear Reg. Commn., Washington, D.C. v. Fed. Lab. Rel. Auth.*, 25 F.3d 229, 233 (4th Cir. 1994), *as amended* (June 21, 1994)("The bulk of the Inspector General Act's provisions are accordingly devoted to establishing the independence of the Inspectors General from the agencies that they oversee"); *U.S. Dept. of J. v. Fed. Lab. Rel. Auth.*, 39 F.3d 361, 367 (D.C. Cir. 1994)(same).[3]

To be sure, OIG does—and must—communicate with agencies it is auditing. Indeed the GAO auditing standards specifically reference an auditor's duty to gather information, but cautions that "*objective* evaluation of the sufficiency and appropriateness of evidence is a critical component of audits." *Id.* at Sec. 3.62. That auditors communicate with agencies under audit is hardly remarkable, but simply a function of the necessity to gather information relevant to the audit review. IRS auditors, for example, may ask a taxpayer being audited for information or documentation about various matters relating to an audit. But this is part of the auditor's information gathering process, not a give-and-take deliberation. The same would be true of trial witnesses who provides testimony and documentary evidence that a jury then independently reviews and deliberates about. Getting information or materials from agencies under audit does not equate to a deliberative process. *See, for example, Public Citizen v. OMB*, 598 F.3d 865, 875 (D.C. Cir. 2010)(stating that "[t]o the extent the documents at issue in this case neither make recommendations for policy change nor reflect internal deliberations on the advisability of any particular course of action, they are not . . . deliberative").

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[3] Indeed, even OIG's summary judgment submissions emphasize its independence from other USDA agencies: "OIG independently and objectively performs audits and investigations of USDA's programs and operations." *See* Decker Decl. ¶ 5 ECF No. 88-3. "Due to OIG's statutory independence, we have our own FOIA Program within USDA." *See* Decker Decl. ¶ 3 n.1.

Despite this clear mandate of deliberative independence between auditor and agency under audit, OIG argues that the deliberative process privilege is justified to ensure the free flow of information with AMS in the future.[4] But there is no such risk (which is hardly surprising in light of the obligation of IGs to operate free of agency influence or threat of silence). USDA Departmental Regulations and federal law assure that OIG's ability to get all information and documentation it requires for audits is guaranteed. USDA agencies under audit are "required to cooperate with OIG to facilitate the conduct of audits." USDA Departmental Regulation 1700-2, Sec. 3. Department employees are equally required to "cooperate fully with OIG" and to offer sworn statements when requested. *Id.*, Sec. 5(e). Failure to respond to OIG requests—even if against the employee's own interest—is grounds for disciplinary action. *Id.* Officials and employees must provide "all possible assistance" to OIG during audits, including by providing all records relating to matters under review. *Id.*, Sec. 5(c).

Also at OIG's disposal is Section 6(a)(4) of the Inspector General Act, which grants the authority "to require by subpoena the production of *all* information, documents, reports, answers, records, accounts, appears, and other data in any medium ... necessary in the performance of the functions assigned by this Act." 5 U.S.C. app. 3 § 6(a)(4)(emphasis added).

Like other FOIA exemptions, the deliberative process privilege must be construed narrowly. The core purpose of the IG Act was to create an independent and objective auditor while eliminating the inherent bias that attended involvement of program administrators in the

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

decisionmaking process. As applied to communications and materials exchanged between an independent OIG and agency being audited,[5] there is simply no scenario in which a deliberative process between such entities is implicated and so disclosure should be ordered for these materials. See *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d at 1433.

2. "Draft" documents shared with entities under audit are not deliberative.

The D.C. Circuit has made clear that an agency may not categorically exempt documents simply because they are labeled as "drafts." *See Arthur Andersen & Co. v. IRS,* 679 F.2d 254, 257 (D.C.Cir.1982)(recognizing that "*Coastal States* forecloses the ... argument that any document identified as a draft is per se exempt"). Records designated as drafts are neither exempt from the standard two-prong deliberative process test not are they even "presumptively privileged." *Jud. Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 261 (D.D.C. 2004).

Yet contrary to long-established precedent, OIG argues for a flat-out categorical exclusion for all "draft" audit reports. Def. Memo at 5, ECF No. 88-1. To advance its wholesale privilege theory, OIG cites to *Hamilton Securities Group Inc. v. Dept. of Hous. and Urb. Dev.*, 106 F. Supp. 2d 23, 30 (D.D.C. 2000), *aff'd sub nom. Hamilton Securities Group, Inc. v. Dept. of Hous. & Urb. Dev., Off. of Inspector Gen.*, 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001). But *Hamilton Securities* did not establish the per se privilege rule that Defendant seeks. Instead, the court

[5] In its first summary judgment motion, Defendant asserted—and Plaintiff questioned—that the federal Beef Board was not a component of USDA under the control of AMS. ECF No. 62. Shortly before the second briefing schedule deadline, OIG decided (without explanation) it would no longer pursue that assertion. ECF No. 73. As such, OIG communications with the federal Beef Board redacted or withheld pursuant to deliberative process privilege should be treated the same as communications with AMS. *See, for example*, "Emails exchanged between CBB and OIG," Def. Mem. at 20-21, ECF No. 88-1.

followed the *Coastal States* rule that "the deliberative process privilege is ... dependent upon the individual document and the role it plays in the administrative process." *Id.* at 30.

Applied to the records at issue in the instant case, *Hamilton Securities* is actually helpful to OCM. In considering draft audit records of the Department of Housing and Urban Development's OIG, the court noted that whether a draft report is predecisional "depends upon its role" in the "OIG's audit process." *Id.* The documents at issue in *Hamilton Securities* were wholly internal OIG documents that included personal opinions of lower level auditors and, importantly, had not been cleared for release outside the OIG's deliberative participants. The "draft" reports at issue in this case are of an obviously different character.

Importantly, not all audit report drafts are actually at issue here. OIG notified Plaintiff that it identified more than 5,000 pages of audit report drafts, *all* of which were withheld in their entirety pursuant to a deliberative process claim. *See* Exhibits 8, 17, 19 ECF No. 88-6. However, the only materials at issue here comprise less than 200 pages of the withheld reports. Ex. 58, ECF No. 88-6. Plaintiff explained to Defendant during the processing schedule that the only reports being sought are those that OIG internally cleared and provided to the agency under audit for review and comment or that AMS internally cleared and provided back to OIG, which are the materials covered in the *Vaughn* index as Exhibit 58.[6]

The line of cases most analogous to shared draft reports would be those Circuit decisions that involve an agency sharing materials with a party acting in its own self-interest. For example,

[6] OIG initially informed Plaintiff that there were three draft reports shared with AMS. When Plaintiff informed OIG that Plaintiff possessed documents indicating there were more, OIG then confirmed the number was in fact higher. Ultimately, OIG stated it was "working on indexing about 13 items that reflect AMS comments or input on the draft audit reports." Exh. 7, ECF No. 90-3.

in a case where the Department of Justice shared materials in the course of negotiating a consent decree modification, *Ctr. for Auto Safety v. Dept. of J.*, 576 F. Supp. 739, 745 (D.D.C. 1983), *order vacated in part on reconsideration,* 82-0714, 1983 WL 1955 (D.D.C. July 7, 1983), the court held that three letters the agency prepared in the process, while they may have been deliberative internally, lost any claim to Exemption 5 protection once the agency shared them with self-interested parties. *Id.* at 747. Nor were documents received from the self-interested parties protectable by the deliberative process privilege. *Id.* The court noted its reasoning was true to the Congressional intent of FOIA and to the holding in *Coastal States* that "the 'function' of a document is 'crucial' to determining whether an exemption applies." *Id.*; *see* also *Madison County, N. Y. v. U.S. Dept. of J.*, 641 F.2d 1036, 1040–41 (1st Cir. 1981)(holding the Exemption 5 should not be expanded to input of a self-interested party seeking to get agency to adopt its proposals).

As noted above, one of the fundamental concerns the prompted passage of the Inspector General Act was the Congressional recognition that agency heads are not disinterested deliberators when evaluating their own programs. Because of that self-interest, materials shared with them are not protected by the narrow exemption that only protects objective deliberation.

3. The Deliberative Process Privilege is Not Available in for Certain Records at Issue in this Case.

The Court of Appeals has made clear that the deliberate process privilege "disappears altogether when there is *any* reason to believe government misconduct occurred." *See In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997)(emphasis added). If OIG and AMS truly were deliberating with each other on policy issues, such as the audit findings, such deliberations would be incompatible with OIG's legal mandate against doing so. The audit report states it was conducted in accordance with GAO's Government Auditing Standards, which was required by law. *See*, Audit Report, p. 12. OIG submitted a declaration confirming that it "independently and

objectively performs audits and investigations of USDA's programs and operations." *See* Decker Decl. ¶ 5, ECF No. 88-3. Yet, OIG was not simply getting information from the audited agency but permitting the audited agency to participate in the audit's decisionmaking process.

On March 7, 2013, OIG formally delivered the "official draft" audit report to AMS officials for written response. Ex. 5, ECF No. 90-3. The notice stated that the "report was revised based on the exit conference with your staff on December 6, 2012." *Id.* The notice clearly gives the public impression that AMS input was last provided at the early December exit conference and, after internal deliberation, OIG revised and presented AMS the final.

In reality, the report was revised on far more significant contact than the exit interview. Emails from OIG show that AMS had in late December 2012 been provided with "unofficial official" drafts for their review and comment. Ex. 2, ECF No. 90-3. After reviewing the report findings, AMS' audit liaison—who would later be copied on the March 7 letter—told OIG that there is "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." Ex. 3, *Id.* Just one month later, a "rebooted report" was issued. Ex. 4 *Id.* This too was shared with AMS for review and comment during the last week of February 2013. *Id.* AMS returned that rebooted, unofficial draft back to OIG on March 6, 2013. *Id.*

One day later, OIG sent the formal "official draft report" to AMS for review and comment in a letter that gives the public impression that AMS had not seen or been involved with the report since December 6, 2012. Ex. 5, *Id.* In reality, it had only been one day. Where a government auditor leads the public to believe that an audited entity had minimal opportunity to provide reaction to the auditor's preliminary findings, but the reality is that the audited entity appears to have played a much more influential role in the decisionmaking than suggested by the auditor, communications

between the two entities should be subject to disclosure, *See Alexander v. F.B.I.*, 186 F.R.D. 154, 165–66 (D.D.C. 1999)(denying deliberative process where "disingenuous" government documents omitted material information).

OIG cannot have it both ways. It cannot claim to have met its legal obligations to adhere to GAO audit standards requiring independence and objectivity on the one hand, and then also assign "deliberative" status to information received from and communications with AMS during the auditing process. To the extent that OIG was deliberating with AMS, rather than independently and objectively conducting the audit in accordance with mandated standards, the deliberative process privilege may not be applied and such records should be ordered fully disclosed as a matter of law. *Id.*

C. Defendant's boilerplate *Vaughn* entries and declarations are insufficient to justify its extensive deliberative process claims

Like other FOIA exemptions, claims of deliberative process privilege must be construed narrowly. Unlike many other FOIA exemptions, however, Exemption 5 requires a heightened explanatory standard. *See, The James Madison Project, et al. v. Dep't of Justice, et al.*, 302 F. Supp. 3d 290, 298 (D.D.C. 2018)(rejecting deliberative privilege process redactions in light of insufficient and boilerplate agency information regarding the specific deliberative process, the function of the particular record, the nature of the decisionmaking authority, and/or any potential harm to the specific process that would be incurred by release of the information). Because the applicability of the deliberative process privilege is dependent on the content of each document and the role it plays in the decisionmaking process, an agency's affidavit describing the withheld documents must be specific enough so that the elements of the privilege can be identified. *Senate of Puerto Rico*, 823 F.2d 574, 585 (D.C. Cir. 1987); *Coastal States*, 617 F.2d at 866; *Mead Data*, 566 F.2d at 251. "At a minimum, the agency must provide three basic pieces of information in

order for the deliberative-process privilege to apply: (1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient." *Natl. Sec. Counselors*, 960 F. Supp. 2d at 189.

Defendant's submissions don't come close to the required detail. One of OIG's declarations states that the information in the redacted records "*often* involved consultative communications involving OIG personnel or between OIG and AMS staff." *See* Decker Dec. ¶ 129 (emphasis added). This fails entirely to identify the specific role of the communication in the deliberative process, or the role of the author and recipient in the decisionmaking effort.

In the second deliberative process section of Defendant's brief,[7] AMS oddly asserts that it has made a deliberative process claim "at the request of OIG." It then provides a brief, conclusory and entirely insufficient rationale for the deliberative process claim, stating that the "record is predecisional because it was created before OIG had completed its audit" and "deliberative because it is a draft document that is not the final version." Def. Mem. at 26, ECF No. 88-1. Defendant's Exemption 5 *Vaughn* entries are no better. *See Vaughn* index, ECF No. 88-5 (Ex. 57 and 59); ECF No. 88-33. "[U]nlike other exemptions where the agency declaration and *Vaughn* index may be read in conjunction to provide an adequate justification for application of an exemption to a class or category of records, to sustain its burden of showing that records were properly withheld under Exemption 5, an agency must provide in its declaration and *Vaughn* index

[7] It appears that OIG and AMS prepared different sections of the briefs, and submitted separate exhibits. For legal purposes, however, OIG remains the Defendant (as the agency in custody of the records at the time of the request). *See Dep't of Justice v. Tax Analysts,* 492 U.S. 136, 144 (1989).

precisely tailored explanations for each withheld record at issue." *Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F.Supp.2d 157, 168 (D.D.C. 2011).

All the deliberative process Vaughn entries contain the same boilerplate text in the "justification for withholding" section. *See Vaughn* index, ECF No. 88-5. This is simply not sufficient to justify Exemption 5 withholdings. *See Hunton & Williams LLP v. U.S. Envtl. Protec. Agency*, 248 F. Supp. 3d 220, 242 (D.D.C. 2017)(rejecting boilerplate Exemption 5 language that continued with "only modest variation" for several hundred pages of Vaughn entries); *Muttitt v. Dep't of State,* 926 F.Supp.2d 284, 306–07 (D.D.C.2013)("buzz-word adjectives" are no substitute for "a meaningful description of the factual context surrounding a document"); *Natl. Sec. Counselors*, 960 F. Supp. 2d at 189(noting that unlike other FOIA exemptions, "when an agency claims the deliberative-process privilege under Exemption 5, the factual context surrounding the withheld document is critical").[8]

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

Exemption 4 relates to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *See* 5 U.S.C. § 552(b)(4). There is no claim of trade secrets raised in this case, so the agency may only withhold checkoff-related information if it establishes that "the withheld records are (1) commercial or financial, (2) obtained from a person,

[8] Defendant's *Vaughn* entries and declarations with respect to segregability are legally insufficient, as well, claiming that no segregation *at all* is required for "draft" materials or even "factual information from audit notes, internal memoranda, communications, and other audit work papers" and including a barebones statement of compliance for everything else. *See* Def. Mem. at 5, ECF No. 88-1. Defendant is wrong. If there is non-exempt info that can be segregated withheld materials it must be released, or explained if withheld. "[U]nless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead Data C.*, 566 F.2d at 261.

and (3) privileged or confidential." *Jordan v. U.S. Dep't of Labor*, 273 F.Supp.3d 214, 230 (D.D.C. 2017)(internal quotation marks omitted).

It is important to preface the Exemption 4 discussion with a brief section about the public funding and operative framework of the government checkoff programs. Producers paying in to checkoff programs entrust their funds to the Secretary of Agriculture, who is then responsible to make sure they are used effectively and lawfully. Because these funds are legislatively mandated by a continuing appropriation assessed against producers, there are strict constitutional parameters placed on checkoffs. *See* 7 U.S.C. § 2904, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *cf. United States v. United Foods, Inc.*, 533 U.S. 405 (2001)(ruling that if checkoff boards were private entities,[9] as opposed to programs of *government* speech and action, producers could not be compelled to pay assessments to subsidize them). A crucial element of the constitutional structure of federal checkoffs is the Secretary's ultimate responsibility for the lawful use of checkoff funds and liability for their misuse, including by contractors and subcontractors. *See Humane Socy. of the U.S. v. Vilsack*, 797 F.3d 4 n.1 (D.C. Cir. 2015); *Humane Socy. of U.S. v. Perdue*, 290 F. Supp. 3d 5, 7 (D.D.C. 2018), *amended in part sub nom. Humane Socy. of U.S. v. Vilsack*, CV 12-1582 (ABJ), 2018 WL 1964305 (D.D.C. Apr. 16, 2018)(enjoining arbitrary and capricious pork checkoff expenditures).

[9] In its opening Summary Judgment submission filed in August 2017, Defendant for the first time asserted that the Beef Board was a "private" submitter of business information that was claiming confidentiality for its records. ECF No. 62-1, p. 26. Plaintiffs promptly expressed an intent to challenge that position. *See* ECF No. 64, pp. 1-2; ECF No. 74, p. 2. Six months later, days before the second briefing schedule deadline, Defendant decided without explanation to drop its Exemption 4 claims for Beef Board records, which resulted in the most recent delay to this third summary judgment briefing schedule.

OCM is concerned about government contracts and proper use of funds in the federal beef checkoff program. Indeed, even OIG recommended that USDA "take additional steps to enhance assurance in the program by strengthening transparency over the use of funds overall." *Agricultural Marketing Service Oversight of the Beef Promotion and Research Board's Activities*, OIG Audit Report 01099-0001-21, January 2014,, p. 8.

Many of OCM's members are producers who must pay the mandatory assessments that fund the federal beef program, have long had concerns about improper checkoff activity and spending, and look to FOIA as a primary safeguard to bring transparency and accountability to this massively funded federal program:

> In perhaps no sphere of governmental activity would [FOIA's] purpose appear to be more important than in the matter of government contracting.

Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 41 (D.D.C. 1997).

The FOIA request in this case has not sought proprietary business models or secret methods for revolutionizing food promotion, but only FOIA's clarity as a mechanism to assure federal checkoff funds are not being spent on Rolex watches or First Class air travel or state and federal lobbying. FOIA is the only mechanism by which producers and the public generally can directly understand how the program is operated and funding expended, to know if funds are being spent properly and to stop any instances where they are not.

The focus of the OIG audit was on the checkoff program and reviewed checkoff expenditures to ensure that AMS's administration of the checkoff program is complaint with the law. Thus, the instant FOIA request is focused on transparency and accountability as to legally mandated oversight of government contracting and expenditures. NCBA has stated it maintains a financial firewall between its checkoff-funded and privately funded divisions by "using accounting codes, separate bank accounts, policies, and responsible officials." OIG Audit Report 01099-0001-

21, p. 3. Given this strict level of segregation of checkoff and private business records, it is difficult to imagine how OIG and NCBA can make such extensive claims of confidentiality for records relating only to its publicly funded division. It is simply not a proper use of Exemption 4 to so broadly conceal checkoff financial records as Defendant and Intervenor attempt to do here.

A. Checkoff records provided to OIG for program audit are lawfully compelled, not voluntary.

In this Circuit, whether information is "confidential" under FOIA Exemption 4 turns first on the question whether the information was provided to the Government on a "voluntary basis" or "under compulsion." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993). Where the Government requires the information to be submitted, it must be released under FOIA unless its disclosure is likely either to (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1975). In this case, OIG initiated an audit of AMS and the Beef Checkoff program, including review of contractor services and expenditures. The withheld checkoff records were "requested"[10] by OIG in order to conduct that audit. In such circumstances, *National Parks* governs the release of FOIA materials.

Nonetheless, Defendant and Intervenor argue submission of these mandatory checkoff accounting records to OIG for its audit was done voluntarily and that the more favorable test for

[10] Defendant did not submit an index of exhibits with its summary judgment submissions. It appears that the business submitter declarations relevant to the Exemption 4 issue appear at ECF No. 88-9 through 88-17, all of which acknowledge that OIG initiated the request for the checkoff-related records as part of its audit.

submitters announced in *Critical Mass* should apply. Def. Mem. at 29, ECF No. 86-1; Int. Mem. at 28, ECF No. 85-1. They are wrong.

The question of whether information is submitted mandatorily or voluntarily is an objective one, and its resolution does not depend on whether a submitter happens to provide the information in advance of a request, or subpoena or other demand: "actual legal authority [to compel disclosure], rather than parties' beliefs or intentions, governs judicial assessments of the character of submissions." *Ctr. for Auto Safety v. Nat'l Hwy. Traffic Safety Admin.*, 244 F.3d 144, 149 (D.C. Cir. 2001); *Frank LLP v. Consumer Fin. Protec. Bureau*, 288 F. Supp. 3d 46, 60 (D.D.C. 2017). The purpose behind the two standards is also helpful to explain why *National Parks* is the appropriate standard here. Where the government has power to compel submission of the information, its future access to information is not at risk. In such situations, FOIA's strong policy in favor of disclosure dictates that only "substantial competitive harm" to the submitter may be considered, as stated in *National Parks*.

On the other hand, where the government cannot compel submission of private business information that might be useful to it, a more favorable test for businesses is necessary in order to encourage voluntary submission of information the government couldn't otherwise obtain. *See Frank LLP*, 288 F. Supp. 3d at 60 (discussing the two standards and the purposes behind them).

The materials at issue in this case fall squarely in the mandatory camp. The Beef Act requires financial records to "account for receipt and disbursement" all funds "entrusted" to the program by the producers funding it. 7 U.S.C. § 2904(7). *Contractors* for checkoff funds must "keep accurate records of all of its transactions, account for funds received and expended" and make reports of such activity available as the Secretary may require. *Id.* at (6). The financial

records at issue in this case are precisely those which the Beef Act requires all checkoff contractors to keep and make available for the Secretary's review.

As for OIG's authority to obtain the materials, there can be no doubt. Section 6(a)(4) of the Inspector General Act provides authority "to require by subpoena the production of all information, documents, reports, answers, records, accounts, appears, and other data in any medium (including electronically stored information), as well as any tangible thing and documentary evidence necessary in the performance of the functions assigned by this Act." 5 U.S.C. app. 3 § 6(a)(4). This subpoena power is not limited to government entities, but may be exercised upon federal contractors or any other entity in possession of such material. *See U.S. v. Inst. for College Access & Success*, 27 F. Supp. 3d 106, 112 (D.D.C. 2014).

But even without the OIG's broad subpoena power to obtain the records directly from non-government entities, the materials at issue would still be mandatorily available to OIG though the Beef Act's requirement that complete accounting for all checkoff funds be kept and made available to the Secretary. The Secretary's authority to make all checkoff records available combines with the Secretary's duty to fully cooperate and provide "all possible assistance" to OIG during audits, including by providing all records relating to matters under review. USDA Departmental Regulation 1700-2, Secs. 3, 5.

As "the relevant question is whether the [government] has 'actual legal authority' to obtain the information that was produced," OIG's obligation to compel, and its multiple means of compelling, production of checkoff financial records as part of its auditing function dictates *National Parks* is the correct standard. *Frank LLP v. Consumer Fin. Protec. Bureau*, 288 F. Supp. 3d at 61 (citing *Ctr. For Auto Safety*, 244 F.3d at 149); *see also Niagara Mohawk Power Corp. v. U.S. Dept. of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999). Defendant and Intervenor's

characterization of government contractors "voluntarily" providing records of their receipt and handling of federal checkoff dollars "would be out of step with the underlying thrust of FOIA" and illogical in light of the reasons for the two standards.[11] *Frank LLP v. Consumer Fin. Protec. Bureau*, 288 F. Supp. 3d at 62 (finding that Exemption 4 does not permit the government to treat information produced in response to a government request as voluntary where the government had power to compel the production).

B. Claims of substantial competitive harm from disclosure are not adequately supported or supportable

Defendant and Intervenor's declarations make dire predictions of competitive harm should records of federal checkoff expenditures be disclosed. All echo the same formulaic statement that competitors would be able to discover their pricing and undercut them for future bids. *See, for example, Vaughn* index entries, ECF No. 88-33, 88-34. But "[c]onclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983), quoting *Pacific Architects & Engineers, Inc. v. Renegotiation Board*, 505 F.2d 383, 384-385 (D.C. Cir. 1974). In fact, a general rule of federal contracting is that "[d]isclosure of prices charged the Government is a cost of doing business with the Government." *Racal-Milgo Gov't Systems v. Small Business Administration*, 559 F. Supp. 4, 6 (D.D.C. 1981). Whether it be the producers who fund the federal checkoff program, the public

[11] As a policy matter, the premise that OIG is dependent on the voluntary cooperation of government contractors providing accounting records for federal dollars raises concerns about OIG's ability to objectively fulfill its mission to protect against improper use of government funds. If OIG had to "play nice" with contractors in order to review their federal expenditures, it's hard to imagine how OIG could ever make a finding of misuse of funds without jeopardizing future "voluntary" contractor cooperation.

generally, or even potential competitors, FOIA fosters true transparency by requiring disclosure of records accounting for government contracts:

> The public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and, indeed, even to learn how to be more effective competitors in the future.

Martin Marietta Corp. v. Dalton, 974 F. Supp. at 41. Yet Defendant and Intervenor have withheld *nearly the entirety* of the checkoff financial records at issue in this case. *See, for example, Vaughn* index entries, ECF No. 88-33, 88-34; *see also* AMS letter, ECF No. 88-24 (releasing in full just 143 of 12,341 checkoff-related financial records; withholding in full more than 12,000).

Conspicuously lacking from Defendant and NCBA's claims of competitive harm from disclosure is an examination of the real-world structure and historical data from the beef checkoff contracting process. NCBA is the perennial primary contractor to the federal beef checkoff, receiving the vast majority of the government contracts in excess of tens of millions of federal checkoff funds every year. *See* OIG Audit Report 01099-0001-21, pp. 2-3. NCBA's Federation division receives 98.6% of its revenues from federal checkoff dollars, which itself comprises 82% of the organization's total funding. *Id.*

And there is a reason NCBA receives so much more of the beef checkoff contract dollars each year than anyone else: it has the voting power to control contract awards. Although the Secretary makes final approval decisions on contract recommendations, only contracts recommended by the Beef Promotion Operating Committee are presented for the Secretary's consideration. 7 U.S.C. § 2904. Testimony from an AMS official responsible for checkoff oversight confirmed that no beef checkoff "money can be spent without the positive support of at least 14 members of the Beef Operating Committee." Testimony of Barry Carpenter, Deputy Administrator of the Livestock and Seed Program of the AMS, Joint Appendix, Vol. 2, p. 294,

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005). What's important about that number is that 10 of the 20 members of the Operating Committee are held by NCBA's own Federation Division.[12] *Id.* at 293; *see also* 7 U.S.C. § 2904. According to Carpenter, before a beef checkoff spending decision can be approved by the Secretary, it has to make it out of the Operating Committee. *Id.* "If it doesn't survive there it doesn't make it." *Id.*

The undeniable practical import of this structure is that NCBA holds enough checkoff contract award votes to prevent *any* competitive harm at all from a release of checkoff receipt and disbursement records, let alone substantial competitive harm. There are understandable public concerns about an organization possessing a voting lock on a committee that awards federal contracts that the organization itself bids on,[13] but as a purely legal matter such a structure eliminates entirely any legitimate claim of substantial competitive harm from the release of spending records.

This structural monopoly on checkoff contracts all but ignored in Defendant's brief. NCBA's brief doesn't even mention its controlling voting lock on the Operating Committee when describing the checkoff contract award structure. Int. Mem. at 13, ECF No. 87-1. AMS submitted a declaration baldly stating that competition is "fierce" among the organizations competing for contracts, but provided zero details to substantiate that. Brook Decl. ¶ 99, ECF No. 88-7. NCBA argued that because of the "fierce" competition, "NCBA's share of BPOC contract dollars

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[12] *See also*, 2001 testimony of Monte Reese, Chief Operating Officer of the Beef Board:
Q: So when anyone says the Federation, they're really talking about a division of the NCBA?
A: That's correct.
Joint Appendix, Vol. 2, p. 236, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

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

fluctuates from year-to-year." Def. Memo at 13, ECF No. 87-1 (citing to Evans Declaration, but omitting rest of the sentence that admits "NCBA has received a majority of the total contracts awarded each year"). It's unclear why or by how much NCBA's share fluctuates each year, but if last year's figures are a good approximation, NCBA's checkoff contracts totaled nearly $50 million.[14] And the total of all other domestic contractors combined was less than $3 million. *Id.* Even if we could take the "fierce competition" or "fluctuation" claims seriously in light of the jaw-dropping actual figures, there's still no explanation of how there can be a risk of substantial competitive harm when NCBA is in a position to control the voting outcome of any contract bid. For purposes of Exemption 4, that ends the inquiry.

NCBA also improperly and inaccurately seeks to have this Court base its decision on disparaging claims about OCM, including false characterizations of its actions, and even an assertion that OCM is a marketplace competitor (despite never having bid for a contract). *See, for example*, Int. Mem. at 2-5, 8-10, 39-41; ECF No. 87-1. This type of personal attack is neither appropriate nor relevant to a FOIA case. FOIA is blind to its requestor, its driving purpose being to serve an informed public confidence in its government. "As a general rule, if the information is subject to disclosure, it belongs to all." *Natl. Archives and Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004).[15]

Moreover, OCM isn't speculating as to some imagined or non-existent problem. Both OIG and GAO have said these programs have transparency problems. There's also clear evidence of

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[14] 2018 Beef Checkoff Authorization Requests, http://www.beefboard.org/producer/170630-FY-2018-Authorization-Requests-Final.asp

[15] Perhaps needless to say, OCM disagrees with NCBA's specific disparagements as to its actions and intentions. Because these are irrelevant to resolving any legal issues in the case, OCM declines to address them in the context of summary judgment briefing.

concern about "vulnerability" of checkoff funds, which many of OCM's members pay, because of AMS' failure to address previously identified problems, as noted in the 2010 independent audit, which resulted in return of over $200,000 to the for legitimate spending. *See* OIG Audit Report 01099-0001-21, p.4. Exemption 4 may not be employed to avoid the fallout from shining a light on potential vulnerability, misspending, or other problems in the federal checkoff program.

"In other words, Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury." *United Techs. Corp. v. U.S. Dept. of Def.*, 601 F.3d 557, 563–64 (D.C. Cir. 2010); *see also CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 & n. 158 (D.C. Cir. 1987); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341-42 (D.C.Cir.1989)(desire to avoid embarrassment and reputational damage is irrelevant to substantial competitive harm determination); *Pub. Citizen,* 704 F.2d at 1291 n. 30 ("injury to competitive position, as might flow ... from the embarrassing publicity attendant upon public revelations" is not substantial competitive harm)(internal quotation omitted).

C. Boilerplate Declarations and Vaughn entries are Insufficient

Of the volume of declarations submitted by Defendant and Intervenor, none supply the type of information required to sustain claims for withholding checkoff accounting records under Exemption 4. *See* ECF Nos. 88-9 – 88-17 (Declarations); ECF Nos. 88-33, 88-34 (Exemption 4 Vaughn index). Not surprisingly they all make 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. It is the type of generic claim of harm that could be made in any Exemption 4 case. Rather than addressing each individually, Plaintiff will focus on several fatal deficiencies they share.

First, there is a well-established rule that declarations are insufficient if they "are conclusory, merely reciting statutory standards, or if they are too vague or sweeping.'" *In Def. of Animals v. U.S. Dep't of Agric.,* 501 F.Supp.2d 1, 5–8 (D.D.C. 2007). FOIA "imposes a substantial burden on an agency seeking to avoid disclosure, and an agency may not rely on "conclusory and generalized allegations of exemption." *Vaughn v. Rosen*, 484 F.2d 820, 826, 828 (D.C. Cir. 1973).

The declarations and *Vaughns* in this case are replete with buzzwords, like "reverse-engineer" and "underbid" and expose "purchase activity" and so on, but they all lack meaningful substance.[16] The declaration template here is very similar to the one rejected in *Biles v. HHS*:

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

931 F.Supp.2d 211, 223 (2013). These buzzword arguments were insufficient to meet the agency's burden of proof in *Biles*, as "mere observations that disclosure will provide 'insight' into certain types of information fail to show *how* such 'insight' creates a likelihood of actual and substantial competitive harm." *Id.*

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[16] By way of example, the following excerpt appears in the justification box of virtually *every page* of the Exemption 4 *Vaughn* entries at ECF No. 88-34:

> Competitors would gain detailed knowledge of NCBA's business operations, strategies, relationships and/or financial condition. Competitors would learn about NCBA's business structure and practices and be able to copy them with little investment. Competitors could also use this information to tailor their bids and underbid NCBA as they compete for contracts. There is no segregable material and redactions would render the document meaningless.

The second problem with the declarations and *Vaughn* submissions relating to these records is segregability. None of the declarations or *Vaughns* explain why records relating to checkoff-contracted services cannot be separated from non-checkoff business records. Since the Beef Act requires recordkeeping for all receipts and disbursements of checkoff funds, and requires that such accounting be available to USDA, why is there no ability to segregate and produce those same records that the Secretary has authority to require?[17] *See* 7 U.S.C. § 2904. OIG was auditing the federal beef checkoff program and requested the records at issue in order to review checkoff-funded activities. *See* OIG Audit Report, 01099-0001-21, p. 10. OIG stated in the audit report that the Beef Board required contractors to maintain records for three years and that OIG collected 19,018 transactions "pertaining to beef board checkoff funds." *Id.* If there truly is private business information in the withheld records, Defendant's burden is to establish that with specificity as to each segregable portion deemed exempt, and to release the rest.

The burden is "on the agency to prove that no segregable information exists." *Wilderness Soc'y v. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004). Blanket declarations are insufficient. *Id.*; *see also Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 257 (D.D.C. 2004)(the mere assertion that "allegedly privileged material is so intertwined with the non-privileged material that it cannot be segregated, without demonstrating that this is indeed the case" is inadequate); *Mead Data*, 566 F.2d at 261(agencies must "provide the reasons" for claiming information is not segregable in "order that they may be challenged by FOIA plaintiffs and reviewed by the courts").

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

D. Even if submission of the financial records was voluntary, OIG's claims of privilege to prevent disclosure of federal expenditures would still fail.

Under *Critical Mass*, if information is provided to the Government voluntarily, it is only exempt from release from Exemption 4 where the submitter can show that it would not ordinarily release the information to the public. 975 F.2d at 879. But the only records at issue here are those relating to the use of federal funds. As noted above, checkoff contractors are required to keep these records and to make them available to the Secretary. They are mandatorily retained, producible records accounting for the receipt and disbursement of funds pursuant to federal contract.

Revisiting the underlying purpose of the *Critical Mass* test (*see* p. 26, *infra*) is again illuminative here. The test is more favorable to submitters, but only for the purpose of encouraging businesses to voluntarily submit information that the government otherwise couldn't obtain. Because producing the records at issue here to a government entity (USDA-AMS) is a requirement for securing Beef Board contracts, and because NCBA's receipt of beef checkoff funds through such contracts is essential to its very existence (more than 80% of its annual budget comes from checkoff contracts), there can be no legitimate argument that the exemption is needed here to encourage NCBA to continue to submit such information to USDA in the future.

III. Defendant's Categorical Exemption 6 Decision is not Supported

Defendant invokes Exemption 6 to withhold the names of certain public employees at an arbitrarily selected federal grade level, and does so based on an improper (and incorrect) purpose. *See* Def. Mem. at 11-14. OIG suggests that the claimed privacy interest arises from OCM's belief that the audit might not have been handled properly and that workers might be subjected to harassment if their names were disclosed. *Id.* Defendant is misguided about both Plaintiff's interest

in FOIA scrutiny of beef checkoff administration activities, and with respect to its interpretation of the statute.

As discussed above, OCM is seeking the records (requested more than 5 *years ago* now) to further its efforts toward ensuring transparency in federal checkoff programs. Indeed, both GAO and OIG have stated greater transparency in checkoff programs are exactly what is needed. Moreover, the text of Exemption 6 does not apply to an invasion of privacy produced *as a secondary effect* of the release. Public debate and consequent public speculation as to the effectiveness of administration and oversight of government programs that may be triggered by the release of records, is not the sort of invasion of privacy that can support an Exemption 6 claim. According to the 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); s*ee Arieff v. U.S. Dept. of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983).

Nevertheless, if it will expedite resolution of this long delayed matter, plaintiff is willing to accept title, posting, and job grade for lower level employees in lieu of specific names. The problem with this program is not the hard-working staff employees doing their assigned jobs within the agency. The problem is a longstanding track-record of political interference and misconduct that has kept these employees from carrying out their statutory duties in accordance with the federal checkoff act, the OIG act, and the FOIA.

CONCLUSION

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

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Respectfully submitted,

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