UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RUSSELL MOKHIBER,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 01-1974 (EGS/JMF)
v.	)	
	)	
U.S. DEPARTMENT OF THE TREASURY,	)	
	)	
Defendant.	)	

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CR0SS-MOTION FOR SUMMARY JUDGMENT

Plaintiff is entitled to summary judgment in this action because the government cannot establish specific elements that are essential to its claims that the information it is withholding is exempt from disclosure under Exemptions 5, 2 and 7(C) of the Freedom of Information Act ("FOIA"). Where the government fails to prove an essential element of its claim, other facts it offers to justify withholding the records are "immaterial" and summary judgment against the government is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The Department of Treasury's opposition and cross-motion for summary judgment miss the mark because they focus almost exclusively on issues other than the critical elements that Plaintiff has identified. For example, the Department stresses that the memoranda that it has redacted based on the deliberative process privilege contain recommendations, but the law makes clear that such recommendations may not be withheld where, as here, they appear in the documents that set forth the agency's final decision. The Department's claim that the documents may be withheld because they were "not shared with the settling party" is equally misplaced because information received from the settling party is not privileged, regardless of whether the document in which the information appears has been shared with that party. Finally, the

Department makes policy arguments for why it should be permitted to withhold the information that it has redacted under Exemptions 7(C) and 2, but fails to address key statutory language that limits Exemption 7(C) to disclosures that invade "*personal* privacy" and limits Exemption 2 to information related to "internal *personnel* rules and practices." 5 U.S.C. § 552(b)(2), (7)(C) (italics added). As discussed below, none of the Department's arguments cure the fatal defects identified in Plaintiffs' Motion for Summary Judgment. Because the government has failed to sustain its burden of proof, summary judgment should be entered for Plaintiff. See Public Citizen Health Research Group v. FDA, 185 F.3d 898, 904-05 (D.C. Cir. 1999).

ARGUMENT

I. THE DEPARTMENT HAS FAILED TO SHOW THAT THE REDACTED INFORMATION IS COVERED BY THE DELIBERATIVE PROCESS PRIVILEGE.

A. Recommendations in Memoranda Adopted By The Agency Director Are Not Privileged.

The records in which the Department has asserted the deliberative process privilege, including the "Settlement Memoranda" addressed to the Director of the Office of Foreign Asset Control ("OFAC"), represent OFAC's final decision on settlement of the regulatory violations identified in these records. FOIA expressly provides that the public is entitled to disclosure of the agency's rationale for such decisions. 5 U.S.C. § 552(a)(2). Moreover, the courts have held that, even if such documents contain recommendations, they are not privileged when the "predecisional" recommendation is "adopted, formally or informally, as the agency position on an issue." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Bristol-Meyers Co. v. FTC, 598 F.2d 18, 24 (D.C. Cir. 1978).

In defending its deliberative process claim, the Department focuses on two considerations that are irrelevant to Plaintiffs' challenge. First, the Department argues that "the primary question" is whether the "redacted information is deliberative" and argues that its claims are proper because the information that it has the redacted consist of "candid advice to a superior with respect to the disposition of particular civil penalty matters." Defendant's Memorandum at 4. There is no dispute that some of the redacted material contains recommendations and advice, but the case law makes clear that these sections of the documents are no longer privileged when the recommendation becomes the record of the agency's final decision. See NLRB v. Sears, Roebuck & Co., 421 U. S. 132, 161 (1975). This Court need not determine whether all the redacted portions of the records were "pre-decisional" and "deliberative" before they were endorsed as the agency's position on settlement because, once these documents were signed as the agency's final decision, any recommendations in the documents ceased to be pre-decisional. See Id.; Bristol-Meyers Co., 598 F.2d at 24; Ashfar v. Department of State, 702 F.2d 1125, 1139-40 (D.C. Cir. 1983).

Second, the Department argues that the settlement memoranda are not privileged, even if they set forth the agency's final decision, because they "are not precedential and do not constitute the 'working law' of OFAC." Defendant's Memorandum at 6 n.3. However, the rule that agency decisions may not be withheld as "deliberative" is not limited to decisions that are "precedential" or working law. FOIA provides that *all* agency opinions and orders must be disclosed; it does not allow an agency to keep its actions or reasoning secret by asserting that its orders should not be considered precedential or that the reasons given in those orders do not necessarily reflect the agency's view of the law. See Ashfar, 702 F.2d at 1141-42 (rejecting argument that Sears only requires disclosure of "working law"); National Prison Project of

American Civil Liberties Union Foundation, Inc. v. Sigler, 390 F. Supp. 789, 793 (D.D.C. 1975) (wording of FOIA is "too straightforward and unambiguous" to accept government argument that disclosure should be limited to opinions deemed precedential); cf. Tax Analysts and Advocates v. Internal Revenue Service, 362 F. Supp. 1298, 1303-04 (D.D.C. 1973), modified on other grounds, 505 F.2d 350 (D.C. Cir. 1974) (rejecting argument that disclosure obligation is limited to precedent setting agency interpretations).

The pivotal fact showing that the Department has improperly invoked the deliberative process privilege is that the Director of OFAC records his final decision by initialing the recommendations and adding "OK." See, e.g., Mokhiber Decl., Exhibits, pp. 3, 10. The Director's declaration confirms that memoranda with this notation are no longer pre-decisional:

> . . . If I agree with my staff, I write "OK" in the margin of the memorandum and instruct my staff to accept the amount stated and terminate the proceeding.
>
> 11. There are many different reasons I might choose to settle a civil penalty matter. When I indicate "OK" at the bottom of a settlement memorandum, I am simply concurring in the recommendation of the Civil Penalties Division (described in the proceeding paragraphs) and giving my approval to accept a particular sum of money to settle the allegations of sanctions violations, weighing the various factors involved.

Declaration of R. Richard Newcomb ¶¶ 10, 11. Consequently, the memoranda with the Director's endorsement must be disclosed under the rule that agencies must "disclose all documents that are agency final opinions, even if they are inter- or intra-agency memoranda." Rockwell International Corp. v. United States Department of Justice, 235 F.3d 598, 602 (D.C. Cir. 2001).

Indeed, the Department does not dispute that the redacted information includes the only statement of the agency's reasons for its decision in the settlements that the Director authorizes by endorsing the Settlement Memoranda. The Director does not author a separate document

setting forth his reasons and decision but, instead, adopts the document written by his staff. See Newcomb Decl. ¶ 10. Where agency officials make final decisions in this manner, the records must be disclosed because of the public interest "in knowing the reasons for a policy actually adopted by an agency." Bristol-Meyers Co. v. FTC, 598 F.2d at 24.

Because FOIA places the burden of proof for this claim on the Department, it may withhold portions of these decisions only if it can show that the portion that it is withholding was rejected by the Director. The Department has offered no such proof. Instead, the agency asserts that the Directors' endorsement does not signify adoption "of all or any of the deliberative analysis." Defendant's Memorandum at 6. The Department's evidence, however, does not support this statement. The Director's declaration contains an equivocal statement that, "I do not *necessarily* endorse all or any of the substantive points made in the memorandum or in the commentary provided by other OFAC staff." Newcomb Decl. ¶ 11 (italics added). This statement is tantamount to stating that the Director is not revealing whether he endorsed all or any points in the memoranda, and does not satisfy the Department's burden of proving that none of the information that it has redacted was adopted when the Director authorized the recommended settlement. Moreover, this statement does not nullify the Director's earlier acknowledgment that the notations terminate the proceeding by signaling his concurrence in result recommended in the Settlement Memorandum.

B. Offers from Settling Parties and Information Shared With Settling Parties Are Not Covered By The Deliberative Process Privilege.

As noted in Plaintiffs' Motion for Summary Judgment, the information that the Department has withheld under Exemption 5 includes the section of the memoranda that describe the settlement offers that corporations presented to OFAC. See Mokhiber Decl., Exhibits, pp. 5, 7, 10, 11, 13, 15, 16, 17. These redactions are inconsistent with decisions that recognize that

Exemption 5 may not be used to withhold communications received from non-governmental entities in the course of settlement discussions and similar interactions. See Plaintiffs' Motion at 10-11 (citing cases).

The Department's Memorandum dismisses this issue in a single paragraph that asserts that such information may be withheld as long as the document in which it appears "is not disclosed to the settling party." Defendant's Memorandum at 5. This assertion is incorrect. A statement in an agency memorandum that corporation X proposed to settle potential charges for $10,000, or a description of what the agency said to the corporation in response to such an offer, is not privileged -- even if the agency memorandum was not disclosed to the corporation. Such communications are not privileged because they are external exchanges between the agency and a potential adversary, not internal deliberations.

Indeed, the Court of Appeals has squarely held that the portion of an internal agency document that describes an agency's exchanges with a private party during negotiations may not be withheld under Exemption 5. In Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242 (D.C. Cir. 1977), the Air Force claimed that internal documents concerning negotiations with West Publishing were properly withheld under the attorney-client and deliberative process privileges. The Court of Appeals rejected these claims for the portions of the documents that described offers and counter-offers between West and the agency because such communications were not confidential under the attorney-client privilege, id. at 255, and were not covered by the deliberative process privilege if the description of the offers and counteroffers was segregable from the agency's internal evaluation of the offers. Id. at 257 & n.43. In a subsequent decision, the Court of Appeals reaffirmed that " a document merely summarizing the offers and counteroffers made by each side during negotiations" is not

protected by the privilege because disclosure of the agency's communications with the private party does not impair the candid exchange of ideas within the agency. Senate of the Commonwealth of Puerto Rico Judiciary Committee v. United States Department of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987). Accordingly, subsequent decisions have rejected Exemption 5 claims for information describing negotiations with a private party because "factual information about negotiations between an agency and an outside party does not" fall within the deliberative process privilege. Greenberg v. United States Department of Treasury, 10 F. Supp. 2d 3, 17 (D.D.C. 1998). These decisions foreclose the Department's claim that it may properly withhold offers, counter-offers, and other factual information about OFAC's settlements under the deliberative process privilege.

C. The Department Has Not Disclosed Segregable Factual Information In The Records.

The third flaw in the Department's Exemption 5 claim is that, even if there are portions of the documents that are not subject to disclosure because they have been adopted as the agency's final decision, the agency must prove that it has disclosed all segregable factual information. See Army Times Publishing Co. v. Department of Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993). The Department asserts that this burden is satisfied because (1) "each individual settlement memorandum is no longer than two pages in length," and (2) the Director's declaration states that any facts are "inextricably intertwined" with deliberative analysis. Defendant's Memorandum at 7-8. Neither the length of the documents nor the declaration satisfy the agency's burden.

First, length of the memoranda do not demonstrate that the factual material being withheld is not segregable because a one or two page document may contain many paragraphs or sentences that state facts without revealing deliberations. For example, the Department's

practice of withholding the section of the memoranda that describes the corporation's offers to OFAC demonstrates that segregable portions are being withheld. The settlement memoranda are divided into several discrete sections. See Mokhiber Decl., Exhibits pp. 5, 7. As a result, the portion of the memorandum described as the "Recommendation" is always separate from the portion that describes the corporation's offer and separate from the portions that list mitigating or aggravating factors. The description of the offer – which is generally no more than one or two lines of each memoranda – is segregable factual information. Similarly, the length of the memoranda provide no proof that every item or sentence in the lists of aggravating and mitigating factors reveals agency deliberations.

Second, a conclusory statement that the facts in a document are inextricably intertwined with agency deliberations does not satisfy the agency's burden. See Krikorian v. Department of State, 984 F.2d 461, 467 (D.C. Cir. 1993). The agency must provide sufficient details to allow the court and the plaintiff to evaluate its claim, including a statement of the reasons for its conclusion that the factual information is not segregable and a description of "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." Mead Data Central, 566 F.2d at 261. An agency's declaration is inadequate if it simply asserts that additional information cannot be released and does not "describe the process by which it determined that all reasonably segregable material had been released or state why some materials are not reasonably segregable." Rugiero v. United States Department of Justice, 257 F.3d 534, 553 (6th Cir. 2001).

The Director's declaration is inadequate to satisfy this test. The only portion of the declaration that addresses segregability is a conclusory statement that facts are "inextricably interwined" without any explanation of the basis for this conclusion. This wholesale statement

also fails to distinguish between the specific sections of these multi-section memoranda and fails to explain why the Department maintains that information is not segregable. See Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (agency affidavit must correlate claims with particular passages of the withheld documents to which they apply). Moreover, nothing in the declaration indicates that the Director's statements are based on his personal knowledge, as Federal Rule of Evidence 56(e) requires. See Londrigan v. Federal Bureau of Investigation, 670 F.2d 1164, 1174-75 (D.C. Cir. 1981). Finally, the Director's statement must be based on an erroneous standard for assessing what must be disclosed because the sections of the memoranda that describe corporate offers are not deliberative or "inextricably intertwined" with deliberative analysis. Because the Director has erroneously asserted that this information is properly withheld, his statement is not reliable basis for concluding that the agency has properly disclosed the factual information in any portion of the documents.

II. THE DEPARTMENT'S EXEMPTION 2 CLAIM SHOULD BE REJECTED BECAUSE THE NUMBERS IT IS WITHHOLDING DO NOT RELATE TO INTERNAL PERSONNEL RULES AND PRACTICES.

The Department acknowledges that, to sustain its claim that Exemption 2 of the FOIA covers OFAC's tracking numbers, "the material withheld should fall within the terms of the statutory language as a personnel rule or internal agency practice of the agency." Defendant's Memorandum at 8. If this threshold requirement is not met, other considerations – including those that the Department discusses at some length in its Memorandum – are immaterial.

The tracking numbers at issue here are not covered by the statutory language. The tracking numbers at issue are used by OFAC to track correspondence, investigations, license files and civil penalty matters. Newcomb Declaration ¶ 17. The Department asserts that Exemption 2 is satisfied because the manner in which OFAC assigns tracking numbers "is

plainly an internal agency practice." Defendant's Memorandum at 10-11. However, the statutory language limits Exemption 2 to information related to "internal *personnel* rules and practices." 5 U.S.C. § 552(b)(2) (italics added). The District of Columbia Circuit and every other circuit court that has ruled on the issue has held that "personnel" modifies both rules and practices. See Jordan v. United States Department of Justice, 591 F.2d 753, 764 (D.C. Cir. 1978); Abraham & Rose v. United States, 138 F.3d 1075, 1080 (6th Cir. 1998). The Department makes no claim, and offers no evidence, that these numbers relate to personnel rules or practices. Because this threshold requirement is not satisfied, the Department's arguments that the Court must evaluate the public interest in disclosure or weigh it against the risk that the numbers will be misused, Defendant's Memorandum at 9-10, are irrelevant because these considerations only arise if the agency has first shown that the information falls within the terms of the statutory language. See Schwaner v. Department of Air Force, 898 F. 2d 793, 794 (D.C. Cir. 1990). [1]

III. THE DEPARTMENT'S REDACTION OF THE NAMES OF CORPORATE FUNCTIONARIES IS IMPROPER BECAUSE DISCLOSURE OF A CORPORATE AFFILIATION DOES NOT INVADE PERSONAL PRIVACY.

The Department's defense of its Exemption 7(C) claim ignores the critical issue raised by Plaintiff's Motion, namely that this Exemption is limited to invasions of *personal* privacy and does not cover disclosures that reveal an individual's affiliation with a corporation or a business.

[1] The Department's argument that the disclosure of the numbers at issue here would risk circumvention of agency regulations is also not supported by the evidence that accompanies its motion. The Department is withholding numbers that are used to track several different types of materials. Newcomb Decl. ¶ 17. However, the only evidence that the Department presents to support its claim that agency regulations could be circumvented relates to registration and license numbers. Id. ¶ 18, 19. There is no evidence that other types of numbers that OFAC has withheld – such as numbers for incoming correspondence, outgoing correspondence, enforcement investigations, or civil penalties matters – could be used to circumvent any agency regulation.

There is no dispute that revealing the names that have been redacted would not identify these individuals as suspects in a criminal investigation. Newcomb Decl. ¶ 14. The names identify attorneys or corporate compliance officers who communicated with OFAC concerning settlement of charges of misconduct by a corporation. Id. Nothing in the records states or infers that these individuals are suspected of misconduct. Consequently, the Department's unsubstantiated assertion that disclosure of the names "would stigmatize these individuals," Defendant's Memorandum at 12, is far-fetched.

More importantly, the Department's assertion is irrelevant under the statute because the disclosure involves no invasion of personal privacy. As noted in Plaintiffs' Motion, courts evaluating claims under Exemptions 6 and 7(C), have repeatedly held that the disclosure that an individual is associated with a business involved in civil litigation or a enforcement proceedings does not invade any privacy interest. Plaintiffs' Motion at 14-15. For example, in Washington Post Co. v. United States Department of Justice, 863 F.2d 96 (D.C. Cir. 1988), the Court of Appeals concluded that Exemption 7(C) did not permit the government to withhold the names of corporate employees where the individuals were not identified as suspects in an investigation, but simply as employees of a corporation that is being investigated. Id. at 100-01. Indeed, the government itself has argued that information that embarrasses corporate officers may not be withheld under the FOIA's exemptions concerning personal privacy because any harm from such a disclosure does not relate to personal privacy. New York Times Co. v. NASA, 920 F.2d 1002, 1007 (D.C. Cir. 1990) (quoting government petition).

Because the Department acknowledges that these records do not identify the individuals as targets or witnesses in an investigation, its reliance on SafeCard Servs., Ins. v. SEC, 926 F.2d 1197, 1206 (1991), and cases applying the categorical rule described in SafeCard is misplaced.

SafeCard articulated a categorical rule in the context of law enforcement records that name private individuals as targets or witnesses, and recognized that there is a general privacy interest in not being associated with an investigation in these contexts. See Nation Magazine v. United States Customs Service, 71 F.3d 885, 895-96 (D.C. Cir. 1995) (clarifying that SafeCard does not apply to all identification of individuals, but to disclosing the identity of individuals who are suspects, witnesses or informants in law enforcement investigations). This categorical rule is inapplicable where disclosure of the name would not identify the individual as a suspect or witness, but as the representative of a corporation. See, e.g., Washington Post Co., 863 F.2d at 100; Cohen v. EPA., 575 F. Supp. 425, 429-430 (D.D.C. 1993) (ordering disclosure of names of corporate representatives named in EPA notices).

CONCLUSION

The Department's Cross-Motion for Summary Judgment should be denied. The Court should enter summary judgment for Plaintiff and direct it to disclose the information that it has withheld in reliance on Exemptions 5, the numbers it has withheld relying on Exemption 2, and the names of corporate functionaries.

Respectfully submitted,

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December 13, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RUSSELL MOKHIBER,	)	
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Plaintiff,	)	
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U.S. DEPARTMENT OF THE TREASURY,	)	
	)	
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PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

Pursuant to LCvR 7.1(h), Plaintiff hereby submits the following response to Defendants' Statement of Material Facts As To Which There Is Not Genuine Dispute.

Plaintiff disputes the following portions of Defendant's Statement of Material Facts:

C Plaintiff disputes that the disclosure of the individual names for which OFAC has asserted an exemption could reasonably be expected to constitute an unwarranted invasion of personal privacy. The record does not show any invasion of personal privacy with respect to the individuals whose names appear in the records as agents for the corporations entering into settlements with OFAC.

C Plaintiff disputes the statement that "[a]ny facts embedded in these portions of the memoranda are so inextricably intertwined with deliberative analysis that they could not be reasonably segregated any further." The records show that factual information that is

not privileged (e.g., the offers by the settling parties) has been withheld even though it is not "inextricably intertwined" with deliberative analysis. In addition, the declaration cited to establish this fact (Newcomb Decl. ¶ 8) is conclusory.

Respectfully submitted,

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December 13, 2002

CERTIFICATE OF SERVICE

I, Michael E. Tankersley, hereby certify that on December 13, 2002, I caused copies of Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendant's Cross-motion for Summary Judgment, and Plaintiff's Response to Defendant's Statement of Material Facts to be served by delivering an electronic copy to the CM/ECF system for the District Court for the District of Columbia.

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