UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-409 (RCL)
	)	
OFFICE OF MANAGEMENT AND BUDGET,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This Freedom of Information Act (FOIA) case involves the Office of Management and Budget's (OMB's) withholding of records listing which agencies it permits to bypass its legislative and/or budgetary clearance processes, and of records explaining that an agency or agency can bypass one of those processes. OMB's legislative and budgetary clearance processes require agencies to submit draft legislation, reports, testimony, and budgetary materials to OMB before transmitting them to Congress.

The withheld records contain or explain OMB's policy concerning one of its primary roles. OMB's failure to disclose those records therefore violates FOIA's basic purpose of explaining how the government operates and shedding light on an agency's performance of its duties. FOIA, "properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (quotation marks and citations omitted).

OMB claims that these records are exempt as predecisional, deliberative materials and

internal practices whose disclosure would risk circumvention of law. However, it has not demonstrated that either of the exemptions it cites apply to the records at issue here, and neither exemption permits agencies to create and withhold secret law. The Court should deny defendant's motion for summary judgment, grant plaintiff's motion, and order OMB to release the requested records.

BACKGROUND

A. Legislative and Budgetary Clearance and Bypass

OMB operates a formal legislative clearance process to "assur[e] that agency legislative proposals and recommendations, as well as testimony, are consistent with [the President's] policies and programs." OMB Memorandum M-01-12, *Legislative Coordination and Clearance* (Feb. 15, 2001), available at http://www.whitehouse. gov/omb/memoranda/m01-12.html. Under the clearance process, federal agencies must submit proposed legislation, reports, and testimony to OMB before submitting them to Congress. *See* OMB Circular A-19, *Legislative Coordination and Clearance* (attached to the Declaration of Adina H. Rosenbaum (Rosenbaum Decl.) as Exhibit D). OMB then advises the agency whether or not the materials are in accord with or consistent with the President's program. *See id*. Attachment C. After receiving OMB's feedback, agencies must "incorporate the advice received from OMB in their reports and in their letters transmitting proposed legislation to Congress." *Id.* ¶ 8(c)(1). "In the case of proposed legislation, the originating agency shall not submit to Congress any proposal that OMB has advised is in conflict with the program of the President or has asked the agency to reconsider as a result of the coordination process." *Id*. ¶ 8(c)(3).

OMB operates a similar clearance process for budgetary materials, including budget

justifications and oversight materials, testimony and letters to congressional committees, written responses to congressional inquiries or other materials for the record, and materials responding to committee and subcommittee reporting requirements. These materials must be cleared by OMB before being transmitted to congressional committees, individual members of Congress, or congressional staff. Rosenbaum Decl. ¶ 7.

Both OMB Circular A-19, which contains legislative clearance requirements, and Circular A-1l, which contains budgetary clearance requirements, refer to the fact that some agencies may submit legislative and budgetary materials directly to Congress, without first clearing them with OMB. *See* Rosenbaum Decl. Exhibit D ¶ 4 (Circular A-19 stating that it applies to all executive branch agencies "except those agencies that are specifically required by law to transmit their legislative proposals, reports, or testimony to the Congress without prior clearance"); Rosenbaum Decl. ¶ 7 (noting that Circular A-11 states that OMB may provide additional materials where "statutory provisions exist for the direct submission of the agency budget request to the Congress"). However, neither circular lists which agencies can submit their materials directly to Congress. *See id*. ¶ 7 and Exhibit D.

B. Plaintiff's FOIA Request and the Agency's Response

Because OMB's circulars do not list which agencies can bypass the legislative and budgetary clearance processes, on December 8, 2006, Public Citizen sent OMB a FOIA request to learn its policy on which agencies can transmit records to Congress without first submitting them to OMB. Rosenbaum Decl. ¶ 2 and Exhibit A. In particular, Public Citizen requested:

> 1) All records listing agencies that may directly submit legislative proposals, reports, or testimony to Congress without receiving OMB clearance;
> 2) All records listing agencies that may directly submit budget-related materials to

> Congress without receiving OMB clearance; and
> 3) All records explaining that agencies or an agency may directly submit legislative or budget-related materials to Congress without receiving OMB clearance or providing statutory authority for agencies or an agency to directly submit legislative or budget-related materials to Congress without receiving OMB clearance.

Id.

On January 10, 2007, OMB denied Public Citizen's request. The denial letter stated that OMB had found two documents that were "potentially responsive" to the request, but that it had decided those records were exempt from disclosure under FOIA Exemptions 2 and 5, 5 U.S.C. §§ 552(b)(2) & (5). Declaration of James Jukes (Jukes Decl.) Exhibit B. Instead of releasing its policy on which agencies can bypass the legislative and budgetary clearance processes, OMB included in its letter a list of the statutes that address the direct submission of legislative materials and the agency concerned and a list of the statutes that address the direct submission of budgetary materials and the agency concerned. *Id*.

Public Citizen appealed OMB's denial, explaining that the responsive records could not be withheld under either Exemption 2 or Exemption 5. Rosenbaum Decl. Exhibit B. It also questioned the adequacy of OMB's search for responsive records, noting that it had requested "*any* record that explains that *any* agency can submit legislative or budget-related materials to Congress without receiving OMB clearance," and that it is "difficult to believe that an adequate search for records responsive to the request would turn up only two records relating to agencies being permitted to bypass the legislative or budgetary clearance process." *Id*. On February 26, 2007, OMB denied Public Citizen's appeal. Rosenbaum Decl. Exhibit C. Two days later, Public Citizen filed this lawsuit, seeking disclosure of the requested records.

C. The Withheld Records

In its *Vaughn* Index, filed with its motion for summary judgment on May 14, 2007, OMB now identifies 22 responsive records that it is withholding.[1] According to the *Vaughn* Index, 13 of the 14 records contain a one or two page (or both) memorandum from the OMB Assistant Director for Legislative Reference to OMB policy officials or OMB's legislative reference staff. *See Vaughn* Index ¶¶ 1, 3-14. The memorandum contains unspecified "information about Federal agencies with legislative and budget 'bypass' authorities." Attached to the memorandum is a longer memorandum providing background on bypass authorities, listing the agencies with bypass authority, describing the authority under which each agency can bypass the clearance process, and explaining the relationship between bypass authority and the Inspector General Act. *Id*. In other words, these 13 records contain a cover memorandum and longer memorandum describing and explaining OMB's policy on legislative and budgetary bypass. Included in this description of the policy are "the views and perspectives of OMB official's interpretations of the views of certain agencies regarding legislative clearance requirements." *Id*. The first record listed in the *Vaughn* Index, dated February 20, 2001, is the version of the memorandum that "currently appli[es] and [is] utilized by OMB employees," Jukes Decl. ¶ 17; the other 12 memoranda are "obsolete prior issuances" of the same memorandum. *Id.* ¶ 18.

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[1]In his declaration, James Jukes noted that he was not certain whether 20 of the withheld records were responsive to the request but that he added them to the *Vaughn* Index out of an "abundance of caution." Jukes Decl. ¶ 18; *see also* Def. Mem. at 18 (explaining how Mr. Jukes added the records to the *Vaughn* Index out of "an abundance of caution" and an "abundance of completeness and thoroughness"). Mr. Jukes's uncertainty of whether those records are responsive apparently stems from his description of them as being "out dated, superseded, or now obsolete." Jukes Decl. ¶ 18. Records 3-21, however, all explain that agencies or an agency may bypass the legislative clearance process, and are all therefore clearly responsive to the FOIA request.

A fourteenth record is a two-page record entitled "Agencies Exempt from the Legislative Clearance Process" that is part of a larger document on "OMB Roles and Responsibilities." *Vaughn* Index ¶ 2. The contents of this record are unspecified except that among them are "OMB official's characterizations and perspectives concerning certain agencies views regarding legislative clearance requirements applicable to their respective agencies." *Id*. This record "currently appli[es] and [is] utilized by OMB employees." Jukes Decl. ¶ 17.

Seven of the other eight records are letters from the OMB Deputy Director to officials at other agencies "discuss[ing] [the] agency's legislative authority to bypass OMB's mandatory review and provid[ing] his comments and perspectives on legislative coordination between that agency and OMB." *Vaughn* Index ¶¶ 14-21. The final record is a memorandum from another agency to OMB giving that agency's perspectives on OMB's review of that agency's draft testimony, and a handwritten note from OMB's counsel regarding those views. *Vaughn* Index ¶ 22. After reviewing OMB's *Vaughn* Index, Public Citizen has decided it is not interested in this final record and is not challenging OMB's failure to release it.

OMB still claims that all of the responsive records are exempt under FOIA Exemptions 2 and/or 5.

ARGUMENT

FOIA reflects the "strong policy" that "the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). Because it was designed "to open agency action to the light of public scrutiny," *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted), FOIA requires agency records to be disclosed unless they are subject to one of the limited exemptions provided in 5 U.S.C.

§ 552(b). These exemptions are construed narrowly and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*.

FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). To discharge this burden, "the agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Nat'l Cable Television Ass'n, Inc. v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973). The court gives no deference to the agency's reasoning for withholding the information and must decide *de novo* whether the exception applies. 5 U.S.C. § 552(a)(4)(B); *see also Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) ("[T]he agency's opinions carry no more weight than those of any other litigant in an adversarial contest before a court."). If the government does not "carry its burden of convincing the court that one of the statutory exemptions apply," the requested records must be disclosed. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

Here, OMB claims that some of the requested records are exempt under FOIA Exemption 2, which exempts records that are "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), and that all of the requested records are exempt under Exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). However, the withheld records are not predominantly internal, and they neither relate solely to trivial administrative matters nor would their release risk circumvention of any law or regulation. Accordingly, they cannot be withheld under Exemption 2. Moreover, the

records are not predecisional and deliberative and therefore cannot be withheld under the deliberative process privilege encompassed in Exemption 5. Summary judgment thus should be granted to Public Citizen, and the requested records should be released.

A. OMB Cannot Withhold Any of the Requested Records Under Exemption 2.

OMB invokes Exemption 2 to withhold the 13 records explaining and describing OMB's policy on legislative and budgetary bypass, *Vaughn* Index ¶¶ 1, 3-14, and the record entitled "Agencies Exempt from the Legislative Clearance Process." *Id*. ¶ 2. Records may be withheld under Exemption 2 if they are "predominantly internal," *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc), and if either "the material relates to trivial administrative matters of no genuine public interest," or "disclosure may risk circumvention of agency regulation." *Schwaner v. Dep't of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990) (citations omitted). OMB fails both parts of this test.

First, the withheld records fail "the threshold test of predominant internality." *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992).[2] Information cannot meet this test if it "regulate[s] the public" or "embod[ies] any 'secret law' of the agency." *Crooker,* 670 F.2d at 1073; *see also Dep't of Air Force v. Rose*, 425 U.S. 352, 369 (1976). Here, the memoranda issued by OMB listing which agencies can bypass the legislative and/or budgetary clearances processes and explaining the background and authority for those agencies having bypass rights do not relate

[2]In its memorandum, OMB stresses that it stamped ten of the documents "for OMB internal use only" and that it stated in its *Vaughn* Index that 14 of the documents contain "internal information." Def. Mem. at 24. OMB's conclusory use of the word "internal," however, does not provide useful information about the content of the records, nor does it demonstrate that either Exemption 2 or Exemption 5 applies. Similarly, that OMB has chosen to keep the records secret and has placed one of the records on its internal website does not demonstrate that the records are predominantly internal for Exemption 2 purposes.

solely (or even predominantly) to the "internal workings of an agency." *Crooker*, 670 F.2d at 1056. To the contrary, such information relates to what is required of *other* agencies. In other words, the withheld records do not just "establish rules and practices for agency personnel," *id.* at 1073; they govern the actions of individuals outside of OMB, regulating which agencies must submit materials to OMB. Accordingly, Exemption 2 does not apply to them.

Moreover, even if OMB could overcome the hurdle of predominant internality it still would not be able to withhold the requested records under Exemption 2. OMB does not even attempt to argue—nor could it—that the withheld records are exempt under the "low 2" exemption, *see Schiller*, 964 F.2d at 1207, which applies to trivial administrative matters of no public significance. The public has an interest in knowing which agencies can submit proposed legislation, reports, testimony, and budgetary materials to Congress without first submitting them to OMB.

Instead, OMB contends that the records are exempt under the "high 2" exemption, which exempts material whose disclosure "would risk circumvention of agency statutes and regulations." *Id*. OMB's sole argument for why the high-2 exemption applies is that "the documents contain information regarding the agency's internal views on legislative clearance requirements," and "[i]f this information were disclosed, various federal agencies could use this information to challenge the application of the legislative clearance requirement to them, thus weakening the OMB's chief tool for legislative coordination." Def. Mot. at 24-25.

Although it is not entirely clear, OMB's argument seems to be that if agencies knew that other agencies were allowed to submit their materials directly to Congress when they were not, or if they understood OMB's views on whether or not they should be able to bypass the legislative

and budgetary clearance processes, they would get upset and challenge the legislative clearance process's application to them. The high-2 exemption, however, is designed to prevent *the public* from circumventing the law. The government cannot withhold records based on the argument that, if those records are released, it *itself* would break the law. The public should be able to trust that executive branch officials will abide by the law even if they are discontent with whether or not their agencies are permitted to bypass the legislative and budgetary clearance processes.

Moreover, the high-2 exemption does not apply to any information that, if released, would encourage someone to "challenge" a law. Rather, it applies to information that could allow someone to "circumvent" a law. Thus, for example, in *Sinsheimer v. United States Department of Homeland Security*, 437 F.Supp.2d 50, 56 (D.D.C. 2006), the court held that Exemption 2 applies to "agency procedures for the conduct of sexual harassment investigations" because exposure of the procedures would "create a serious risk of circumvention of the law by allowing subjects to anticipate and potentially foil investigative tactics the agency must protect to perform its official mission." Similarly, in *Judicial Watch, Inc. v. United States Department of Commerce*, 337 F.Supp.2d 146, 166 (D.D.C. 2004), the court held that "guidelines for protecting the Secretary of Commerce on trade missions and guidelines for internal audits of Commerce expenses and travel vouchers" were exempt because their disclosure could "compromise the Secretary's safety, making the Secretary subject to unlawful attacks, and could enable Commerce employees to evade the law when preparing expenses for audit."

In other words, the high-2 exemption applies to records that, if released, would be rendered "operationally useless" because the records themselves would inform people about how to get around them. *Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530

(D.C. Cir. 1986); *see also Schiller*, 964 F.2d at 1208. Here, OMB has not explained how releasing the records listing and discussing which agencies can bypass the legislative and budgetary clearance processes would risk those agencies getting around the law. If an agency is already on the list of agencies allowed to bypass the processes, knowing that it is on the list would not cause it to circumvent any laws; and if an agency is not on the list, the withheld records would not give it any guidance on how to avoid the law.

In short, Exemption 2 does not permit an agency to withhold a policy simply because, if the policy were disclosed, the people affected by it would be unhappy and would lobby for its change; agencies that are discontent with their presence or absence on the list of agencies that can bypass the legislative and budgetary clearance processes have every right to ask OMB, or even Congress, for a new policy. OMB cannot invoke Exemption 2 to keep them from doing so, or to keep itself from having difficult conversations with other executive branch officials. Exemption 2 does not justify OMB's withholding of the requested records.

B. OMB Cannot Withhold Any of the Requested Records Under Exemption 5.

OMB claims that all of the responsive records are exempt under the deliberative process privilege encompassed in Exemption 5, which exempts from disclosure records that are "predecisional" and "deliberative." *Wolfe v. Dep't of Health and Human Servs*., 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). To be exempt under the deliberative process privilege, the records must be "generated before the adoption of an agency policy" and "reflect[] the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866. Here, the withheld records are not predecisional and deliberative and therefore are not exempt under the deliberative process privilege.

1. Records 1-14 Are Not Predecisional and Deliberative.

Records 1-14 are not predecisional records that are part of a deliberative process. Rather, they contain OMB's policy on which agencies can bypass the legislative and/or budgetary clearance processes, together (at least in the case of records 1 and 3-14) with background on bypass in general and an explanation for why each agency has bypass authority. It is well-established that an agency cannot rely on the deliberative process privilege "to develop a body of 'secret law,' used by it in the discharge of its regulatory duties . . . ." *Coastal States*, 617 F.2d at 867; *see also, e.g., Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("[S]tatements of an agency's legal position . . . cannot be viewed as predecisional."); *Pies v. U.S. I.R.S.*, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (documents that "reflect the working law of the agency," including "statements of policies" "do not fall within the protection of Exemption 5"); *Schwartz v. IRS*, 511 F.2d 1303, 1305 (D.C. Cir. 1975) (internal memoranda are not protected "if they represent policies, statements or interpretations of law that the agency has actually adopted"). Accordingly, records 1-14 must be released.

OMB contends that these records do not contain "the policy of a government agency" but rather "the personal opinions of the writer." Def. Mem. at 29. However, neither James Jukes's declaration nor the *Vaughn* Index describe these records as containing personal opinions. To the contrary, Mr. Jukes describes records 3-14 as having been "issu[ed]" and as now being "obsolete." Jukes Decl. ¶ 18. These are not words used to describe personal opinions, but rather to describe policies. Similarly, according to Mr. Jukes, records 1 and 2 "currently apply and are utilized by OMB employees." *Id.* ¶ 17. This description makes sense if describing a policy, but not if describing "one employee's opinion." Def. Mem. at 29.

Further, records 1 and 3-14 contain versions of the same memorandum, updated and reissued by OMB's Legislative Reference Division every few years from 1979 through 2001. It is disingenuous to contend that the head of that division issued his personal opinions on legislative and budgetary bypass in regular memoranda as part of a 22-year long deliberative process that did not include any deliberative materials from anyone else and never led to any final policy. And although the Assistant Director for Legislative Reference changed multiple times between 1979 and 2001, Mr. Jukes's declaration identifies only changes in law and practice, not changes in personality, as the reason the older memos became obsolete. Jukes Decl. ¶ 18.

Moreover, even if Mr. Jukes's declaration did describe these records as personal (or if Mr. Jukes submitted a supplemental declaration suddenly declaring that the records contained only personal opinions), that label would not be controlling. An agency cannot hide a policy "behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Coastal States*, 617 F.2d at 867. Here, records 1 and 2 "apply" and are "utilized" by the agency, Jukes Decl. ¶ 17, and records 3-14 are "obsolete prior issuances" of record 1, *id.* ¶ 18, that presumably applied and were utilized before they were superseded. Even if not declared binding by the agency, the records contain agency law that cannot be withheld. *See Tax Analysts,* 117 F.3d at 617 ("The fact that [the records] are nominally non-binding is no reason for treating them as something other than considered statements of the agency's legal position."); *Coastal States*, 617 F.2d at 869 (D.C. Cir. 1981) (explaining that an agency is not permitted to withhold records "routinely used by agency staff as guidance" and "retained and referred to as precedent" because they constitute "a body of secret law which [the agency] is actually applying in its dealings with the public but which it is attempting to protect behind a label"). Because they contain the policy

actually followed by OMB, either now or in the past, records 1-14 are "neither 'predecisional' nor 'deliberative.'" *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978).

OMB also asserts that records 1-14 are exempt under the deliberative process privilege because they include "information used by OMB in determining whether certain federal agencies must comply with OMB's budgetary and legislative clearance requirement." Def. Mem. at 26.[3] To begin with, however, the *Vaughn* Index does not state that these records contain information relied on by OMB to create its policy; rather, it states, with regard to records 1 and 3-14, that they contain "a description of the views and perspectives of OMB official's interpretations of the views of certain agencies regarding legislative clearance requirements." *Vaughn* Index, ¶¶ 1, 3-14. With regard to record 2, it states, "[i]ncluded in this document are OMB official's characterizations and perspectives concerning certain agencies views regarding legislative clearance requirements applicable to their respective agencies." *Id*. ¶ 2. These descriptions are somewhat opaque and do not meet defendant's burden of demonstrating that these records are predecisional and deliberative. Moreover, it seems likely that what the *Vaughn* Index is describing as being contained in the records is the OMB official's *explanation* of the bypass policy. Records that explain the reasons for decisions after they are made are not predecisional and therefore are not protected by Exemption 5. *See Sears,* 421 U.S. at 151-52 (expressing approval of lower courts' "distinction between predecisional communications, which are

[3]In particular, OMB, citing its *Vaughn* Index, claims that records 1-14 contain "internal information that was passed from one OMB official to the next as part of a discussion of the views and perspectives of OMB officials concerning bypass authority." Def. Mem. at 26. Notably, the *Vaughn* Index does not in fact claim that these records were part of a "discussion" of OMB's views and perspectives, but rather that they contain a "description" of those views and perspectives. *See Vaughn* Index ¶¶ 1, 3-14. Although the word "discussion" may imply some give-and-take, the word "description" does not.

privileged, and communications made after the decision and designed to explain it, which are not"); *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991) (explaining that "an agency's contemporaneous or after-the-fact explanation of a decision [that] . . . carefully weighs the arguments for and against various outcomes before announcing a winner" is not exempt from disclosure). As the Supreme Court has explained, "the public is vitally concerned with the reasons which [supplied] the basis for an agency policy actually adopted." *Sears*, 421 U.S. at 152. "These reasons, if expressed within the agency, constitute the 'working law' of the agency . . . ." *Id*. at 152-53; *see also Taxation with Representation v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981).

In any event, if an agency "chooses expressly to adopt or incorporate by reference an intra-agency memorandum" in a final policy, that memorandum loses its Exemption 5 protection. *Sears*, 421 U.S. at 161; *see also Safecard Servs, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) ("[I]f, in explaining its collective decision, the Commission expressly adopts or incorporates any element of a Commissioner's or a staff member's prior oral or written discussion of the matter, those incorporated portions of earlier minutes or documents would no longer qualify as pre-decisional."). Thus, even if the records do contain some predecisional, deliberative information, that information still would not be exempt from disclosure because it was incorporated into the agency's final policy.[4]

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[4]OMB also claims that the records are predecisional and deliberative because some of the opinions and recommendations in them "concern matters that are fluid and are considered, reviewed and reconsidered." Jukes Decl. ¶ 20. Mr. Jukes does not specify which of the withheld records contain such opinions and recommendations. In any event, an agency cannot withhold its working law simply because that law—like all law—may, at some point, be "considered, reviewed and reconsidered."

Finally, even if records 1-14 contain some information that is exempt under the deliberative process privilege—and they do not—that information would be segregable from other sections of the record. Under FOIA, agencies must release "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *see Mead*, 566 F.2d at 260 ("[A]n agency cannot justify withholding an entire document simply by showing that it contains some exempt material."). An agency's conclusory assertion that it has satisfied the segregability requirement is inadequate; the agency must provide sufficient details for the district court to make a *de novo* finding on segregability. *See Mead*, 566 F.2d at 261; *see also*, *e.g.*, *Krikorian v. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993). Here, Mr. Jukes simply stated in his declaration that "OMB withheld documents which contain factual material intermingled with the author's impressions or analysis. Such intermingled factual material is not reasonably segregable from the overall deliberative quality of these materials." Jukes Decl. ¶ 21. At the very least, however, the agency could segregate and release the lists of agencies that OMB permits to bypass the legislative and/or budgetary clearance processes agencies, which the *Vaughn* Index states are included in records 1 and 3-14, and which, based on its name, seem likely to be included in record 2 as well. It could also release the description of the authority under which the listed agencies can bypass the clearance processes. These sections of the records are neither deliberative nor predecisional and accordingly are not exempt under the deliberative process privilege.[5]

[5]If the Court concludes that OMB has met its burden of demonstrating that the withheld records contain some exempt material, Public Citizen requests that the Court order defendant to release the lists of agencies that can bypass the legislative and/or budgetary clearance processes and conduct an in camera review of the withheld records to determine what other segregable material they contain. *See* 5 U.S.C. § 552(a)(4)(B) (permitting in camera review).

2. OMB Has Not Demonstrated that Records 15-21 Are Predecisional and Deliberative.

OMB also cannot withhold records 15-21 under the deliberative process privilege. Except for stating conclusorily that these records contain "interagency or intra-agency predecisional, deliberative communications," *see Vaughn* Index ¶¶ 15-21, the agency has made no showing that these records are predecisional. To the contrary, all of these records are dated July 18, 2001, and therefore post-date record 1, dated February 20, 2001, which contains the policy that currently applies and is utilized by OMB employees. Jukes Decl. ¶ 17.

Further, OMB has not demonstrated that the records are deliberative. According to the *Vaughn* Index, records 15-21 consist of letters from Sean O'Keefe, OMB's Deputy Director, to officials at other agencies, discussing "that agency's legislative authority to bypass OMB's mandatory review and provid[ing] his comments and perspectives on legislative coordination between that agency and OMB." *Vaughn* Index ¶¶ 15-21. It is unclear why OMB would be providing another agency with deliberative, rather than final, information about that agency's authority to bypass OMB review. Moreover, an agency's explanation of a policy that already exists is not privileged from disclosure. *See Access Reports*, 926 F.2d at 1194. At the very least, therefore, the parts of the letters that provide final information explaining the agency's bypass authority are not exempt and should be disclosed.

CONCLUSION

For the foregoing reasons, the Court should deny OMB's motion for summary judgment, grant Public Citizen's motion for summary judgment, and order OMB to release the requested records.

Respectfully submitted,

/s/ Adina H. Rosenbaum

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Dated: June 13, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-409 (RCL)
	)	
OFFICE OF MANAGEMENT AND BUDGET,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AND RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 56, plaintiff sets forth this statement of material facts as to which there is no genuine issue and responds to defendant's statement of material facts as to which there is no genuine issue. The paragraph numbers below correspond to the paragraph numbering of defendant's statement of material facts.

1. It is undisputed that OMB is a federal agency that plays a management and budgetary role within the executive branch. The rest of this paragraph is immaterial to whether the withheld records must be disclosed under the Freedom of Information Act (FOIA).

2. It is undisputed that OMB engages in a legislative clearance process. OMB also conducts a budgetary clearance process. Declaration of Adina H. Rosenbaum (Rosenbaum Decl.) ¶ 7. The rest of this paragraph is immaterial to whether the withheld records must be disclosed under FOIA.

3. It is undisputed that the legislative clearance process includes interagency review of agency proposals for legislation, testimony, and reports to Congress. The rest of this paragraph is immaterial to whether the withheld records must be disclosed under FOIA.

4. It is undisputed that the Legislative Reference Division conducts the legislative clearance process. The rest of this paragraph is immaterial to whether the withheld records must be disclosed under FOIA.

5. Undisputed.

6. It is undisputed that OMB receives drafts of reports, testimony, and legislation for interagency review and clearance on a regular basis. The rest of this paragraph is immaterial to whether the withheld records must be disclosed under FOIA.

7. Undisputed, except that the word "proposal" was plural in the request letter, and the word "with" in line 4 of this paragraph of defendant's statement was "without" in the request letter. Rosenbaum Decl. Exhibit A.

8. Undisputed, except OMB's letter did not include the word "the" before "legislative materials," and did include the word "a" before the second appearance of the words "listing of those statutes." Declaration of James Jukes (Jukes Decl.) Exhibit B.

9. Undisputed.

10. Undisputed, except OMB's letter included the words "we are continuing to withhold" after the word "documents;" did not have a comma before the word "including;" had a comma, the words "for example," and another comma between the words "including" and "deliberative;" and used the word "guidelines" instead of "guidance." Rosenbaum Decl. Exhibit C.

11. Undisputed.

12. It is undisputed that OMB is a federal agency located in Washington, D.C., with several offices. Defendant's characterizations of the size of the agency are immaterial to whether the withheld records must be disclosed under FOIA.

13. Facts related to defendant's search for responsive records are immaterial because plaintiff is not challenging the adequacy of the search for the records.

14. Facts related to defendant's search for responsive records are immaterial because plaintiff is not challenging the adequacy of the search for the records.

15. It is undisputed that documents 1 and 2 in the *Vaughn* Index currently apply and are utilized by OMB employees. Document 1 contains a cover memorandum and a longer memorandum providing background on bypass authorities, listing the agencies with bypass authority, describing the authority under which each agency can bypass the clearance process, and explaining the relationship between bypass authority and the Inspector General Act. *Vaughn* Index ¶ 1. Facts related to defendant's search for responsive records are immaterial because plaintiff is not challenging the adequacy of the search for the records.

16. It is undisputed that defendant enclosed with the letter to plaintiff, dated January 10, 2007, a piece of paper with a list entitled "Statutes that Address the Direct Submission of Legislative Materials (and the agency concerned)" and a list entitled "Statutes that Address the Direct Submission of Budget Materials (and the agency concerned)." It is also undisputed that, in the January 10, 2007, letter, OMB stated that it was not releasing the responsive records it had found at that point because it had decided they were exempt under Exemptions 2 and 5.

17. It is undisputed that defendant's *Vaughn* Index listed an additional 20 documents. It is also undisputed that these records are "outdated, superseded, or now obsolete" in that they do not contain OMB's most recent policy on legislative or budgetary bypass. Mr. Jukes's personal motivation for including these responsive records in the *Vaughn* Index is immaterial to whether the records are exempt from disclosure under FOIA.

18. It is undisputed that 12 of the documents are prior issuances of the February 20, 2001 memorandum (referenced as *Vaughn* Index item 1) which were issued between 1979 and 1999 and are now obsolete in that they do not contain OMB's current policy on legislative and budgetary bypass. These documents contain a cover memorandum or two and a longer memorandum providing background on bypass authorities, listing the agencies with bypass authority, describing the authority under which each agency can bypass the clearance process, and explaining the relationship between bypass authority and the Inspector General Act. *Vaughn* Index ¶¶ 3-14. It is also undisputed that OMB did not reference these responsive records during the administrative process. The rest of this paragraph is immaterial to whether the withheld records must be disclosed under FOIA.

19. It is undisputed that eight of the documents in the *Vaughn* Index are inter-agency Executive branch correspondence, including seven letters dated July 18, 2001, and a memo dated March 15, 2002. Mr. Jukes's personal motivation for including these responsive records in the *Vaughn* Index is immaterial to whether the records are exempt from disclosure under FOIA. It is also undisputed that the 20 withheld documents that OMB failed to mention during the administrative process are being withheld and are included in the *Vaughn* Index. Plaintiff disputes defendant's characterization that these records are described "in detail." *See Vaughn* Index.

20. It is undisputed that the *Vaughn* Index is nine pages long and contains a paragraph for each responsive record defendant has located that includes the date (except for one undated item), the sender, the recipient, brief information about the record, and which exemption(s) the agency is claiming.

21. It is undisputed that defendant claims that these records are exempt under FOIA exemption 5. The rest of this paragraph contains a legal conclusion that is disputed by plaintiff.

22. This paragraph is immaterial to whether the withheld records must be disclosed under FOIA.

23. It is undisputed that OMB marked some of the responsive records with the term "for OMB internal use only." It is also undisputed that some of the documents contain correspondence between OMB and officials in various other agencies relating to legislative coordination between the agencies and those agencies' authority to bypass OMB's clearance processes. The rest of this paragraph contains legal conclusions that are disputed by plaintiff.

24. It is undisputed that OMB marked some of the responsive records with the term "for OMB internal use only." It is also undisputed that document 2 is part of a larger internal OMB document entitled "OMB Roles and Responsibilities" and can be found on OMB's internal website. It is further undisputed that documents 1 through 14 contain information related to legislative and/or budgetary bypass authority. Plaintiff does not understand what is meant by "views and perspectives of OMB officials' interpretations of the views of certain agencies regarding legislative clearance requirements" and therefore can neither dispute nor agree with that characterization of the information in the records. The rest of the paragraph contains legal conclusions that are disputed by plaintiff.

25. Immaterial. Plaintiff is not challenging defendant's withholding of document 22.

26. This paragraph contains legal conclusions that are disputed by plaintiff.

Respectfully submitted,

/s/ Adina H. Rosenbaum

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