

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____))
RUSSELL MOKIHBER,))
))
Plaintiff,))
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v.))
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U.S. DEPARTMENT OF THE))
TREASURY,))
))
Defendant.))
_____)

Civ. No. 01-1974 (EGS)

MEMORANDUM OPINION AND ORDER

Plaintiff, a reporter for Corporate Crime Reporter, a weekly legal publication, filed this lawsuit pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552 (2003), against the Office of Foreign Assets Control ("OFAC"), an agency within the U.S. Treasury Department that administers and enforces economic and trade sanctions against targeted foreign countries, terrorism-sponsoring organizations, and international narcotics traffickers. The parties' cross-motions for summary judgment, as well as plaintiff's motion to strike the declaration of Richard Newcomb, OFAC's Director, are now before the Court.

I. Background

As part of its enforcement activities, OFAC imposes financial penalties on U.S. corporations that trade with OFAC-targeted countries and organizations in violation of the law. Newcomb Decl. ¶ 5. On occasion, OFAC allegations of unlawful corporate activity result in a settlement before the case is proven. *Id.*

On May 17, 2000, plaintiff sent a letter to OFAC requesting,

pursuant to FOIA, "records of all enforcement actions settled by the OFAC since May 17, 1998" and specifically, "records revealing the following information with respect to such enforcement actions: the date of settlement, the amount of settlement, the identity of the entity with which the enforcement action was settled, and amount of any penalty imposed, and the nature of the alleged violation." Compl. ¶¶ 5, 6. Both parties agree that these records are within the possession and control of OFAC. Pl.'s Stat. of Mat. Facts ("Pl.'s Stat.") ¶ 2; Def.'s Stat. of Mat. Facts ("Def.'s Stat.") at 1. At the time of the plaintiff's request, the Department did not publicize information about these settlements. Mokhiber Decl. ¶¶ 2,4. However, these records, with certain portions redacted, have since been posted on the Treasury Department's website. *Id.*

On September 18, 2001, plaintiff initiated this suit in an effort to compel the Department to respond to his FOIA request. On January 25, 2002, plaintiff moved for partial summary judgment with respect to Count Three of his complaint, in which he alleged that the Department's refusal to provide him with any documents created *after* the date of the plaintiff's FOIA request violated the Act. On April 3, 2002, this Court granted the plaintiff's motion for partial summary judgment as unopposed by the government.¹

¹The government's counsel failed to respond because of an electronic error that caused the response date to be left off of his calendar.

The Department released records responsive to the plaintiff's request in installments between February 25, 2002 and September 6, 2002. Pl.'s Stat. ¶5. The records released included "Settlement Memoranda," documents drafted by OFAC staff for the OFAC Director Richard Newcomb detailing specific alleged corporate violations, any settlement offers made by the corporation, any mitigating or aggravating factors the Department considered when deciding whether to settle, and a settlement recommendation. Newcomb Decl. ¶ 10. For the most part, these Memoranda included the information the plaintiff requested in his letter. Many of the Memoranda have the notation "OK/RN" in the corner of the document indicating Director Richard Newcomb's approval of the recommended settlement. See Newcomb Decl. ¶ 10.

Plaintiff's remaining claims are that 1) portions of many of the released Settlement Memoranda that detail mitigating or aggravating factors in each case, as well as the reasoning behind each settlement recommendation, are unlawfully redacted under FOIA Exemption 5, and defendant's *Vaughn* index and declaration are inadequate because defendant has not shown that all reasonably segregable factual information in the memoranda has been released; 2) agency tracking numbers in each document are unlawfully redacted under FOIA Exemption 2; and 3) the names of attorneys, corporate officials, and other corporate agents with whom the agency was in contact about alleged violations and proposed settlements are unlawfully redacted under FOIA Exemption

7(C). Pl.'s Stat. ¶ 7. Plaintiff has also filed a motion to strike the declaration of OFAC Director Richard Newcomb on the grounds that information in the declaration is not based on his personal knowledge.

The defendant has filed a cross-motion for summary judgment, arguing that 1) the redacted portions of the Settlement Memoranda reflect deliberative processes and are thus protected from disclosure under FOIA Exemption 5; 2) agency tracking numbers are related solely to agency practices and are protected from disclosure under FOIA exemption 2; and 3) names of the corporate functionaries who served as OFAC's points of contact are protected from disclosure under Exemption 7(C) because disclosure of the information could constitute an unwarranted invasion of personal privacy. Def.'s Mot. Summ. J. ("Def.'s Mot.") at 2, 8, 11.

II. Analysis

The Freedom of Information Act (FOIA) requires that federal agencies release all documents requested by members of the public unless the information contained within such documents falls within one of nine exemptions. 5 U.S.C. § 522(a), (b). These statutory exemptions must be narrowly construed in favor of disclosure. *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 1599 (1976). The government bears the burden of justifying the withholding of any requested documents through agency affidavits, an index of withheld documents, or both. *U.S.*

Dep't of State v. Ray, 502 U.S. 164, 173, 112 S. Ct 541, 547 (1991); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). If the government does not satisfy its burden, the requester is entitled to summary judgment. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). If, however, the government meets its burden, and its affidavits are not controverted by either contrary evidence in the record or evidence of agency bad faith, summary judgment for the agency is warranted. *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

This Court reviews *de novo* the applicability of particular exemptions cited by the government to the withheld documents. 5 U.S.C. § 522(a)(4)(B).

A. *Motion to Strike Declaration of Richard Newcomb*

Plaintiff asks the Court to strike OFAC Director Richard Newcomb's declaration in support of defendant's motion for summary judgment on the grounds that he has insufficient personal knowledge of the information therein. The Court finds that Mr. Newcomb's personal knowledge of the matters discussed in his declaration is sufficient to satisfy the relevant standards, and denies the motion to strike.

Federal Rule of Civil Procedure 56 states that affidavits supporting summary judgment motions "shall be made on personal knowledge, shall set forth such facts as would be admissible in

evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Affidavits based on information and belief do not meet the requirements of Rule 56(e). *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981); see also *Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949). Rather, the affiant's competence to testify to the matters therein must "affirmatively appear." *F.S. Bowen Elec. Co., Inc. v. J.D. Hedin Constr. Co., Inc.*, 316 F.2d 362, 364 (D.C. Cir. 1963).

An agency affiant can testify to his own observations upon review of documents, the procedural history of a plaintiff's attempt to obtain information pursuant to statute, the agency's procedures during his own tenure, and earlier practices of which he possesses personal knowledge. *Londrigan*, 670 F.2d 1164, 1174. In the FOIA context, agency officials are competent to make observations concerning whether a document falls within the FOIA exemptions where their observations are based upon review of the document and "general familiarity" with similar documents or procedures. *Laborers' Int'l Union of North America v. U.S. Dep't of Justice*, 578 F. Supp. 52, 56 (D.D.C. 1983), *aff'd*, 772 F.2d 919 (D.C. Cir. 1984).

OFAC Director Richard Newcomb states that his declaration is "based upon information within my personal knowledge or acquired by me through my official duties as Director of OFAC." Newcomb Decl. ¶ 2. The plaintiff argues that the Newcomb declaration

should be stricken because it is the Department's only evidence on the issue of whether the Department has released all segregable information from the records - specifically, the Settlement Memoranda -- and Newcomb himself did not actually participate in the determination of which portions of the Memoranda would be released and whether factual information in the Memoranda was segregable from deliberative information. Pl.'s Mot. To Strike at 2-3. Because his statements are partly based on information "acquired" by Newcomb through his duties, plaintiff argues the Declaration should be stricken from the record.

However, the law does not require that Newcomb have participated directly in determining the segregability of factual information in the documents, or that he have personally redacted the documents in question, in order for a finding that he has the requisite personal knowledge to be warranted. *Londrigan* clearly stated that declarants can testify to their own observations upon review of the documents in question and based on their relevant knowledge of agency procedures and practices. 670 F.2d at 1174. In *Laborers'*, the Circuit reiterated this interpretation of the law. 578 F. Supp. at 55.

Both the plaintiff and the defendant agree that the Settlement Memoranda in question were written for and directly given to Newcomb for his review. Pl.'s Mot. For Summ. Judg. ("Pl.'s Mot.") 4-5; Newcomb Decl. ¶ 10. It can therefore be

assumed that Newcomb has intimate knowledge of the contents of these documents, as he has at one time read most, if not all, of them. Newcomb Decl. ¶¶ 10, 16. While it is not clear from the declaration if Newcomb reviewed these documents *after* they were redacted, his personal knowledge of the contents of these documents before they were redacted should be sufficient for him to determine how factual information is separated from deliberative process in the documents, and if factual and deliberative information is too closely intertwined to be further separated for disclosure. Given that the law requires a presumption of agency good faith that cannot be rebutted by speculative claims, *Safeguard*, 926 F.2d at 1200, there is no basis for finding that Newcomb did not have the personal knowledge required to testify to the segregability of information in the Memoranda.²

This conclusion is consistent with other D.C. District Court cases finding personal knowledge based on the affiant's position of employment, job responsibilities, and review of, production of, or familiarity with the requested documents. *See, e.g., Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 11-12 (D.D.C. 2000). Furthermore, this case is distinguishable from those in which the D.C. Circuit has found

²However, given the vague treatment Newcomb gave the issue of segregability in his declaration, perhaps a different OFAC staff person should submit an affidavit if Newcomb is unable to provide a more detailed declaration based on his personal knowledge.

affidavits to be insufficient on the grounds that they were not based on personal knowledge. See, e.g., *F.S. Bowen Elec. Co., Inc.*, 316 F.2d at 364 (holding that affidavit based only on information and belief, and not affirmatively demonstrated personal knowledge, is not sufficient).

Accordingly, plaintiff's motion to strike the declaration of Richard Newcomb is denied.

B. Exemption 5 claim

The Department redacted a significant amount of information from the documents released to Mr. Mokhiber, claiming that the information reflects the agency's deliberative process and is therefore exempt from disclosure under FOIA Exemption 5.

Exemption 5 allows withholding of requested documents or information when they include "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. § 522(b)(5). To qualify for Exemption 5, a document must satisfy two conditions: 1) its source must be a government agency; and 2) it must fall within a discovery privilege that would apply in litigation against the agency that holds the document. *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S. Ct. 1060, 1065 (2001). This includes the "deliberative process" privilege, which covers documents "reflecting advisory opinions, recommendations, and deliberations that are part of a process by

which Government decisions and policies are formulated.” *Id.* The purposes of Exemption 5 are to protect open discussion among agency decision-makers, ensure that agency officials are able to communicate candidly with each other, and prevent the disclosure of information that may not accurately reflect the agency’s position. *Id.* at 8-9; *Coastal States*, 617 F.2d at 866. Both plaintiff and defendant agree that the redacted portions of the documents in question are deliberative and include the personal impressions and recommendations of OFAC staff. See Pl.’s Mot. at 9; Def.’s Mot. at 4.

The primary issue in dispute is whether the deliberative information in question is predecisional or was incorporated into a final decision of the agency. There is a well-established distinction between privileged predecisional communications and communications made after a decision and designed to explain it, which are not privileged. *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52, 95 S. Ct. 1504, 1517 (1975). In *Sears*, the U.S. Supreme Court held that when an agency expressly adopts or incorporates by reference an intra-agency memorandum prepared prior to a decision into a subsequent final opinion, including final dispositions of adjudicated cases, that information loses its predecisional character and must be disclosed. *Id.* at 161. The justifications for this distinction are that a lesser injury results from disclosure of communications made after a decision has been reached, and that

the public has a greater interest in knowing the basis for agency policies that are actually adopted and constitute the "working law" of the agency. *Id.* at 152-53. "When adopted, the reasoning becomes that of the agency and becomes its responsibility to defend." *Id.* at 161.

Plaintiff argues that a large portion of the information redacted from the released documents includes reasoning that led to and was incorporated into the Department's final decision to accept a settlement offer, and thus does not fall within the ambit of Exemption 5. Pl.'s Mot. at 9. Plaintiff points to the OFAC Director's initials in the corner of the disclosed settlement memoranda as proof that the recommendations contained in the memo were approved and served as the basis for the Director's decision to settle, which in turn was the final decision in each of the enforcement actions. *Id.* Plaintiff also argues that this information should be disclosed because it is the only record of the rationale underlying the Department's decision to settle, and FOIA gives the public a right to know the rationale for agency decisions. *Id.* Director Newcomb, in his declaration, does not dispute that the settlement memoranda are the only record of the Department's final decision to settle. Newcomb Decl. ¶ 10. However, he states that his initials in the corner of released settlement memoranda indicate only that he has approved the settlement amount recommended by his staff, not that he also agrees with the reasoning behind this recommendation, and

therefore, the redacted deliberative information is predecisional in nature. Newcomb Decl. ¶ 11-12; Def.'s Reply at 2.

The law is on the Department's side. In *Sears*, the Supreme Court held that only reasoning that is "expressly" adopted or incorporated by reference into a final opinion must be disclosed. In a companion case decided the same day, the Court clarified this holding in a case very similar to the instant case. See *Renegotiation Board v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 95 S. Ct. 1491 (1975). In *Grumman*, a government contractor sued the Renegotiation Board³ for the disclosure of documents relating to the Board's decisions in a number of cases. *Id.* at 179. The Renegotiation Board made final decisions about these contracts by considering, behind closed doors, a regional board report which recommended a particular course of action in a given case. *Id.* at 178-79. If the Renegotiation Board agreed with the recommended action, no further documents were prepared to explain the Board's reasoning, and it was not possible to know whether the Board agreed with the regional board's reasoning or only its conclusion. Id. at 179. Finding that the Board was the only entity that had the power to make a governing decision regarding excessive profits, and acknowledging that the Board made decisions by considering a variety of factors and recommendations, the Court held that the regional board reports

³ The Renegotiation Board reviews federal government contracts to ensure contractors do not realize excessive profits.

were not final opinions and were exempt from disclosure under Exemption 5 because there was no evidence that the reasoning in the reports was expressly adopted by the Board as its own. Id. at 184-85. In the words of the Court,

Absent indication that its reasoning has been adopted, there is little public interest in disclosure of the report. The public is only marginally concerned with reasons supporting a decision which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a decision which was actually adopted on a different ground. Indeed, release of the Regional Board's reports on the theory that they express the reasons for the Board's decision would, in those cases in which the Board had other reasons for its decisions, be affirmatively misleading.

Id. at 186 (citation omitted).

Similarly, in the instant case the Director of OFAC is the only individual who has the authority to make final decisions about a settlement offer, and it is his reasoning that would be relevant for FOIA disclosure. There is no separate document that details the Director's reasoning in a settlement decision, and the Director expressly states in his declaration that he does not necessarily endorse the reasoning of his staff when agreeing with a settlement recommendation. Newcomb Decl. ¶11. This statement is certainly self-serving, and the Director makes no assertion that he conducts an independent investigation beyond staff recommendations, or consults with others about the recommendations in a way that is akin to the Board's deliberations in *Grumman*. Nevertheless, the plaintiff has not submitted any evidence refuting the Director's assertion that the reasoning included in the Memoranda is not necessarily his own.

While the concern that the public may never know the reasoning behind the Director's decisions without disclosure of the settlement memoranda is a genuine one, the *Grumman* court rejected this argument, saying,

The Freedom of Information Act imposes no independent obligation on agencies to write opinions. It simply requires them to disclose the opinions which they do write. If the public interest suffers by reason of the failure of the Board to explain some of its decisions, the remedy is for Congress to require it to do so. It is not for us to require disclosure of documents, under the purported authority of the Act, which are not final opinions, which do not accurately set forth the reasons for the Board's decisions, and the disclosure of which would impinge on the Board's predecisional processes.

Id. at 191 (citation omitted).

Therefore, the Department is not required to disclose the deliberative portions of the settlement memoranda that set forth OFAC staff recommendations and impressions, as they have not been expressly adopted by Director Newcomb in his decision to settle a case, and the plaintiff has not responded to Director Newcomb's declaration with any evidence showing that OFAC staff recommendations are indeed adopted by the Director in every case.⁴ Accordingly, the Court denies plaintiff's motion for summary judgment, and grants defendant summary judgment on the Exemption 5 claim.

⁴ It should be noted that the plaintiff did not specifically request information pertaining to the rationale behind agency settlement decisions, and the Department has disclosed the specific information the plaintiff requested, including the amount of the final settlement offer. Although, arguably, the agency's reasoning is included in the "all records" request plaintiff made in his letter to the agency. See Compl. ¶6.

C. *Segregation of deliberative material from factual material in disclosed documents*

To meet its burden of justifying non-disclosure of requested documents, the government must submit an affidavit, a *Vaughn* index, or both. *Coastal States*, 617 F.2d at 861; *Andrade v. CIA*, Civ. A. No. 95-1215, 1997 WL 527347, at 4 (D.D.C. Aug. 18, 1997). These submitted materials must explain in detail the nature of each document withheld, the exemption claimed for each document, correlated to the particular part of the withheld document to which it applies, the manner in which the information in each document specifically falls under one of FOIA's exemptions, and how disclosure would inhibit candor in the agency's decision-making process. See, e.g., *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998); *Army Times Publ'g Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 221, 224 (D.C. Cir. 1987); *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251, 258 (D.C. Cir. 1977); *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973).

FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 522(b). Therefore, an agency must disclose non-exempt portions of a document unless they are inextricably intertwined with exempt portions, and the agency bears the burden of demonstrating that withheld documents contain "no separable,

factual information." *EPA v. Mink*, 410 U.S. 73, 93, 93 S.Ct. 827, 839 (1973); *Army Times*, 998 F.2d at 1068; *Mead Data*, 566 F.2d at 260. A conclusory assertion that "no factual portions could be reasonably segregated" does not suffice. *Mead Data*, 566 F.2d at 260. Instead, the agency must provide detailed reasons for its conclusions, describe what proportion of the information in each document is non-exempt, and specify how that material is dispersed throughout the document. *Id.* at 261. It is error for a district court to approve the withholding of a document without entering a finding of segregability or lack thereof. *Schiller v. Nat'l Labor Relations Bd.*, 964 F.2d 1205, 1210 (D.C. Cir. 1992).

Plaintiff argues that the Department has not adequately attested to the segregation of deliberative material from factual material within the disclosed documents, and has unlawfully redacted factual information that should be disclosed. Pl.'s Mot. at 10-12. Indeed, the Department's *Vaughn* index falls far short of the requirements set forth in the case law. It only lists the documents in question, provides a brief categorical description of them, lists the exemptions that apply, and for some, merely recites the statutory language as a reason for the exemptions. Director Newcomb's declaration helps fill in many of these gaps by explaining in greater detail which exemptions applied to which portions of the documents and *why*. However, on the issue of segregability, the Newcomb declaration is brief and vague, stating in only conclusory terms that "any facts embedded

in these portions of the memoranda are so inextricably intertwined with the deliberative analysis that they could not be reasonably segregated any further.” Newcomb Decl. ¶ 8. Because the case law holds that agency affidavits will not suffice if they are conclusory, merely recite statutory standards, or are too vague or sweeping, the Court finds good cause to require a more detailed affidavit or Vaughn index. See *Quinon v. FBI*, 86 F.3d 1222, 1227 (D.C. Cir. 1996).

Certainly, the Department is not attempting to withhold *entire* documents based on a conclusory assertion of segregability, only portions thereof. The Department has released a great deal of factual information within each document, including that specifically requested by the plaintiff, which could suggest that the documents were reviewed for segregability. See Pl.’s Ex. However, Director Newcomb’s declaration does not correlate claimed exemptions with particular passages within the documents. Newcomb Decl. ¶ 8. He also does not speak to the proportion of factual material in relation to deliberative material within the redacted portions. Defendant argues in its pleadings that the short length of the documents provides evidence of the impossibility of segregating further; however, this contention is not contained in the *Vaughn* index or the agency declaration, and the mere fact that the document is short does not preclude complete segregation of exempt from non-exempt material. Def.’s Mot. at 8. Nevertheless, despite the

requirements outlined in *Mead Data*, the D.C. Circuit recently affirmed an agency's assertion of segregability after the agency made assertions very similar to that provided in the instant case. See *Johnson v. Executive Office for the U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002). However, in that case, the declarant stated that she had conducted a line-by-line analysis of the requested documents, a statement that Newcomb did not make in his declaration. *Id.*

As an example of the Department's failure to segregate, the plaintiff specifically disputes the redaction of portions of settlement memoranda discussing settlement offers made by corporations. Plaintiff argues that these sections contain information received through communications with a third party, namely the corporation that is the subject of the enforcement action, which is not an agency and thus is not protected under the deliberative process privilege. Pl.'s Mot. at 10. Defendant responds that these sections include not just the amount offered by the alleged violator, but also analysis of the offer, and therefore reflect deliberative process that is exempt under Exemption 5. Def.'s Reply at 3. If it is indeed the case that these portions of the memoranda, often consisting of one or two lines, are purely factual information, the law mandates that the information be disclosed. Exemption 5 only protects those communications that are between or within agencies; therefore, information pertaining to settlement discussions between an

agency and a third party are not exempt from disclosure. See, e.g., *Senate of the Commonwealth of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987); *Mead Data*, 566 F.2d at 257-58. The issue, then, remains whether factual information about the specific amount of money offered OFAC by the corporations can be reasonably segregated from the deliberative material.

If agency affidavits are inadequate or vague or if there is evidence of agency bad faith or contradictory information in the record, the court, at its discretion, may conduct an *in camera* review of the documents in question. *Mead Data*, 566 F.2d at 262. There is no evidence of bad faith on the part of the Treasury Department. However, because the Department's assertion of segregability is vague, the Court will deny the parties' motions for summary judgment on this issue and order the Department to provide a more detailed *Vaughn* index addressing with the requisite specificity the segregability of factual information from deliberative information within the "settlement offer," "administrative considerations," and other redacted portions of the documents.

D. Exemption 2 claim

The Department redacted internal tracking numbers, referred to as "correspondence control numbers," from the documents

released to the plaintiff, arguing that these numbers are exempt from disclosure under FOIA Exemption 2. Newcomb Decl. ¶ 20; Def.'s Mot. at 9. Exemption 2 allows the withholding of documents which are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 522(b)(2). Plaintiff argues that the Department fails to meet the standard of proof required in Exemption 2 case law and thus has unlawfully redacted the numbers. Pl.'s Mot. at 14.

The Supreme Court last spoke on Exemption 2 in *Department of Air Force v. Rose*, 425 U.S. 352, 96 S. Ct. 1592 (1976), a case involving the withholding of Ethics Code violation reports by the U.S. Air Force Academy. In that case, the Court held that the exemption extends to material which the public could not reasonably be expected to have an interest, but that "where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to . . . a genuine and significant public interest." *Id.* at 369. The D.C. Circuit further developed Exemption 2 case law in *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), a case involving the withholding of Bureau of Alcohol, Tobacco, and Firearms (BATF) manuals, disclosure of which *would* risk circumventing agency regulations. In *Crooker*, the court held that a document is exempt from

disclosure under Exemption 2 if it is "predominantly internal"⁵ and if disclosure "significantly risks circumvention of agency regulations or statutes." *Id.* at 1074. Finally, the court applied, expanded, and clarified the *Rose* and *Crooker* holdings in *Founding Church of Scientology v. Smith*, 721 F.2d 828, 831 (D.C. Cir. 1983), where it laid out a test for determining if a document falls under Exemption 2.

First, the material withheld should fall within the terms of the statutory language as a personnel rule or internal practice of the agency. Then, if the material relates to trivial administrative matters of no genuine public interest, exemption would be automatic under the statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.

Id. (citations omitted). Therefore, once a document is shown to be a predominantly internal personnel rule or agency practice, the government may prevent disclosure by proving that either the material is a trivial administrative matter or that its disclosure would significantly risk circumvention of agency regulations. *Schwaner v. Dep't of the Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990); *Crooker*, 670 F.2d at 1074.

⁵ Though the statute uses the word "solely," the D.C. Circuit has consistently interpreted this restriction to include matters that are "predominantly" internal. See, e.g. *Schwaner*, 898 F.2d at 795; *Crooker*, 670 F.2d at 1074.

The Treasury Department has met the *Founding Church of Scientology* test. First, the correspondence control numbers withheld fall under the statutory language of the statute as an internal practice of the agency. For material to fall under Exemption 2, "information need not be 'rules and practices,' . . . as . . . matter 'related' to rules and practices is also exempt;" the material need only shed "significant light" on an agency rule or practice and be "predominantly internal." *Schiller v. Nat'l Labor Relations Bd.*, 964 F.2d 1205, 1207 (D.C. Cir. 1992); *Schwaner*, 898 F.2d at 795, 797. OFAC uses correspondence control numbers internally to help the agency monitor compliance with its regulations and track documents, including incoming and outgoing correspondence, enforcement investigations, licensing files, and matters relating to civil penalties. Newcomb Decl. ¶ 17. Each number is also used by the private party to which it pertains in its dealings with the agency, particularly when that party engages in activities that would otherwise violate OFAC regulations but in which they are specifically allowed to engage. *Id.* ¶ 18; Def.'s Mot. at 9.

The D.C. Circuit and District Court have found source symbols and file numbers to be predominantly internal and exempt from disclosure. See, e.g., *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 485-86 (D.C. Cir. 1980); *Coleman v. FBI*, 13 F. Supp. 2d 75, 79 (D.D.C. 1998). While the argument could be made that the numbers at issue in the instant case are not internal because the

private parties to which they pertain have access to them, the case law does not require the information to be exclusively internal, but rather "predominantly" internal. On the record before it, the Court finds the correspondence control numbers to be predominately internal.⁶

Furthermore, the disclosure of these numbers would shed significant light on the OFAC licensing process by revealing the specific sequence of valid OFAC numbers, information which could be illegally used by the public to circumvent OFAC regulations. See Newcomb Decl. ¶¶ 18-19. Newcomb asserts that the disclosure of these numbers would reveal information about their sequence, number of digits, and combination of letters and numbers, information which could enable members of the public to evade law enforcement by forging or illegally using OFAC licensing numbers for the purpose of engaging in conduct prohibited by OFAC regulations. *Id.* The D.C. Circuit and District Court have consistently allowed the withholding of information where

⁶ In arguing that the correspondence control numbers must be disclosed, plaintiff relies on *Fitzgibbon v. U.S. Secret Serv.*, 747 F. Supp. 51 (D.D.C. 1990), which held that numbers used to collect and organize information must be disclosed because the mere collection of information does not qualify as an agency practice under *Schwaneer*. *Id.* at 57. However, the *Schwaneer* court explicitly acknowledged and affirmed *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980), which held that agencies can delete sensitive notations on documents that indicate an agency's internal routing or distribution practices. 898 F.2d at 796. While the holding in *Fitzgibbon* seems in direct conflict with *Lesar*, the *Fitzgibbon* court distinguished *Lesar* by stating that the agency in *Lesar* had shown that disclosure of the numbers would risk circumvention of agency regulation, while the agency in *Fitzgibbon* had not. *Id.* Given that the Treasury Department in the instant case has made such a showing, *Fitzgibbon* is inapposite. Moreover, courts within this Circuit have more recently held symbols and file numbers exempt from disclosure. See, e.g., Coleman v. FBI, 13 F. Supp. 2d 75, 79 (D.D.C. 1998).

disclosure would risk public misuse, fraud, or circumvention of the law. See, e.g., *Crooker*, 670 F.2d at 1075 (exempting from disclosure BATF manuals that could help criminals evade the law); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 83 F. Supp. 2d 105, 110 (D.D.C. 1999) (exempting from disclosure agency credit card numbers); *Coleman*, 13 F. Supp. 2d at 79 (exempting from disclosure source numbers identifying confidential informants). Because the plaintiff has not contested Newcomb's assertion in his brief or declaration, Newcomb's statement should be taken as true for purposes of summary judgment. Therefore, the sensitive nature of these numbers should exempt them from disclosure.

Moreover, the correspondence control numbers arguably fall within the "trivial administrative matters" category, as they are of little or no interest to the law-abiding public. Indeed, the plaintiff has identified no reason why he needs to have access to these numbers, nor has he identified any public interest served by their disclosure. Furthermore, Newcomb's declaration implies that a person would only want access to these numbers for illicit purposes. See Newcomb Decl. ¶ 19. While it is conceivable that an outsider might want the number to more easily request information relating to that particular party, courts have consistently found no legitimate public interest in the disclosure of agency source codes and file numbers. See, e.g., *Lesar*, 636 F.2d at 485-86; *Coleman*, 13 F. Supp. 2d at 79; *Branch v. FBI*, 658 F. Supp. 204, 208 (D.D.C. 1987) (Richey, J. presiding). It is of

no consequence that the numbers might have some effect on the public at large, as most agency rules and practices do. See *Schiller*, 964 F.2d at 1207; *Crooker*, 670 F.2d at 1073 (citing *Vaughn v. Rosen*, 523 F.2d 1136, 1150 (D.C. Cir. 1975) (Leventhal, J. concurring)). What matters is that the numbers do not serve as "secret law" of the agency - agency policies which set standards dictating how agency personnel should regulate the public and about which the public has a right to be informed. See *Crooker*, 670 F.2d at 1069, 1073. The correspondence control numbers at issue are used only to identify private parties and documents, not to regulate the public in any way. Accordingly, these numbers appear to embody trivial administrative matters that are exempt from disclosure.

Finding that the Department has sustained its burden of showing that the numbers at issue satisfy the *Founding Church of Scientology* test, and that they likely represent trivial administrative matters, the Court denies plaintiff's motion for summary judgment on the Exemption 2 claim and grants the defendant's cross motion for summary judgment on Exemption 2.

E. Exemption 7(C) claim

The Department redacted the names of corporate functionaries from the documents disclosed to the plaintiff, arguing that these names are exempt from disclosure under FOIA Exemption 7(C). Def.'s Mot. at 11. The named individuals are persons who work for the corporate entities that allegedly violated OFAC

regulations, and are often the agency's point of contact within the targeted corporation, such as an attorney or corporate compliance officer with whom OFAC staff conducted settlement negotiations. Newcomb Decl. ¶ 14. Plaintiff contests these redactions and argues that the Department unlawfully applied Exemption 7(C) to justify their non-disclosure. Pl.'s Mot. at 14. The Court finds for the agency on this claim.

Exemption 7(C) protects records and information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. ¶ 522(b)(7)(C). The plaintiff does not dispute that the documents at issue are law enforcement records. Therefore, the only issue remaining is whether disclosure of these names could reasonably be expected to constitute an unwarranted invasion of the individuals' personal privacy. In applying Exemption 7(C), a court must balance an individual's privacy interest in nondisclosure against the public's interest in disclosure. *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762, 109 S. Ct. 1468, 1476 (1988). Unlike other FOIA exemptions, "Exemption 7(C)'s balance is not . . . tilted emphatically in favor of disclosure" and turns on the specific facts of each case. *Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 346-47 (D.C. Cir. 1987); *Senate of Commonwealth of P.R.*, 823 F.2d at 587. The agency need not establish that an unwarranted

invasion of privacy is certain to result from disclosure; it need only demonstrate a "reasonable" expectation of such an invasion. *Keys*, 830 F.2d at 346 (D.C. Cir. 1987).

It is well-established that names corresponding to targets, witnesses, and informers in a law enforcement investigation are exempt from disclosure under Exemption 7(C) because disclosure could result in serious reputational harm, harassment, and embarrassment. *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995); *Senate of Commonwealth of P.R.*, 823 F.2d at 588; *Lesar*, 636 F.2d at 488. Where the names at issue correspond to individuals without such roles in law enforcement investigations, however, the case law is not as clear.

Plaintiff relies on *Washington Post Co. v. U.S. Department of Justice*, 863 F.2d 96 (D.C. Cir. 1988) to support his contention that there is no legal privacy issue raised here. In that case, the Department of Justice redacted the names of corporate officials in an Eli Lilly Board committee investigative report. *Id.* at 99-101. The report examined potentially unlawful behavior on behalf of Eli Lilly employees surrounding the marketing and development of a drug the company produced. *Id.* The court held that these names must be disclosed, as "information relating to business judgments and relationships does not qualify for exemption . . . even if disclosure might tarnish someone's professional reputation." *Id.* at 100.

Reasoning that the report did not identify any particular employees as targets of the Department's investigation or accuse any of them of breaking the law, the court held that there was no risk that anything of a private nature would be revealed by releasing the employees' names, and thus Exemption 7(C) did not apply. *Id.* at 101.

While *Washington Post* would seem to counsel in favor of finding for plaintiff, the D.C. Court of Appeals revisited Exemption 7(C) in *Safeguard Servs., Inc. v. Sec. and Exch. Commission*, 926 F.2d 1197 (D.C. Cir. 1991). In *Safeguard*, the SEC deleted the names and addresses of third parties mentioned in witness interviews, customers listed in stock transaction records, and persons in correspondence with the SEC which were contained in documents requested by the plaintiff. *Id.* at 1205. Finding that this information is "simply not very probative of an agency's behavior or performance" and that substantial privacy interests were at stake in its disclosure, the court held categorically that, unless access to the names and addresses of private individuals appearing in law enforcement files is necessary to confirm or refute compelling evidence that the agency has engaged in illegal activity, such information is exempt from disclosure. *Id.* at 1205-06.

D.C. Circuit decisions issued after *Safeguard* have continued to acknowledge the privacy interests of individuals who are not subjects of law enforcement investigations, but are third-parties

associated with a criminal investigation or merely mentioned in law enforcement files. See, e.g. *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Service*, 72 F.3d 897, 904 (D.C. Cir. 1996) (exempting the names of non-suspects in attendance at a meeting that attracted the attention of law enforcement); *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1281-82 (D.C. Cir. 1992) (exempting the names of telephone operators whose voices were incidentally recorded on law enforcement tapes because the "virtually non-existent" public interest in their disclosure outweighed even the minor privacy interest at stake).

In a 1994 case, the D.C. Circuit affirmed its holding in *Washington Post*, but distinguished it from the facts before it. See *McCutchen v. U. S. Dep't of Health and Human Servs.*, 30 F.3d 183, 187 (D.C. Cir. 1994) (finding the individuals at issue to be targets of career-damaging investigations). Similarly, a 1997 D.C. District Court opinion relied on *Washington Post* in finding no privacy interest in the names of gun sellers who were mentioned in Bureau of Alcohol, Tobacco, and Firearms reports documenting sales of multiple handguns. *Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F. Supp. 20, 23-24 (D.D.C. 1997). This Court, however, in *Tripp v. Department of Defense*, 193 F. Supp. 2d 229 (D.D.C. 2002) summarized the holding in *Safeguard* as establishing "a categorical rule that FOIA Exemption 7(C) prohibits an agency from releasing documents that include the names and addresses of individuals in files that are

compiled for law enforcement purposes." *Id.* at 239.

Despite the somewhat confusing nature of Exemption 7(C) case law on this point, controlling authority and the record in this case strongly suggest that the corporate functionaries at issue have at least a minor interest in their names being kept private. While these individuals are not listed as suspects in an investigation, and their names may appear only once in the documents at issue, the release of the corporate officials' names could reasonably be expected to engender speculation about or stigma surrounding their involvement in the illegal activity of their employer, especially where they are directly negotiating a settlement pertaining to their corporation's alleged violation of OFAC regulations. The D.C. Circuit has acknowledged the difficulty associated with anticipating all the respects in which disclosure might damage an individual's reputation or lead to embarrassment. *See Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990); *Lesar*, 636 F.2d at 488. "If anything, the fact that a person's name appears in a [law enforcement file] with no other information could weigh against disclosure in that it would be very difficult for a court to determine with any degree of precision the actual invasion of privacy that would occur from release of the name." *Fitzgibbon*, 911 F.2d at 767. Under a strict reading of *Safeguard*, such as that previously adopted by this Court, the release of the names at issue in the instant case is certainly not necessary in order to confirm or refute illegal

agency activity, and the plaintiff does not even suggest as much. Therefore, this Court should find at least a minor privacy interest at stake in the disclosure of these names.

The public interest in disclosure of the names of these corporate officials is negligible at best. Because the purpose of the FOIA is to shed light on the actions of government agencies, courts have consistently held that any invasion of an individual's privacy interest is warranted only when disclosure would "open agency action to the light of public scrutiny" and inform citizens about "what their government is up to." *Reporters Comm.*, 489 U.S. at 772-73. The FOIA's purpose is not furthered by disclosure of information about private citizens that reveals little or nothing about an agency's own conduct. *Id.* at 773.

In this regard, the instant case is very similar to that considered by the D.C. Circuit in *Fitzgibbon v. CIA*. 911 F.2d 755. In *Fitzgibbon*, the CIA redacted an individual's name in a document which included no other information about that person. *Id.* at 758. Reasoning that there was "no conceivable way" in which release of the individual's name would inform citizens about agency action, the court upheld the agency's non-disclosure. *Id.* at 768. Here, it is equally unclear what public interest would be served by the disclosure of the names of corporate functionaries with whom OFAC was in contact, as the plaintiff identifies none in his brief or declaration. Indeed,

the plaintiff has already received the information he specifically requested, including the name of each corporation that settled with OFAC and the amount for which it settled. Disclosure of the names of individual employees who worked for these corporations and were charged with no unlawful activity would not shed any light on agency action. See Newcomb Decl. ¶ 6. Therefore, the privacy interest identified above, even if minor, more than outweighs the negligible public interest in disclosure, and the Court finds that the names were properly withheld under Exemption 7(C). See *Fitzgibbon*, 911 F.2d at 768 ("something outweighs nothing every time."). Plaintiff's motion for summary judgment on his Exemption 7(C) claim is therefore denied, and the Court grants defendant summary judgment on this claim.

III. Conclusion

Upon careful consideration of the parties' cross-motions for summary judgment, the responses and replies thereto, the governing statutory and case law, and the entire record herein, it is by the Court hereby

ORDERED that plaintiff's motion to strike the Declaration of Richard Newcomb is hereby **DENIED**; and it is

FURTHER ORDERED that plaintiff's motion for summary judgment is **GRANTED IN PART**. Defendant is hereby directed to file, by no later than **October 30, 2003**, an amended *Vaughn* index addressing, with the requisite specificity, the segregability

of facts from deliberative process materials in the redacted portions of the disclosed documents. Plaintiff's motion is in all other respects **DENIED**; and it is

FURTHER ORDERED that defendant's motion for summary judgment is **GRANTED** as to plaintiff's Exemption 2, Exemption 5, and Exemption 7 claims, and **DENIED** as to plaintiff's segregability claim.

Signed: **Emmet G. Sullivan**
UNITED STATES DISTRICT JUDGE
September 26, 2003

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