UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENISE GILMAN, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al. Defendants.	)	Civil Action No.: 09-468 (BAH)

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

This Freedom of Information Act case concerns records relating to the Texas-Mexico border wall, a massive government infrastructure project that engendered significant controversy. Professor Denise Gilman requested the records to analyze the impacts of the wall from a human rights perspective. CBP released many emails in response to Professor Gilman's request, but redacted or withheld portions of the emails that do not fall within any of FOIA's exemptions, including the names and addresses of people who own property potentially affected by the wall, various records it claims are covered by the deliberative process or attorney-client privileges, emails describing the justification for building the wall in certain areas, and all email attachments.

BACKGROUND

A. The Texas-Mexico Border Wall

Historically, the border between Mexico and Texas has not been marked by extensive physical barriers. Declaration of Denise Gilman (Gilman Decl.) ¶ 3. In 2006, however,

Congress passed the Secure Fence Act, which required construction of a fence or wall along specific portions of the U.S.-Mexico border, including areas in Texas. Pub. L. No. 109-367, 120 Stat. 2638 (2006). The following year, Congress amended the mandate to include 700 miles of fencing, 370 miles of which were to be completed by the end of 2008. *See* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Sec. 564, 121 Stat. 1844, 2090-91 (2007). The new provisions left the precise placement of the fence to the discretion of the Department of Homeland Security (DHS), which was required to consult with states, local governments, Indian tribes, and property owners. *Id.*

The plan to build a fence along the U.S.-Mexico border generated significant public interest and debate. Gilman Decl. ¶¶ 6-7. Among other things, people raised concerns about the effect of the wall on environmental resources. *Id.* ¶ 7. Fueling these worries, in 2008, the Secretary of DHS waived the application of numerous federal environmental laws with regard to construction of the wall, including the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, and the Administrative Procedure Act. *Id.* ¶ 8 & Exh. 1. Concerns were also voiced about the effect of the wall on indigenous communities along the border that have traditional connections to the land along the Rio Grande and about the lack of timely and meaningful consultation with indigenous tribes, local communities, and other leaders along the border. *Id.* ¶ 7. And concern was raised as well about the possibility that property owners along the border, some of whom held plots of land that had been in their families for generations, would lose significant portions of their land without adequate compensation and would be unable to reach property left on the river side of the fence, thereby limiting their ability to use their property for business, farming, and personal purposes. *Id.* Contributing to this worry was research, based on the proposed

siting of the wall, that showed statistically significant differences between the income and race of property owners whose land would be affected by the wall versus those whose land would remain unaffected, with affected property owners being, on average, less wealthy and including more people of color than those who would remain unaffected. *Id*. ¶ 16.

B. Denise Gilman's FOIA Requests

Plaintiff Denise Gilman is a Clinical Professor at the Immigration Clinic at the University of Texas School of Law and a member of the University of Texas Working Group on Human Rights and the Border Wall, which has been studying the effects of the border wall construction. *Id*. ¶¶ 1, 4. Despite the public interest in the border wall, Professor Gilman, the Working Group, and other community members had difficulty obtaining information from DHS about the planned locations of segments of the wall. *Id*. ¶ 14. The lack of this information impeded the Working Group's ability to study the wall's impact on border communities, the border environment, and individual landowners. *Id*. ¶¶ 14-15.

On April 11, 2008, Professor Gilman submitted FOIA requests to DHS, U.S. Customs & Border Protection (CBP), and Army Corps of Engineers (ACE), requesting records relating to the border wall. Among the records requested were maps of possible locations for segments of the border wall; documents identifying properties potentially affected by construction of the border wall, including ownership of those properties; documents identifying the properties for which the United States government sought to obtain access through consent/waiver or through litigation; documents reflecting surveys or other analyses of the areas possibly affected by the border wall, including any research on its impact on Native Americans; and communications received from, provided to, or referenced by the DHS that make recommendations or suggestions regarding the border wall route. *Id*. ¶ 9 & Exh. 2.

On March 11, 2009, having received only 2 documents from CBP—both in response to only one of the nine parts of the request—and a total of only 69 pages from ACE, Professor Gilman filed this lawsuit. *Id*. ¶ 10.

C. Procedural Posture

Professor Gilman filed this case against DHS, CBP, and ACE. In a status report dated July 23, 2009, DHS stated that it had referred processing of its FOIA request to CBP, and that no other components of DHS were likely to hold responsive records. *See* Docket No. 6 at 3. Professor Gilman is not challenging this assertion. On March 1, 2011, the parties filed a stipulation of settlement and dismissal as to ACE. *See* Docket No. 23. Thus, only CBP records remain at issue.

Professor Gilman and CBP agreed that CBP would process responsive email records and non-email records separately. *See* Docket No. 6 at 2. As of November 4, 2011, when the parties filed their most recent status report, CBP estimated it would take another 18 months for it to complete processing of the non-email records. *See* Docket No. 31. With regard to email records, the parties agreed that, to "expedite" the release of emails—because, 15 months after Professor Gilman's request, CBP still stated it did not intend to even begin reviewing documents solely in response to the request for a "substantial period of time"—CBP could satisfy the request with respect to the processing of emails by providing Professor Gilman with the emails released in *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Security*, Case No. 08-1046-JDB ("Crew v. DHS"). *See* Docket No. 6 at 2. In that case, CBP was searching the emails of the 25 CBP officials most directly involved in the border fence placement decision, and the schedule in that litigation called for the processing of 1,000 emails per month. *Id*.

In March 2011, CBP stated that it had completed or had nearly completed its production of the *CREW v. DHS* email records. Gilman Decl. ¶ 12. Because email production was near completion, but CBP expected that it would not complete non-email production for several years, the parties agreed to bifurcate summary judgment briefing over redactions/withholdings in the email and non-email records. *See* Docket No. 26. The parties proposed—and, on March 28, 2011, the Court ordered—that CBP confirm within 30 days that it had finished producing the email records, and that Professor Gilman identify within 60 days the emails still in dispute, specifying which exemption claims she was challenging. On May 27, 2011, Professor Gilman identified for CBP the 289 emails with redactions and/or withholdings she is challenging. *See* Docket No. 32-2.

D. The Redactions and Withholdings in Dispute

On November 4, 2011, Professor Gilman received from CBP new copies of the emails in dispute, containing fewer redactions than in the original release. Gilman Decl. ¶ 12. After reviewing those new copies and CBP's Vaughn Index, Professor Gilman has decided not to challenge certain of CBP's redactions.

Names and contact information: Professor Gilman challenges CBP's withholding of names and addresses of landowners from the released emails. However, she does not challenge CBP's withholding of the phone numbers or email addresses of landowners. She also does not challenge CBP's withholding of the names, direct phone numbers, or email addresses of CBP employees or of individual employees of contractors.

Information withheld under Exemption 5: With regard to the 12 records CBP redacted under the deliberative process privilege, Wade Decl. ¶ 12, Professor Gilman challenges the redactions to records 24, 28, 29, 66, 90, 93, and 134, but not the redactions to records 57, 73,

78, 145, and 152. With regard to the 11 records CBP redacted under the attorney-client privilege, Wade Decl. ¶ 13, Professor Gilman challenges the redactions to records 24, 72, 174, and 187, but not the redactions to records 20, 43, 70, 79, 122, 200, and 246.

Information withheld under Exemption 7(E): Professor Gilman challenges CBP's redaction under Exemption 7(E) of records that set forth the "justification behind needed fencing in certain areas" or that CBP otherwise claims would provide a "roadmap" to those seeking to cross the border. Vaughn Index at 37-38. She also challenges the redaction of record 24 under Exemption 7(E). *Id*. at 4. However, she does not challenge the redaction of "references to specific Border Patrol Station 'border zones.'" Wade Decl. ¶ 15.

Email attachments: Professor Gilman challenges CBP's withholding, without citing any applicable exemption, of all email attachments.

ARGUMENT

FOIA reflects the "strong policy" that "the public is entitled to know what its government is doing and why." *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (citation omitted). Because it was designed "to pierce the veil of administrative secrecy and 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 disclosure of agency records unless they are subject to one of the exemptions provided in 5 U.S.C. § 552(b). These exemptions are "given a narrow compass," *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1265 (2011) (citation omitted), and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.

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); *see also, e.g.*, *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been 'improperly' 'withheld.'" (citation omitted)). The court gives no deference to the agency's reasoning for withholding the records and must decide de novo whether the claimed exemption applies. 5 U.S.C. § 552(a)(4)(B). 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, CBP has not demonstrated that landowner names and addresses, various records it claims are covered by the deliberative process or attorney-client privileges, records that justify the need for fencing in certain areas and other records it is withholding under Exemption 7(E), or email attachments are exempt from disclosure. Those records should be released.

A. Landowner Names and Addresses Are Not Exempt Under Exemption 6.

CBP has redacted the names and addresses of landowners from the responsive emails. CBP claims that these names and addresses are exempt under Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To determine whether personnel, medical, or similar files are exempt under Exemption 6, courts must first determine whether there is a de minimis or substantial privacy interest at stake. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). "If no significant privacy interest is implicated . . . FOIA demands disclosure." *Id*. If there is a more than de minimis privacy interest at stake, then courts must balance that privacy interest "against the basic policy of opening 'agency action to the light of public scrutiny.'" *Nat'l Ass'n of Home Builders v. Norton*,

309 F.3d 26, 32 (D.C. Cir. 2002) (quoting *Rose*, 425 U.S. at 372). The requirement that the invasion of privacy be "clearly unwarranted" instructs the court to "'tilt the balance . . . in favor of disclosure.'" *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Wash. Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) (citation omitted)). "[I]ndeed, 'under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.'" *Id*. (quoting *Wash. Post Co.*, 690 F.2d at 261)).

Here, the balance tilts strongly in favor of disclosing the withheld landowner names. To begin with, the privacy interest involved is minimal. As the D.C. Circuit has explained, "the disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed." *Horner*, 879 F.2d at 877. Rather, "whether it is a significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue." *Id*.; *see also Morley v. CIA*, 508 F.3d at 1128 (quoting *Horner*). Here, the main information that would be revealed by releasing the landowners' names and addresses is that the named people owned land that was potentially going to be affected by the building of the border wall. *See, e.g.*, Gilman Decl. Exh. 11 (part of record number 190, redacting landowner names in listing pending condemnations for right of entry). Indeed, many of the landowner names in the records are only used as a way to identify a certain piece of property. *See, e.g., id*. Exh. 5 (record number 9, redacting name just used to identify a house); *id*. Exh. 6 (record number 10, redacting names in list of properties CBP had been given possession by the court to investigate). That someone owns land near the border in Texas, however, is not private information. In fact, property records regularly make owner names and addresses available to the public. *See Norton*, 309 F.3d at 35 ("Knowing the square and lot

numbers of a parcel of land is only a step from being able to identify from state records the name of the individual property owner.").

CBP's declaration does not provide any information about the privacy interest in the records or why it would be a clearly unwarranted invasion of privacy to release the names and addresses. Instead, CBP's declarant states only that the "names, addresses, and contact information of private citizens have been withheld from the disputed emails, because the privacy interests of those individuals outweigh the public's right to disclosure." Wade Decl. ¶ 14. CBP cannot meet its burden, however, by relying on declarations that "assume[] the exempt status of the records." *Morley*, 508 F.3d at 1128. Nor can CBP meet its burden simply by showing that the withheld information includes names and addresses. *See id*. ("To the extent the CIA suggests that the privacy interest in biographical information is self-evident, it is mistaken.").

In its memorandum in support of its motion for summary judgment, CBP attempts to come up with a privacy interest in the landowner names and addresses, claiming that landowners have a "similar privacy interest" to CBP employees, who have a "privacy interest in avoiding harassment, retaliation, and potentially life-threatening harm with respect to the work they perform for CBP." CBP Mem. at 17. However, "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities," *Rose*, 425 U.S. at 380 n.19, and CBP has provided no evidence even that CBP employees face such harm for the work they do on the border wall. *See Norton*, 309 F.3d at 35 (discussing agency's "evidentiary support" for claim privacy would be invaded by trespassers); *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1040 (N.D. Cal. 2005) (concluding agency had not met its burden where it offered "no evidence to support its speculation that the employees are likely to be harassed if their names are released"). And even if employees were at risk of harm due to their work on the border wall (and CBP has not so

shown), it would not follow that owners of land affected by the wall would similarly be at risk, given that there is no "work they perform for CBP." CBP Mem. at 17.

In contrast to the privacy side of the balance, the public interest in the landowner names and addresses is significant. Landowner names and addresses are crucial to understanding the government's actions with regard to construction of the border wall. For starters, despite the size, cost, and public interest in the border wall, the government has not made available concrete information about the number of properties affected, the location of those properties, or the dimension and length of the wall. Gilman Decl. ¶ 14. Learning the names and addresses of affected property members will help the public understand the actual dimensions and location of the wall and, accordingly, to more fully evaluate this massive infrastructure project carried out at significant taxpayer cost. *Id.*; *see also Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1232 (D.C. Cir. 2008) (discussing the "special need for public scrutiny of agency action that distributes extensive amounts of public funds").

In addition, learning the names and corresponding addresses of property owners potentially affected by the wall would allow the public to more effectively analyze the impact of the wall on property owners along the border. Gilman Decl. ¶ 15. Among the worries of those concerned about the impacts of the border wall were that it would lead to the taking of property from families who had held their plots of land for generations, sometimes dating back to Spanish land grants, and that property owners along the border would lose parts of their land without adequate compensation and would be unable to reach property left on the other side of the fence. *Id*. ¶ 7. Without a list of affected property and property owners or other information about the identity of individuals with property in the wall's path, it is not possible to assess the impact of the wall on property owners and determine whether the government's construction of the wall

and choice of where to place it has had the predicted negative effects on property owners. *Id*. ¶ 15.

Moreover, having property owners' names and corresponding addresses would allow the public to analyze whether the government was treating property owners equally and fairly. *Id*. ¶ 16. Statistical and anecdotal information suggest that the proposed wall locations would have a disparate negative impact on small minority property owners. *Id*.; *see, e.g.*, J. Gaines Wilson et al., *An Analysis of Demographic Disparities Associated with the Proposed U.S.-Mexico Border Fence in Cameron County, Texas*, available at http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-an-analysis-of-Demographic-Disparities.pdf (finding that areas designated for gaps in the border fence were populated by people with higher incomes and fewer Hispanics and Hispanic Indians than in areas designated for the fence itself); J. Gaines Wilson, et al., *Due Diligence and Demographic Disparities: Effects of U.S.-Mexico Border Fence on Marginalized populations*, 14 Southwestern Geographer 42 (2010), available at http://utb.academia.edu/JeffWilson/Papers/357718/Due_diligence_and_demographic_disparities_effects_of_the_Planning_of_U.S.-_Mexico_border_fence_on_marginalized_populations (finding "marked and statistically significant disparities in the demographics between groups living in the fence areas and those in the gap areas" and concluding that as laid out by DHS "during the planning process, the U.S.-Mexico border fence in Cameron County, Texas would disproportionately affect certain already marginalized groups in an adverse manner"). Knowing the identities of landowners would allow for further statistical studies of the impact of the border wall on different populations. Furthermore, anecdotal evidence suggests that wealthier landowners might have received preferential treatment in negotiating placement of the wall or in avoiding placement of the wall on their property altogether. *See* Gilman Decl. Exh. 3 (Texas

Observer article noting that "preliminary plans for fencing seem to target landowners of modest means and cities and public institutions such as the University of Texas at Brownsville" and providing examples). Indeed, the released records indicate that CBP may have afforded special attention to some property owners that was not given to other property owners. *See, e.g.*, *id.* Exh. 4 (record number 140, noting that a rancher, whose name was redacted, was "a friend of the President and a staunch supporter of the Border Patrol"). Release of the redacted names and corresponding addresses would allow the public to further investigate whether property owners with extensive landholdings, wealth, or political connections were treated differently from other property owners. *Id*. ¶ 16.

In short, release of the property owner names and addresses will further the public interest by "shed[ding] light on an agency's performance of its statutory duties" and opening "to the light of public scrutiny" the CBP's actions in building the wall along the Texas-Mexico border. *Multi Ag Media LLC*, 515 F.3d at 1231, 1232 (citations omitted). This public interest far outweighs any privacy interest, and the property owner names and addresses should be released.

B. CBP Has Not Shown That Many of the Redacted Records Are Exempt Under Exemption 5.

CBP redacted many records citing Exemption 5, which applies to "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). To be withheld under this privilege, records must be intra- or inter-agency records and must be covered by "one of the established civil discovery privileges." *Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 512 F.3d 677, 680 n.4 (D.C. Cir. 2008). As an initial matter, CBP has not claimed or demonstrated that all of

the records it is withholding under Exemption 5 are intra- or inter-agency records. (And its redaction of large numbers of names from the to and from lines of the emails makes it impossible for Professor Gilman to determine for herself whether all the records were exclusively between people within the government, *see* Gilman Decl. ¶ 19.) Moreover, although CBP claims that some of the redacted records are exempt under the deliberative process privilege and that others are exempt under the attorney client privilege, CBP has not met its burden of demonstrating that either of those privileges apply to various of the records that CBP has redacted under Exemption 5.

1. CBP Has Not Demonstrated That the Redacted Portions of Records 24, 28, 29, 66, 90, 93, and 134 Are Exempt Under the Deliberative Process Privilege

The deliberative process privilege exempts records that are both "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 privilege, records must be "'generated before the adoption of an agency policy' and 'reflect[ ] the give-and-take of the consultative process.'" *Coastal States Gas Corp. v Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also, e.g.*, *Public Citizen*, 598 F.3d at 874. The deliberative process privilege does not protect factual information, unless that factual information would inevitably reveal agency deliberations. *Public Citizen*, 598 F.3d at 876. Here, CBP has not met its burden of demonstrating that seven of the records it redacted citing the deliberative process privilege—records number 24, 28, 29, 66, 90, 93, and 134—are predecisional and deliberative.

CBP provides very little information about the portions of records it is withholding under the deliberative process privilege, apart from generally stating that "all information still withheld is considered predecisional and deliberative in nature, and contains internal discussions setting

forth various opinions and approaches with respect to CBP's communications and negotiations with landowners, CBP's land acquisition efforts, and litigation relative to the construction of the border fence." Wade Decl. ¶ 12. For example, with regard to the redaction in record number 29, which CBP describes as an "e-mail regarding border fencing issues in the El Paso sector," CBP simply states that "the information is deliberative in nature and relates to litigation that is still ongoing," Vaughn Index at 4, and that it "includes a discussion pertaining to litigation with a particular landowner." Wade Decl. ¶ 12. CBP's assertion that the information is deliberative is conclusory and therefore does not meet its burden. *See, e.g.*, *Morley*, 508 F.3d at 1115 ("[C]onclusory and generalized allegations of exemptions' are unacceptable[.]" (internal quotation marks and citation omitted)). And its explanation that the information relates to ongoing litigation with a landowner shows neither that the information is deliberative nor that it is predecisional. In short, the "minimal information given in the affidavit and Vaughn index provide the court with no way of knowing if the [agency] has properly applied" the deliberative process standard. *Id*. at 1127.

Similarly, the only explanation CBP gives for the redactions in records 90 and 93, which it describes respectively as "e-mail correspondence relating to border fencing issues in the Rio Grande Valley Sector" and "e-mail correspondence referencing SBI net in the Rio Grande Valley Sector," are that "the redactions remaining are considered inter-agency discussions," the redactions "that remain are deliberative," and the documents "contain discussions regarding problems with CBP's efforts in Hidalgo County." Vaughn Index at 13; Wade Decl. ¶ 12. And its only explanation for the redaction in record 66, which it describes as "e-mail correspondence relating to Texas border fencing issues," is that it is "deliberative in nature" and that it "contains a discussion between the U.S. Army Corps of Engineers and CBP officials regarding procedures

for communicating with landowners." Vaughn Index at 9-10; Wade Decl. ¶ 12. None of these statements demonstrate in a non-conclusory manner that the records are predecisional and deliberative.

With regard to records 24, 28, and 134, information provided by CBP not only fails to meet the agency's burden of demonstrating that the records are predecisional and deliberative, but, in fact, suggests that they are not. CBP describes record number 24, for example, as an "update to Border Patrol on various matters." Vaughn Index at 4. The word "update," however, is generally not used to describe deliberations. Rather, it usually connotes the provision of information. *See, e.g.*, Webster's II New Riverside University Dictionary 1268 (1994) (defining the noun "update" as "information that updates").[1] Likewise, record 28 is entitled "waiver update," Vaughn Index at 4, and at least some of the redactions appear to be descriptions of past events. For example, one sentence reads, "the Deputy Secretary settled this by telling everyone that we do have [redaction] to do this and directed the [redaction] to leave the room and call Hildalgo and tell them that we can do this." Gilman Decl. Exh. 7. And another begins "It was determined that we don't need [redaction] in that we will do a [redaction]." *Id.* These sentences are descriptions of actions already taken and determinations already made, not predecisional analysis and deliberations. And although record number 134 contains some redactions of recommendations, it also contains redactions of prices requested for pieces of land—such as a

[1]CBP also claims that the portion of record number 24 that it is withholding under the deliberative process privilege is not about the border wall and is therefore "not responsive to the FOIA request." CBP Mem. at 13. However, in her FOIA request, Professor Gilman requested all "documents" on certain aspects of the border wall, not just the portions of responsive documents that refer to the border wall. Gilman Decl. Exh. 2. Thus, the document *in its entirety* is responsive to the request. Moreover, CBP agreed to release to Professor Gilman all records released in *CREW v. DHS* as a proxy for the records responsive to the request and therefore has conceded any argument that it can withhold *CREW v. DHS* records as non-responsive.

sentence reading "[i]n essence they now want [redaction] for a one-mile by 100' stretch of land . . . plus legal fees which could go as [redaction]"—and of government estimates of the amount the land is worth. *Id*. Exh. 9. This information is factual, not deliberative.

In sum, CBP has not met its burden of demonstrating that the material it redacted under the deliberative process privilege in records 24, 28, 29, 66, 90, 93, and 134 is predecisional and deliberative, and portions of some of the records indicate that they contain information that describes determinations already made or that is purely factual. The redacted material should be released.

2. CBP Has Not Demonstrated That the Redacted Portions of Records 24, 72, 174, and 187 Are Exempt Under the Attorney-Client Privilege.

The attorney-client privilege "protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). It also "protects communications from attorneys to their clients if the communications rest on confidential information obtained from the client." *Id.* (internal quotation marks and citation omitted). "The privilege does not allow an agency to withhold a document merely because it is a communication between the agency and its lawyers." *Judicial Watch, Inc. v. U.S. Postal Serv*., 297 F. Supp. 2d 252, 267 (D.D.C. 2004). "[T]he agency must show that it supplied information to its lawyers 'with the expectation of secrecy and was not known by or disclosed to any third party.'" *Id*. (quoting *Mead Data Cent. Inc.*, 566 U.S. at 254). Here, CBP has failed to meet its burden of showing that the redacted material in records 24, 72, 174, and 187 is covered by the attorney-client privilege.

According to CBP's declaration, the redacted portions of records 24 and 187 contain information provided by CBP attorneys to people within the agency. CBP states that record 24

"contains a summary of the Department of Justice's most recent update regarding particular fence cases," while record 187 "contains a discussion of litigation by the CBP Office of Chief Counsel." Wade Decl. ¶ 13. But in a FOIA case, "[w]hen asserting privilege based on an attorney's communication to a client, the client has the burden of demonstrating 'with reasonable certainty . . . that the lawyer's communication rested in significant and inseparable part on the client's confidential disclosure." *Electronic Privacy Information Ctr. v. Dep't of Justice*, 584 F. Supp. 2d 65, 79 (D.D.C. 2008) (quoting *In Re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)). "[W]hen an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." *Id*. (quoting *In Re Sealed Case*, 737 F.2d at 99). Here, CBP has not demonstrated that the attorneys' information was based on CBP's confidential disclosures instead of facts acquired from outside sources.

Moreover, even if the records are based on confidential information, the agency has not demonstrated that it kept the communications confidential. Although when the client is a group some limited circulation is allowed beyond the attorney and the person seeking the advice, the agency must "demonstrate that the documents, and therefore the confidential information contained therein, were circulated no further than among those members 'of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication.'" *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977)); *see also, e.g., Cuban v. SEC*, 744 F. Supp. 2d 60, 80 (D.D.C. 2010) ("To the extent that any information . . . was relayed to anyone outside the sphere of those who needed to know the information within the organization, that information cannot be withheld[.]"). Here, the released portion of record 24 shows that the record was circulated to at least seven people, and

the released portion of record 187 shows that the record portion was forwarded to at least thirteen people. Gilman Decl. ¶ 18. Because the names of some senders and recipients were redacted, Professor Gilman cannot know whether they were all people authorized to speak or act for CBP, *id*. ¶ 19, but, by failing to address the matter at all, CBP has not carried its burden.

CBP has also not met its burden of demonstrating that the redactions in records 72 and 174 contain privileged information. Although CBP claims that record 72 contains "requests for legal advice from a CBP official to the CBP Office of Chief Counsel," Wade Decl. ¶ 13, the redacted version of the record shows that it contains an exchange between three people, none of whom is identified as an attorney. *See* Gilman Decl. Exh. 8. Similarly, although CBP claims that record 174 contains "requests for legal advice from a CBP official to the CBP Office of Chief Counsel," Wade Decl. ¶ 13, it appears from the released version of the email that the redacted portion is a response to a prior, non-confidential email, and there is no indication on the released record that an attorney is involved in the email exchange. *See* Gilman Decl. Exh. 10. Moreover, CBP has not demonstrated that the information provided was confidential or that all of the people to whom these emails were sent were authorized to speak or act for CBP.

In sum, CBP has not met its burden of demonstrating that the material it redacted in records 24, 72, 174, and 187 is protected by the attorney-client privilege. The redacted material should be released.

C. E-mails Regarding the Border Wall Are Not Exempt Under Exemption 7(E).

CBP is withholding portions of records under Exemption 7(E), which applies to records compiled for law enforcement purposes the release of which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected

to risk circumvention of the law." 5 U.S.C. §552(b)(7)(E). According to CBP, the information withheld from these records "includes identification of areas that are difficult for Border Patrol to access due to harsh terrain and other factors, areas patrolled by fewer agents, and urban areas where illegal traffic has a greater change of blending in quickly without being apprehended." Wade Decl. ¶ 15.

CBP contends that it has "satisfied its burden under Exemption b(7)(E) by 'logically explain[ing] how the [information] could help criminals circumvent the law." CBP Mem. at 22 (citation omitted). But to satisfy its burden, CBP must also demonstrate that the records are "techniques and procedures for law enforcement investigations or prosecutions" or "guidelines for law enforcement investigations or prosecutions." 5 U.S.C. §552(b)(7)(E). CBP has not even attempted to meet its burden of showing that the redacted records contain such techniques, procedures, or guidelines, nor could it: The redacted e-mails contain "assessments of the operational need for fencing," not information relating to investigations or prosecutions. Wade Decl. ¶ 15. On that basis alone, the records should be released.

Moreover, CBP has not, in fact, logically shown that release of the records could be reasonably expected to risk circumvention of the law.[2] CBP claims that releasing the records

[2]Although it is not determinative here because the records are not techniques or procedures for law enforcement investigations or prosecutions, CBP is mistaken in suggesting that the clause "if such disclosure could reasonably be expected to risk circumvention of the law" modifies only "guidelines for law enforcement investigations or prosecutions," and not "techniques and procedures for law enforcement investigations or prosecutions." CBP Mem. at 20-21. In *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011), after explaining that the records withheld there were "undoubtedly 'techniques' or 'procedures,'" the Court explained that "[t]hus, the FBI need only to 'demonstrate logically how the release of the requested information might create a risk of circumvention of the law,'" *id*. (citation omitted), thereby demonstrating that, like guidelines for law enforcement investigations or prosecutions, techniques or procedures for law enforcement investigations or prosecutions are only exempt if they would risk circumvention of the law.

would provide a "roadmap" to people attempting to cross the border, by "discuss[ing] specific areas of weakness in Border Patrol operations due to elements such as terrain, geographic location (including proximity to urban areas), and Border Patrol response time." *See, e.g.*, Vaughn Index at 38. But information such as terrain and geographic location are identifiable by sight. People seeking to cross the border do not need CBP e-mails to know, for example, whether a point on the border is close to an urban area. And Border Patrol response and other factors that led to weaknesses in Border Patrol operations may have changed in the years since the records were created; indeed, one would expect CBP to have attempted to address its areas of weakness in the ensuing years. Furthermore, the border wall has been built in the years since the records were created, presumably changing the calculus of which are the best places to attempt to cross the border. In short, even when it was current, much of the information in the records likely would not have increased the knowledge of people seeking to cross the border undetected, and would therefore not have aided them in circumventing the law; now, such people would not be able to rely on such information as accurate.

In any event, the redacted records do not fall under Exemption 7(E) because they do not meet Exemption 7's threshold requirement of being "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). In determining whether records are compiled for law enforcement purposes, the focus is on "whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. Dep't of Justice, Office of Prof'l Responsibility*, 284 F.3d 172, 177 (D.C. Cir. 2002) (citation omitted). E-mails discussing portions of the border that are difficult for border patrol agents to access do not relate to any kind of enforcement proceeding. They therefore fail to qualify for Exemption 7, even if they are connected to law enforcement

monitoring strategies that "might reveal evidence that later could give rise to a law enforcement investigation." *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 947 (D.C. Cir. 1998).

Finally, in addition to the records it has redacted because it claims that their release would provide a roadmap for people seeking to cross the border, CBP has redacted one record under Exemption 7(E)—record 24—without offering any explanation except that it is "law enforcement sensitive." Vaughn Index at 4. CBP has not met its burden of showing that record is exempt under Exemption 7(E), and it should be released.

D. CBP Cannot Withhold All E-Mail Attachments.

In addition to redacting portions of the text of emails, CBP withheld large portions of the responsive e-mails—the email attachments—without citing any exemptions. The Court should order CBP to release the non-exempt portions of the attachments, which are an integral part of the emails responsive to Professor Gilman's request.

CBP claims it does not have to release the attachments, repeatedly noting that CBP and Professor Gilman stated, in their July 23, 2009 joint status report, that they agreed that CBP could satisfy the request for emails by releasing the emails "as released" in *CREW v. DHS*. *See* Docket No. 6 at 2. According to CBP, because the parties agreed that CBP would release the emails "as released' in *CREW v. DHS*, if it withheld portions of the emails in that case, it can withhold those portions here. But the July 23, 2009 status order—and the agreement described within it—was about the scope of the search for records, not about which portions of the records CBP could withhold. *See* Gilman Decl. ¶ 11. The first line of the section of the status order on CBP states "CBP's search for documents responsive to the narrowed FOIA request is ongoing." Docket No. 6 at 2. Then, in the section on e-mails, the parties explain that the FOIA request in *CREW v. DHS* "overlaps with Plaintiff's request in a manner that Plaintiff finds satisfactory,"

that the schedule in that litigation called for the processing of 1,000 pages of e-mails per month until all responsive e-mails were processed, and that the e-mails being searched were those of the 25 CBP officials most directly involved in the border fence placement decision. Finally, the status report explained:

> The parties have conferred and agree that, in the interest of expediting the release of e-mails to Plaintiff, CBP may satisfy Plaintiff's FOIA request with respect to the processing of e-mails by providing to Plaintiff the emails as released in *CREW v. DHS pursuant to the search described in the Joint Status Report and Proposed Disclosure Schedule (Nov 1, 2008, DE #21) in that case* as follows: (1) by providing Plaintiff, within 30 days of the entry of the accompanying order, all e-mails already released in *CREW v. DHS*, and (2) going further, by providing Plaintiff further e-mails as they are released on a rolling basis in that case.

Id. (emphasis added). (CBP cites this sentence on page 7 of its memorandum, with the emphasized clause removed). Read in the context of the status report and sentence in which they appear, the words "as released" do not mean, as CBP suggests, "in the form in which they were released," but rather "that were released and as they continue to be released." Indeed, although CBP hangs its argument on the words "as released," those two words do not even appear in this Court's order entering the parties' proposed schedule. Rather, the Court ordered that "[w]ithin 30 days of this order, CBP will release to Plaintiff all e-mails already released in [*CREW v. DHS*], and, going forward, CBP will release to Plaintiff on a rolling basis all e-mail records released in *CREW v. DHS*, on the same schedule as they are released in that case." *See* Docket No. 7.

In short, the parties' agreement was about *which* records would be released. The parties agreed that CBP would release to Professor Gilman the same emails it had released to CREW and would continue to release to Professor Gilman copies of emails as they were released to CREW. There was no agreement that, if CBP redacted or withheld portions of the emails from

its release to CREW, it could redact or withhold those portions in its release to Professor Gilman. And it is difficult to imagine that CBP could have believed Professor Gilman was agreeing to accept redactions or withholdings in emails given to CREW, given that CBP had not yet produced to CREW many of the responsive emails in that case and Professor Gilman therefore could not know what withholdings or redactions CBP would be making on those records. Gilman Decl. ¶ 11.

The joint status reports and proposed orders filed by the parties reflect the understanding that Professor Gilman would be able to challenge CBP's withholding of portions of the emails. For example, in their March 25, 2011 joint statement, the parties advised the Court that "Plaintiff expects that there may be a need for dispositive motions to determine whether portions of the records that CBP has withheld fall within any of FOIA's exemptions." Docket No. 26 at 3. CBP nowhere in the status report expressed the opinion that plaintiff could not challenge withheld portions of e-mails if they were also withheld in *CREW v. DHS*. To the contrary, it joined Professor Gilman in explaining that this "Court's July 24, 2009 scheduling order anticipated and provided for such motions, or some other challenge by Ms. Gilman to the withholding of documents under a claimed exemption from disclosure." *Id*. at 3-4.

CBP cites portions of the March 25, 2011 status report discussing how Professor Gilman would require time to review the records to determine the extent to which she was interested in challenging "the withholdings made on the e-mails" and noting that she would "identify to CBP the pages of documents and corresponding claimed exemptions from the e-mail production that are in dispute," *id*. at 4, to argue that the parties "clearly understood" that Professor Gilman would only be able to challenge "*redactions* 'made on the email records' and the corresponding claimed FOIA exemptions, and on no other basis." CBP Mem. at 8 (emphasis added). But the

status report did not address only challenges to "redactions" on released portions of emails; it covered challenges to "withholdings," which includes pages of the emails that were not released at all. *See* Docket No. 26 at 4 (noting that July 24, 2009 order anticipated provided for challenges "to the withholding of documents"). And the discussion in the status report of disputes over the withholding of documents under "claimed exemptions" does not indicate that Professor Gilman would only be able to challenge redactions or withholdings if CBP cited an exemption. Gilman Decl. ¶ 11. Rather, it indicates an assumption on Professor Gilman's part that CBP would not withhold portions of the emails without even claiming that an exemption applied. *Id*.

CBP also faults Professor Gilman for not challenging CBP's withholding of email attachments until May 2011. CBP Mem. at 8. The shared understanding of the parties throughout the course of this litigation, however, was that Professor Gilman would not challenge withholdings and redactions on each production separately, but instead that the parties would resolve any remaining issues after CBP had completed producing what it thought it had to produce. Thus, the March 25, 2011 joint statement proposed that CBP would finish production within 30 days, and that within 60 days, Professor Gilman would identify the pages of documents and exemptions she was challenging. Docket No. 26. This Court entered the order providing Professor Gilman with 60 days to identify the issues in dispute on March 28, 2011, Docket No. 27, and Professor Gilman identified the problem of withholding attachments to CBP on May 27, 2011, exactly 60 days later. *See* Docket No. 32-2. Professor Gilman cannot be criticized for raising the issue of CBP's withholding of the attachments according to the exact process and within the precise timeframe proposed jointly by the parties and entered by the Court.

Finally, CBP contends that the agreement to limit the scope of the email release in this case to the emails in *CREW v. DHS* was entered "so as not to require CBP to expend its limited resources to search for, retrieve and process any additional records" and thus that it should not have to release the email attachments that it failed to process in its release to CREW. CBP Mem. at 9. By agreeing to limit the requested email records to those released in *CREW v. DHS*, however, Professor Gilman greatly decreased the resources CBP had to spend on releasing email records in response to her request. Indeed, the resources saved by CBP will be vast even if the Court orders CBP to release attachments to the 289 emails at issue in these cross-motions because it will not have to review and release the attachments to the thousands of other emails released. But although the parties entered into an agreement that greatly decreased the resources CBP would have to spend in responding to Professor Gilman's request—an agreement that both narrowed her request and resulted in her being given unrequested records that she had to sort through—the agreement was never that CBP would be relieved from having to spend *any* time engaged in responding to Profess Gilman's request as it related to emails. Rather, the parties agreed that Professor Gilman would be able to challenge the withholding of documents. Professor Gilman is now challenging CBP's withholding of the attachments to the emails in dispute. Because they are an integral part of the emails at issue, and because CBP has not claimed any exemption applies to them, the Court should order CBP to release the non-exempt portions of any attachments to the 289 emails at issue.

CONCLUSION

For the foregoing reasons, the Court should deny CBP's motion for summary judgment; grant plaintiff's motion for summary judgment; order CBP to release property owner names and addresses, the portions of records 24, 28, 29, 66, 72, 90, 93, 134, 174, and 187 redacted under

Exemption 5, the portion of record 24 redacted under Exemption 7(E), and records redacted under Exemption 7(E) that set forth the justification behind needed fencing in certain areas or that CBP otherwise claims would provide a "roadmap" to those seeking to cross the border; and order CBP to release the non-exempt portions of any attachments to the 289 emails at issue.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum (DC Bar No. 490928)
Allison M. Zieve (DC Bar No. 424786)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000

Counsel for Plaintiff

January 6, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENISE GILMAN, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al. Defendants.	)	Civil Action No.: 09-468 (BAH)

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

Pursuant to Local Rule 7(h), 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. Paragraph numbers 1-13 below correspond to the paragraph numbering of defendant's statement of material facts. Paragraphs 14-26 set forth additional material facts that are not in dispute.

I. RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

1. Not disputed.

2. It is not disputed that the parties agreed, with regard to which emails would be processed in response to plaintiff's request, that CBP could "satisfy Plaintiff's FOIA request with respect to the processing of e-mails by providing to Plaintiff the emails as released in *CREW v. DHS* pursuant to the search described in the Joint Status Report and Proposed Disclosure Schedule (Nov 1, 2008, DE #21) in that case as follows: (1) by providing Plaintiff, within 30 days of the entry of the accompanying order, all e-mails already released in *CREW v. DHS*, and (2) going further, by providing Plaintiff further e-mails as they are released on a rolling basis in

that case." Docket No. 6 at 3. Plaintiff does dispute that this agreement meant that, if CBP withheld portions of the emails that were released in *CREW v. DHS*, such as the email attachments, whether by failing to retrieve those portions of the emails or otherwise, plaintiff would not be able to challenge those withholdings. Gilman Decl. ¶ 11.

3. Not disputed. Accordingly, plaintiff is not challenging which emails were processed in response to her request. She is, however, challenging the withholding and redaction of portions of those emails.

4. Not disputed. Plaintiff also challenges the withholding of email attachments without CBP claiming any exemptions. Gilman Decl. ¶ 11.

5. Not disputed. Plaintiff received the new release on November 4, 2011. Gilman Decl. ¶ 12.

6. It is not disputed that CBP continues to assert that Exemptions 5, 6, 7(C), and 7(E) apply to the redactions in the records at issue. Whether or not those exemptions apply is the disputed legal issue in this case.

7. Disputed. Whether CBP has released all reasonably segregable, responsive non-exempt documents is a legal issue that is in dispute in this case.

8. It is not disputed that Plaintiff challenges that CBP withheld all attachments from the 289 emails she identified as being at issue.

9. Disputed. The parties' agreement was about which emails CBP would produce in response to plaintiff's request, not about whether CBP could withhold or redact portions of those emails. Gilman Decl. ¶ 11; Docket No. 6 at 2-3. To the extent CBP withheld attachments or portions of attachments that are not exempt from disclosure under one of FOIA's exemption, those attachments or portions of attachments should be released.

10. It is not disputed that this statement is one sentence from the parties Joint Status Report of July 23, 2009, with a portion of the sentence redacted and replaced with ellipses. The full sentence reads: "The parties have conferred and agree that, in the interest of expediting the release of e-mails to Plaintiff, CBP may satisfy Plaintiff's FOIA request with respect to the processing of e-mails by providing to Plaintiff the emails as released in *CREW v. DHS* pursuant to the search described in the Joint Status Report and Proposed Disclosure Schedule (Nov 1, 2008, DE #21) in that case as follows: (1) by providing Plaintiff, within 30 days of the entry of the accompanying order, all e-mails already released in *CREW v. DHS*, and (2) going further, by providing Plaintiff further e-mails as they are released on a rolling basis in that case." Docket No. 6 at 3. The section in which this sentence appears begins by stating that "CBP's search for documents responsive to the narrowed FOIA request is ongoing." Docket No. 6 at 2. Then, in the section on e-mails, the status report explains that the FOIA request in *CREW v. DHS* "overlaps with Plaintiff's request in a manner that Plaintiff finds satisfactory," that the schedule in that litigation called for the processing of 1,000 pages of e-mails per month until all responsive e-mails were processed, and that the e-mails being searched were those of the 25 CBP officials most directly involved in the border fence placement decision. Docket No. 6 at 2-3.

11. Not disputed.

12. Not disputed. On March 28, 2011, the Court entered the proposed order accompanying the status report, providing plaintiff with 60 days to identify the issues in dispute. Docket No. 27. Accordingly, Plaintiff was to identify the issues in dispute by May 27, 2011.

13. It is not disputed that plaintiff first raised the issue of the withheld attachments as an issue in dispute on May 27, 2011.

II. PLAINTIFF'S STATEMENT OF MATERIAL FACTS

14. The plan to build a wall along the U.S.-Mexico border generated significant public interest and attention. Gilman Decl. ¶ 6.

15. The main information that would be revealed by releasing the withheld names and addresses of property owners is that the named people owned land that was potentially going to be affected by the building of the border wall. Gilman Decl. Exh. 5, 6, & 11.

16. Releasing names and addresses of property owners that would potentially be affected by the Texas/Mexico border wall would shed light on the government's actions in constructing the border wall. Gilman Decl. ¶ 13.

17. The government has not made concrete information available about the number of properties affected by the wall, the location of those properties, or the dimension and length of the wall. Obtaining information about affected property owners would make it possible to determine the wall's placement much more effectively and allow the public to better evaluate the wall. Gilman Decl. ¶ 14. It would also allow the public to better analyze and assess the impact of the wall on nearby property owners. Gilman Decl. ¶ 15.

18. Release of names and addresses of property owners would allow for further investigation into whether the wall had a disparate negative impact on minority and less wealthy property owners. Gilman Decl. ¶ 16. It would also allow investigation into the treatment of particular property owners with extensive landholdings, wealth, or political connections. *Id*.

19. Record 24 is an "update to Border Patrol." Vaughn Index at 4.

20. Record 28 is entitled "waiver update." Vaughn Index at 4. One sentence reads, "the Deputy Secretary settled this by telling everyone that we do have [redaction] to do this and

directed the [redaction] to leave the room and call Hildalgo and tell them that we can do this." Gilman Decl. Exh. 7.

21. Record 134 contains redactions of prices requested for pieces of land. Gilman Decl. Exh. 9.

22. CBP has not demonstrated that all of the records withheld under Exemption 5 were between people in government agencies. *See generally* Wade Decl.

23. CBP has not demonstrated that records 24, 72, 174, and 187 contain confidential information that has not been shared with people who cannot speak or act for the agency. *See generally* Wade Decl.

24. The records that were redacted under Exemption 7(E) because they set forth the justification behind the need for fencing in certain areas or that CBP otherwise claims would provide a roadmap for people crossing the border contain information about the operational need for fencing, not techniques, procedures, or guidelines for law enforcement investigations or prosecutions. Wade Decl. ¶ 15.

25. CBP is withholding all email attachments from the emails at issue. Wade Decl. ¶ 9.

26. There was no agreement between Professor Gilman and CBP that, if CBP redacted or withheld portions of the emails from its release to CREW, such as the email attachments, it could redact or withhold those portions in its release to Professor Gilman. Gilman Decl. ¶ 11; Docket No. 6.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum (DC Bar No. 490928)
Allison M. Zieve (DC Bar No. 424786)
Public Citizen Litigation Group
1600 20th Street NW

Washington, DC 20009
202-588-1000

January 6, 2011

Counsel for Plaintiff