UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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KENNETH J. DILLON, )

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 Plaintiff, )

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 v. ) Civil Action No. 17-1716-RC

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UNITED STATES DEPARTMENT OF )

 JUSTICE, )

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 Defendant. )

**PLAINTIFF’S POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT**

 Plaintiff, Kenneth Dillon initiated this action under the Freedom of Information Act, 5 U.S.C. § 552 on August 23, 2017, seeking the disclosure of records maintained by Defendant U.S. Department of Justice's Federal Bureau of Investigation pertaining to the FBI's Amerithrax investigation. Complaint, [Dkt. No. 1]. FBI has alleged that the search for responsive records was adequate and that certain material was properly withheld pursuant to various FOIA Exemptions. But the FBI's search was not adequate nor has it established that the material withheld is exempt from release. Under court order, it found and released 102 new pages of emails, demonstrating that its earlier searches had indeed been inadequate and raising the question of whether further searches will find other records. Thus, Dillon is entitled to summary judgment on his motion for summary judgment.

**Introduction**

In the fall of 2001, five people were killed and seventeen were sickened by letters laced with anthrax, leading to the largest criminal investigation in American history. See <https://www.fbi.gov/history/famous-cases/amerithrax-or-anthrax-investigation>. In 2008, the FBI publicly named the late Bruce Ivins as the suspect in the mailings.However, Ivins committed suicide before charges could be brought and the government concluded its investigation in 2010 with the release of an investigative summary. *Id.* While the investigation was still ongoing, the FBI compiled an Interim Major Case Summary ("IMCS"), which is described by the FBI as an interim investigative summary drafted midway through the investigation. Declaration of David Hardy, dated June 14, 2018 ("Hardy Decl."),¶65 (ECF No. 14-2). The IMCS contained sixteen pages concerning Bruce Ivins. *Id.*,¶19-20, Exhs. O & P. According to former FBI Special Agent Richard Lambert, who headed the Anthrax Investigation from 2002 until 2006, the FBI maintained "a wealth of exculpatory evidence" concerning Bruce Ivins. See, Complaint, *Lambert v. Holder, et al.*, Civil No. 15-0147-PLR-HBG (E.D. TN April 2, 2015) located at <http://www.documentcloud.org/documents/1714250-former-fbi-special-agent-in-charge-richard.html> (last visited June 27, 2018). The FBI has never released any of this exculpatory evidence concerning Bruce Ivins.

Plaintiff, Kenneth Dillon is the author of Scientia Press, a website that discusses science and history. See <http://www.scientiapress.com/about-us>. Dillon has a Ph.D in history from Cornell University, has taught at several universities, and has served as a foreign service officer, in particular as an intelligence analyst (two prizes for analysis). *Id.* Since leaving the State Department, Dillon has worked as a theoretical scientist, medical writer, entrepreneur, and historian. *Id.* Dillon has written about the Amerithrax investigation, raising many questions about the findings made by the government. See <http://www.scientiapress.com/fbi-ivins>. Thus, on April 18, 2015 and May 15, 2015, plaintiff submitted FOIA requests to the FBI concerning the investigation. Complaint,¶¶1,20. The April 18, 2015 request sought certain information pertaining to Dr. Bruce Ivins. Hardy Decl.,¶23 and Ex. S. Dillon subsequently requested the entire IMCS on May 15, 2015. Hardy Decl.,¶5 and Ex. A.

Rather than fulfill plaintiff's requests under the statutory time duty mandated by the FOIA, 5 U.S.C. §552, as amended, the FBI provided false information about the information Dillon sought, forcing lengthy delays to the FBI's processing of plaintiff's requests. Hardy Decl.¶¶6,24 and Exs. B & T. The FBI's extensive delays prompted a frustrated plaintiff to greatly narrow his requests (Id., ¶¶19-20, 32 and Exs. O, P, & BB). The FBI continued to delay, and only after he was forced to file this lawsuit did the FBI finally produce any information. Id. ¶35 and Ex. EE.

Defendant's Memorandum of Law in Support of its Motion for Summary Judgment ("Defendant's Memo.") alleges that the FBI conducted an adequate search for responsive documents, that the documents withheld were done so primarily pursuant to FOIA Exemption 5's deliberative process privilege, and that other exemptions apply even though it did not justify these exemptions or in one case, even do more than mention responsive documents[[1]](#footnote-1), completely in its motion. However, as will be established below, the FBI's search was not adequate nor has the government established that the deliberative process privilege or any other FOIA Exemption applies to the withheld documents. Thus, plaintiff is entitled to his cross-motion for summary judgement and defendant's motion must be denied[[2]](#footnote-2).

**Argument**

**A. DEFENDANT HAS NOT CONDUCTED AN ADEQUATE SEARCH**

 This Circuit has consistently held that in order to meet its burden of an adequate FOIA search, an “agency must demonstrate that it has conducted a ‘search reasonably calculated to uncover all relevant documents.’” *Weisberg v. U.S. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (quoting *Weisberg v. Department of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983). An agency must demonstrate “beyond material doubt that its search was reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). The FBI has described its searches for responsive records which occurred following the submission of the requests, administrative appeals and the Complaint in this matter. Defendant's Memo. at 6-11. As documents were located, defendant believes that its searches were adequate and that summary judgment is appropriate on the issue. *Id.* However, as demonstrated below, the FBI's search has not been established as adequate.

 Plaintiff narrowed his request in FOIA Number 1327397 to, among other items, email communications between Bruce Ivins and Patricia Fellows and Mara Linscott. Hardy Decl.,¶32. The FBI describes how they found the investigative file that these email communications were maintained in. and then states that they reviewed the file for responsive emails. *Id*.,¶47. Plaintiff, via his counsel, notified defendant that he believed that additional responsive emails existed in his narrowed request. Plaintiff provided specific examples to defendant as to his belief as to why additonal responsive emails should exist. See Letter from Scott A. Hodes to AUSA Benton Peterson dated February 8, 2018. Declaration of Scott A. Hodes dated July xx, 2018,¶x and Exhibit A. Plaintiff asked the FBI to explain the universe of emails located and also if any of these records had been destroyed. *Id*. Defendant did not reply to this letter nor did it provide any further details on its search for these emails in its briefing papers before this Court.

The FBI has failed to establish that its search methods for specific emails was reasonably calculated to uncover relevant documents, see *Ogelsby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), as no description of the FBI's search through the investigative file for the requested emails is described in any way. The FBI does not describe if its search for these emails were electronic or hard-copy, if it was a key word search or a screen by screen manual search, what the key words were, who conducted the search, or if a search for the narrowed emails even occurred. This failure of the FBI to describe how it determined that the responsive emails located were the only ones within the parameters of plaintiff's request, without further detail as to its search through the located investigative file establishes that the defendant is not entitled to summary judgement on its search for responsive records. *Weisberg v. U.S. DOJ,* 745 F.2d 1476, 1485 (D.C. Cir. 1984).

**B. DEFENDANT'S *VAUGHN* INDEX IS INADEQUATE**

Defendant includes a *Vaughn* Index in its filing in which it attempts to justify the withholdings it made on the responsive records. Hardy Decl.¶¶48-100. Defendant has the responsibility of justifying information withheld in response to a FOIA request. See 5 U.S.C. § 552(a)(4)(B); *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (explaining that it is agency's burden "to justify the withholding of any requested documents"); *DOJ 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 are not 'agency records' or have not been 'improperly' 'withheld.'"). Defendant has failed to meet its burden.

 One of the items plaintiff narrowed his request to was the sixteen pages in the IMCS concerning Bruce Ivins. Hardy Decl.,¶20 and Exhibit P. Defendant clearly admits that these pages were part of the requests at issue in this litigation, and even states that "the request for documents regarding Dr. Bruce Ivins is discussed below," *Id*.¶23. However, there is absolutely no mention of the withholding or release decision on these documents by defendant in its *Vaughn* index. *Id*.,¶¶48-100. Even with these omissions, defendant seeks summary judgment on the entire case as supported by the *Vaughn* Index in the Hardy Decl. Defendant's Memo. at 12.

 Furthermore, it is not clear that defendant actually reviewed the 22-page Table of Contents in compiling its *Vaughn* index. Defendant states that because it believed the "IMCS was categorically exempt pursuant to Exemption 5, the FBI did not foresee an immediate need to consult with other government agencies regarding their information." Hardy Decl.,¶68. Further, while the *Vaughn* index describes why the FBI believes information is exempt pursuant to FOIA Exemption 1, it does not appear that the FBI followed proper procedures in justifying its classification of this material. The FBI does not state that the material went before the Department Review Committee as is the normal process in withholding FOIA material in litigation. See 28 C.F.R. Section 17.14. Further, while defendant states why it believes the material is substantively classified under the current Executive Order, it does not provide any evidence that it is properly classified procedurally. No statements concerning the dates of classification stamps are provided, no classified declaration was provided for the Court and no exhibits demonstrating that the documents were properly classified have been entered into evidence. As such, the FBI has not demonstrated that the material is classified and its use of the other exemptions are suspect as they, in most cases, mirror the justifications for the classified material. Defendant presents this cursory overview of other exemptions to avoid a *Maydak* issue. *Maydak v.U.S. Department of Justice*, 218 F.3d 760, 769 (D.C. Cir. 2000). (Government must assert all possible exemptions at the District Court level or waives their use in further proceedings). However, defendant's attempt to avoid a future *Maydak* issue does not establish that the cited exemptions are properly justified herein. Further, Exemption 7(A) is a temporal exemption and this case revolves around the defendant's invocation of Exemption 5 which will not lapse until 2031 - long after this plaintiff's statute of limitations has expired, thus Exemption 5, unlike 7(A) is not temporal akin to the situation in *Maydak*. Thus, not only has defendant improperly failed to justify some of the documents its wishes to withhold, it has waived any use of Exemptions 1,3, and 7(E).

 As defendant's *Vaughn* is insufficient, defendant has failed to describe or in any way justify its withholding of the 16 pages regarding Dr. Bruce Ivins in the IMCS and must release these documents. Further, it is not entitled to summary judgment on Exemptions 1, 3, and 7E.

**C. EXEMPTION 5 DOES NOT APPLY**

 Defendant claims that it is entitled to withhold information the IMCS pursuant to FOIA Exemption 5 (5 U.S.C. § 552(b)(5)) because the material is covered by the deliberative process privilege. Defendant's Memo. at 19. The deliberative process privilege may protect some pre-decisional and deliberative records. See *Judicial Watch v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006); *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980). The government’s claim of exemption from disclosure is accorded no deference. *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) (The district court must make a *de novo* determination as to the validity of the agency’s exemption claim). Moreover, the government must construe disclosure exemptions narrowly. See *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011); *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988). Any “[d]oubts are customarily to be resolved in favor of openness.” *Irons v. FBI*, 811 F.2d 681, 685 (1st Cir.1987). The agency seeking to withhold information bears the burden of showing that an exemption applies. *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1190 (D.C. Cir. 2000); *Coastal States* 617 F.2d at 861 (The agency invoking a FOIA exemption bears the burden of “establish[ing] [its] right to withhold evidence from the public.”). Mere “conclusory assertions of privilege will not suffice to carry” the agency's burden. *Id*.; see *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 258 (D.C.Cir.1977) (government must show “by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA”). Thus, the FBI must specifically explain how disclosure of each withheld information segment would “reasonably” be expected to damage the interests protected by the claimed exemption. See, e.g*., Kimberlin v. DOJ,* 139 F.3d 944, 950 (D.C. Cir. 1998); *Pacific Architects & Engineers, Inc. v. Renegotiation Board,* 505 F.2d 383, 385 (D.C. Cir. 1974).

Finally, the FOIA requires the FBI to disclose “[a]ny reasonably segregable portion of a record ... after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). Non-exempt portions of a record may be withheld only if they are “inextricably intertwined” with the exempt portions. See *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys*., 463 F.3d 239, 249 n. 10 (2d Cir.2006); *EPA v. Mink*, 410 U.S. 73, 92 (1973). If the FBI determines that non-exempt portions of a record are not segregable, it must justify that determination in detail. See *Mead* 566 F.2d at 261.

To meet its burden in this case, the FBI must (a) identify a specific valid interest it seeks to protect, (b) demonstrate foreseeable harm to such interest in the event of disclosure, and (c) demonstrate that it has taken reasonable steps to segregate and release nonexempt information. The FBI has met none of these obligations with respect to the records it withheld here.

 “Two requirements are essential to the deliberative process privilege: the material must be predecisional *and* it must be deliberative.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C.Cir.1997) (citation omitted, emphasis supplied); *Wolfe v. Dep't of Health and Human Servs*., 839 F.2d 768, 774 (D.C.Cir.1988) (*en banc*). A document is predecisional if “it was generated before the adoption of an agency policy.” *Coastal States*, 617 F.2d at 868. A document is deliberative if it “reflects the give-and-take of the consultative process.” *Id*. at 866. “A document will be considered ‘predecisional’ if the agency can (i) pinpoint the specific agency decision to which the document correlates, (ii) establish that its author prepared the document for the purpose of assisting the agency official charged with making the decision, and (iii) verify that the document precedes, in temporal sequence, the decision to which it relates.” *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 557 (1st Cir.1992) (citations omitted). See also *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1204 (D.C.Cir.1991) (agency must show the decisional “context” of the document within the process used to reach determinations “like those in issue”); *Senate of Puerto Rico v. US DOJ*, 823 F.2d 574, 585-86 (D.C. Cir. 1987) (agency must “specify the relevant final decision” and bears burden of establishing “what deliberative process is involved, and the role played by the documents in the course of that process”) (citation omitted); *In re Sealed Case*, 121 F.3d 729, 737 (D.C.Cir.1997) ("The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made").

A temporally “predecisional” document may still not “fall within the confines of Exemption 5 if it is not part of the ‘deliberative process.’” *Formaldehyde Inst. v. Department of Health and Human Servs*., 889 F.2d 1118, 1121 (D.C.Cir. 1989). Moreover, a record must be deliberative—i.e., “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C.Cir.1975).

 The FBI claims that the Table of Contents to the IMCS was properly withheld pursuant to the deliberative process privilege because the IMCS was an interim investigative summary drafted in 2006, midway through the investigation. Defendant's Memo. at 19. Defendant alleges that the IMCS is deliberative because "it is a preliminary case summary drafted midway though the anthrax investigation and contains information, analysis, and suppositions based on the limited and incomplete evidence at that time . . . [the IMCS] contains opinions and analyses based on inter-agency communications during the anthrax investigation. *Id*.

 Defendant's statements about the IMCS don't justify the withholding of its Table of Contents pursuant to the deliberative process privilege. The FBI's description of the IMCS as an "interim investigative summary," Hardy Decl.,¶65, without further description does not establish that it is a deliberative document. The FBI doesn't describe any deliberative process involved in the Anthrax investigation, it merely states that in 2006 it created the IMCS and in 2010 it published a final investigative report. *Id*. At no point does it state that the IMCS was used in the investigation as a deliberative document in reaching the conclusions found in the final investigative report. Thus, the FBI has not established that the IMCS played any part in a deliberative process.

 Further, defendant has not established that the investigation concerns any type of policy matter. *Petroleum Information Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). Additionally, it is clear from the FBI's description of the IMCS that there is a great deal of factual information in the document, (IMCS contains among other things "information"). Hardy Decl., ¶65. Factual information is not protected under the deliberative process privilege. *Coastal States*, 617 F.2d at 867.

 Notwithstanding whether or not any part of the entire IMCS is a deliberative document, the only issue before this Court is whether the Table of Contents of the IMCS is protected in full pursuant to the deliberative process privilege. "The table of contents is twenty-two (22) pages and lists each section of the IMCS." Hardy Decl., ¶65. Defendant does not describe the table of contents in any greater detail nor does it establish that it is not wholly factual. Thus, defendant has not established that the Table of Contents is protected pursuant to the deliberative process privilege.

 **D. RELEASE OF ALL SEGREGABLE INFORMATION NOT ESTABLISHED**

 The FOIA requires that any “reasonably segregable,” non-exempt information must be disclosed after redaction of exempt information. 5 U.S.C. § 552(b). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency must show “with ‘reasonable specificity’” that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep’t of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). In this case, the FBI has made a boiler plate statement that it released all reasonably segregable non-exempt information and cannot segregate information any further. Hardy Decl. ¶ 101.

 However, as stated previously, defendant has not established that the Table of Contents is not entirely factual. As such, defendant has not established that many of the pages withheld in full cannot be further processed for release to plaintiff. Defendant should be required to review these pages again and either release all segregable non-exempt information or show with specificity that the information cannot be released. *Armstrong v. Executive Office of the President*, 97 F.3d at 578-79.

**E. *IN CAMERA* REVIEW IS APPROPRIATE**

 As established above, there are many questions concerning the exemption claims made by defendant. Thus, plaintiff respectfully asks that this Court review the documents *in camera*.

 Where, as here, the documents at issue are “are few in number and of short length” and where “the dispute over the applicability of the particular exemption centers on the actual contents of the document”, ­*in camera* review is appropriate. *E.g.*, *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C.Cir. 1980), *overruled on other grounds by Founding Church of Scientology of Washington D.C., Inc. v. Smith,* 721 F.2d 828 (D.C.Cir.1983). Thus, *in camera* review is appropriate.

**Conclusion**

 Defendant has failed to conduct an adequate search for responsive records, nor have they properly justified the withholding of records located but not released. Thus, summary judgment should not be granted for defendant. Plaintiff’s cross-motion for summary judgment should be granted; additional searches should be ordered and the documents withheld should be released to plaintiff.

Dated: July 16, 2018 Respectfully Submitted,

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|  | */s/*  \_\_\_\_\_\_\_\_\_\_\_\_ SCOTT A. HODES, D.C. Bar #430375Scott A. Hodes, Attorney at Law P.O. Box 42002 Washington, D.C. 20015Tel: (301) 404-0502Fax: (413) 641-2833 Attorney for Plaintiff  |

1. Defendant fails to do more than even mention that plaintiff narrowed his request to only sixteen pages concerning the late Bruce Ivins. Hardy Decl.,¶20. Defendant claims it should merit summary judgment on the withholding of these documents even though it does not describe or justify the withholding of the documents pertaining to Ivins in its filing. [↑](#footnote-ref-1)
2. Plaintiff does not challenge the defendant's use of Exemption 6 and 7(C) to protect the privacy of third parties in the responsive records. [↑](#footnote-ref-2)