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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N,

Case No. 05-1587-ST

Plaintiff,

v.

**MEMORANDUM IN SUPPORT OF
PLAINTIFF’S MOTION TO COMPEL
PREPARATION OF A VAUGHN INDEX**

U.S. DEPARTMENT OF THE INTERIOR,
GALE A. NORTON, Secretary, U.S. Department
of the Interior, **ELAINE M. BRONG**, State
Director, Oregon State Office, U.S. Bureau of
Land Management, and **DANA SHUFORD**,
District Manager, Burns District BLM,

Defendants.

INTRODUCTION

In this action, Plaintiff Oregon Natural Desert Association (“ONDA”) challenges the actions of Defendants U.S. Department of the Interior *et al.* regarding a request by ONDA under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended. ONDA’s First Claim for Relief targets Defendants’ failure to justify their reliance on FOIA Exemption 5 to withhold certain responsive documents. Defendants have not demonstrated that the documents are “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). ONDA therefore

requests that this court order Defendants to provide an itemized, indexed inventory of each agency record or portion thereof responsive to ONDA's FOIA request which Defendants assert to be exempt from disclosure, accompanied by a detailed justification statement covering each refusal to release the requested document or portions thereof, in accordance with the indexing requirements of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir.1973), cert. denied, 415 U.S. 977 (1974).

ARGUMENT

The FOIA creates a presumption in favor of disclosure of government documents. Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976); see also TPS, Inc. v. U.S. Dep't of Def., 330 F.3d 1191, 1196 (9th Cir. 2003) (noting “the circuits agree that Congress’ intent is best realized by interpretations of FOIA that favor disclosure over secrecy”). An agency may withhold a document “*only* if the information contained in the document falls within one of the nine statutory exemptions to the disclosure requirements set forth in § 552(b).” Bowen v. U.S. Food and Drug Admin., 925 F.2d 1225, 1226 (9th Cir.1991) (emphasis in original). These exemptions are narrowly construed. Cal-Almond, Inc. v. U.S. Dep't of Agric., 960 F.2d 105, 107 (9th Cir.1992); U.S. Dep't of Justice v. Julian, 486 U.S. 1, 7 (1988). When a government agency refuses to disclose a document, the burden is on the agency to show that a FOIA exemption applies. 5 U.S.C. § 552(a)(4)(B); Bowen, supra.

Unlike “‘ordinary’ civil cases, in a FOIA case the requester generally lacks the ability to challenge the government’s assertions of exemption.” Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State, 818 F.Supp. 1291, 1295 (N.D. Cal. 1992). Because this seriously disadvantages the party seeking release of government records, the courts have devised the Vaughn index requirement to insure that “the requesting party and the deciding judge have

sufficient information upon which to determine whether the government agency properly withheld the requested documents.” Nat’l Res. Def. Council v. U.S. Dep’t of Def., 2005 WL 2397223, at *6 (C.D. Cal. 2005) (quoting Schiffer v. FBI, 78 F.3d 1405, 1408–09 (9th Cir. 1996)); see also Hronek v. Drug Enforcement Agency, 16 F.Supp.2d 1260, 1265–66 (D. Or. 1998) (noting distortion of typical adversarial process in FOIA exemption cases).

The purpose of the *Vaughn* index is to “afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholdings.” Citizens Comm’n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (internal quotations omitted); see also Hronek, 16 F.Supp.2d at 1265. The *Vaughn* index therefore “functions to restore the adversarial process to some extent, and to permit more effective judicial review of the agency’s decision.” Weiner v. FBI, 943 F.2d 972, 977–78 (9th Cir. 1991). The index must “identify[] each document withheld, the statutory exemption claimed, and [provide] a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption.” Id. at 977; Vaughn v. Rosen, 484 F.2d 820. The description of the withheld material must be “sufficiently detailed to allow a court to determine whether the claimed exemptions apply to the withheld documents.” NRDC, 2005 WL 2397223, at *15 (quoting Wilderness Soc’y v. U.S. DOI, 344 F.Supp.2d 1, 9 (D.D.C. 2004)).

In this case, in response to ONDA’s FOIA request, Defendants withheld portions of four documents and 109 full pages of documents, pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Compl. at ¶ 20. Therefore, a *Vaughn* index would be particularly useful in sharpening the issues and in permitting ONDA to test the bases for the government’s exemption claims. Therefore, ONDA respectfully requests the court to require Defendants to provide Plaintiff with an appropriate *Vaughn* index within 20 days of the date of the court’s Order.

DATED this 19th day of October, 2005.

Respectfully Submitted,

s/ Peter M. Lacy

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Oregon Natural Desert Association

Of Attorneys for Plaintiff