Ms. Joo Chung
Director of Oversight and Compliance
Office of the Secretary of Defense
osd.foia-appeal@mail.mil

RE: FOIA Appeal for Case 18-F-0521

November 29, 2021

Dear Ms. Chung,

We are writing to appeal the decision in FOIA case 18-F-0521 pursuant to 32 C.F.R. § 286.11.

On February 7, 2018, in response to breaking news reports that then-President Donald Trump had directed the Department of Defense to plan a military parade in Washington, D.C., we requested communications, notes, documents, calendar entries, or similar records pertaining to the idea of a potential military parade in Washington, D.C., including any discussions of dates, costs, parade routes, vehicles, hardware, weapons, aircraft, units, equipment, materiel, and/or personnel. By letter dated September 16, 2021, and sent the following day, Stephanie Carr of the Freedom of Information Division informed us as follows:

> The Joint Staff conducted a search of their records systems and located 2,026 determined to be responsive to your request. Mr. Scott L. McPherson, Chief, Information Management Division, Declassification Branch, in his capacity as an Initial Denial Authority, has determined that the 2,026 pages are withheld in their entirety. Portions of the withheld information is exempted from disclosure pursuant to 5 U.S.C. § 552 (b)(1), information that is currently and properly classified in the interest of national security in accordance with Executive Order 13526, as amended, applying section 1.4 (a), concerning the protection of military plans, weapons, systems, or operations. Information was also exempted pursuant to 5 U.S.C. § 552 (b)(5), inter- and intra- agency memoranda which are deliberative in nature; this exemption is appropriate for internal documents which are part of the decision making process, and contain subjective evaluations, opinions and recommendations; and (b)(6), information, which, if released, would constitute a clearly unwarranted invasion of the personal privacy of individuals.

While there may be exempt portions within the responsive materials, the denial does not indicate any attempt to separate out non-exempt information, as required by statute. FOIA requires agencies to "consider whether partial disclosure of information is possible" and "take reasonable steps necessary to segregate and release nonexempt information," emphasizing that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C §§ 552(a)(8)(A)(ii)(I)-(II), 552(b). Furthermore, the response indicates that the exemptions cover different portions of the responsive records, but it is not clear which portions are covered by which exemption. Under FOIA, "[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record." *Id.* § 552(b). At the least, a Vaughn index or similar metadata is necessary to clarify the nature and basis of the denial.

I. The Initial Denial Authority Failed to Redact

The DoD's response failed to redact exempt information while releasing non-exempt information. As the U.S. District Court for the District of Columbia recently held, "merely identifying an exemption that covers some material found in a record does not permit an agency to withhold the record in its entirety." *Protect Democracy Project, Inc. v. U.S. Dep't of Health & Human Serv.*, No. 17-cv-792, 2021 WL 4148312, at *2 (D.D.C. Sept. 13, 2021). Instead, the agency must provide a "detailed justification," most commonly through a Vaughn index and affidavit that there has been a "line-by-line review of each document withheld in full . . .[and] no documents contained releasable information which could be reasonably segregated from the nonreleasable portions." *Johnson v. Exec. Office for U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002).[1]

Merely asserting that a document is covered by an exemption is not enough; the government must explain why redaction is not possible. For instance, the FBI failed this test when it merely referenced an applicable privacy exemption to requested documents while "fail[ing] to indicate *why* the privacy interests at stake could not be protected simply by redacting particular identifying information." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1052 (3d Cir. 1995). Similarly, we received four sentences asserting, with no justification or explanation, that all responsive records are exempt.

Even if the agency provides a "detailed justification" of why it did not release redacted versions of documents, that justification must show either that the process of redaction is unreasonably burdensome or that it is not feasible to separate non-

[1] Recent court decisions have generally not conducted separate analyses for sections 552(a)(8)(A)(ii) and 552(b). *See, e.g.*, Ctr. for Investigative Reporting v. U.S. Customs & Border Protection, 436 F. Supp. 3d 90, 115 (D.C. Cir. 2019).

exempt and exempt information and produce a coherent document. *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260–62 (D.C. Cir. 1977).

Here, the denial letter reported that the Joint Staff located 2,026 records (or "pages"—the denial is not consistent) that are responsive to our request. This is nowhere near the numbers of records in cases where courts have found the burden of redaction too great. Such cases have typically involved hundreds of thousands, if not *millions*, of responsive documents. *See, e.g., Nat'l Day Laborer Org. Network v. ICE*, No. 16-cv-387, 2017 WL 1494513, at *12 & n.13 (S.D.N.Y. Apr. 19, 2017) (312,000 multi-page documents); *Ayuda, Inc. v. FTC*, 70 F. Supp. 3d 247, 275-77 (D.D.C. 2014) (20 million responsive records, which would require 8,000 hours to redact); *Vietnam Veterans of Am. Conn. Greater Hartford Chapter 120 v. Dep't of Homeland Sec.*, 8 F. Supp. 3d 188, 203 (D. Conn. 2014) (26,000 packets, each of which contained 50 pages); *Hainey v. Dep't of Interior*, 925 F. Supp. 2d 34, 45 (D.D.C. 2013) (every email sent or received by 25 different employees throughout a two-year period); *Int'l Counsel Bureau v. U.S. Dep't of Defense*, 723 F. Supp. 2d 54, 59 (D.D.C. 2010) (hundreds of thousands of unsorted images).

In contrast, reviewing and redacting 9,882 records (four times as many as involved here) was found to be *not* unreasonably burdensome—even if it might take 2,200 hours. *Kwoka v. IRS*, No. 17-cv-1157, 2018 WL 4681000, at *5 (D.D.C. Sept. 28, 2018). Indeed, if anyone at the DoD has actually reviewed these documents line-by-line as required for a privilege determination, then the agency has already done the work required to separate exempt from non-exempt information.

As to the feasibility of redaction, the initial response offered no reason why the information requested was inseparable. The response indicates that "portions" are exempted due to the national security exemption, while "[i]nformation was also exempted pursuant" to the inter- and intra-agency memoranda exemption and the personal privacy exemption. While a full Vaughn index may not be required prior to litigation, the conclusory response here presents us with the same problem discussed in that case:

> The Government claims that the documents, as a whole, are exempt under three distinct exemptions. From the record, we do not and cannot know whether a particular portion is, for example, allegedly exempt because it constitutes an unwarranted invasion of a person's privacy or because it is related solely to the internal rules and practices of an agency. . . It seems probable that some portions may fit under one exemption, while other segments fall under another, *while still other segments are not exempt at all and should be disclosed*.

Vaughn v. Rosen, 484 F.2d 820, 827–28 (D.C. Cir. 1973) (emphasis added). The denial letter admits that the information is not completely covered by any one of the claimed exemptions. And the scopes of the three exemptions cited are bounded, as

discussed below. Without additional justifications, the DoD has not carried its burden to prove the exemptions apply. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). At the very least, a Vaughn index or other metadata is needed to explain the breakdown between the three categories.

II. The Failure to Redact was Unjustifiable Given the Narrow Scope and Applicability of the Cited Exemptions

A. The Denial Letter Concedes that Exemption 1 (National Security) Only Covers "Portions" of the Records

The denial letter claims that "portions" of the responsive records were withheld under 5 U.S.C. § 552(b)(1), which applies to matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order," and Exec. Order 13,526 § 1.4(a), authorizing classification of information pertaining to "military plans, weapons systems, or operations."[2]

While we acknowledge that there may be *some* properly classified information within the responsive records, the denial letter has only claimed "portions" of the information are covered by this exemption. Therefore, the DoD must either explain why it could not redact the exempt information or release the non-exempt information with the exempt information redacted.

B. The Scope of Exemption 5 (Inter- and Intra-Agency Communications) is Limited

The denial letter claims that an unspecified volume of information was withheld under 5 U.S.C. § 552(b)(5), which applies to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency," because of the "deliberative process" privilege.

That privilege is relatively narrow. To claim this privilege, a document must be both "predecisional," that is, "generated before the adoption of an agency policy," and "deliberative," that is, it "reflects the give-and-take of the consultative process." *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2010) (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)). The D.C. Circuit has held that once a policy has been adopted, even informally as non-binding "working law," descriptions of that policy are not predecisional. *Public Citizen*, 598 F.3d at 875.

[2] Section 1.4 of the Executive Order emphasizes that information may only be classified if "its unauthorized disclosure could *reasonably be expected to cause identifiable or describable damage to the national security*," and FOIA exemption 1 by its own terms only applies to matters that are "are in fact properly classified pursuant to such Executive order."

Furthermore, records that reference existing policy as a "starting point" in discussions are not predecisional simply because they are used to discuss policy changes. *Id.* at 875–76.

Even if a document is predecisional, if it has both deliberative sections and descriptions of existing policy, then "[o]nly those portions . . . that reflect the give and take of the deliberative process may be withheld." *Id.* at 876. The agency must release all factual materials that do not "inevitably reveal the government's deliberations." *Id.* For instance, in *Public Citizen*, the court held that internal documents listing agencies that typically do not submit materials to Congress without OMB preclearance, as well as why they were treated differently by OMB, were not deliberative. *See id.* Therefore, the documents had to be released with only "those portions that provide candid or evaluative commentary" redacted. *Id.*

Here, descriptions of existing DoD policy, including descriptions of policies that were subsequently adopted, as well as factual statements, cannot be withheld under this exemption, even if they appear in predecisional documents of a generally deliberative nature. Even accepting that there is likely some predecisional and deliberative information within the responsive records, only the specific portions of the records that are *both* predecisional *and* deliberative may be withheld.

C. The Scope of Exemption 6 (Privacy) is Limited

The denial letter claims that an unspecified volume of information was withheld under 5 U.S.C. § 552(b)(6), which applies to personnel, medical, or "similar" files. While the Supreme Court has taken a broad view of what constitutes "similar" files, *U.S. Dep't of State v. Wash. Post Co.*, there must also be a "significant privacy interest." 456 U.S. 595, 602 (1982). Unlike other agencies, courts have found most DoD employees and military personnel outside of leadership positions have a significant privacy interest in their names. *See, e.g., Seife v. U.S. Dep't of State*, 298 F. Supp. 3d 592, 627–28 (S.D.N.Y. 2018). But as the DoD itself recognizes, this privacy interest does not extend to senior leadership. *See* Dep't of Defense, Dir. for Admin. & Mgmt., *Memorandum for Secretaries of the Military Dep'ts*, OSD 17746-05 (Sept. 1, 2005) (applying blanket ban on releasing names of employees below the "office director" level).[3] We have no interest in the addresses or contact information of any DoD employees, nor even the names of non-leadership employees. But that type of information can be redacted, and the other portions of the records must be released.

Even if there is a responsive portion of a document that raises a significant privacy interest, we have a substantial interest in disclosure of materials that may help inform the public about this matter. The planned military parade was a matter

[3] http://www.acq.osd.mil/dpap/pcard/Withholding_personally_identifying_information_09-01-05.pdf.

of serious controversy and represented a break in the tradition of civilian-military relations in the United States. This is a matter of grave public interest, not merely a request for "information for its own sake," but whether the highest military and civilian officials proposed "improper[]" and possibly corrupt actions. *NARA v. Favish*, 541 U.S. 157, 172 (2004). This interest is substantial and there is a close "nexus" between the information requested—the planning for an unprecedented, controversial military parade—and the public interest in knowing the conduct of the officials leading that planning. *Id.* at 173.

Even if the substantial public interest does not override any significant privacy interests, the DoD is obligated to redact personal information and release the remainder. The exemption "does not permit an agency to exempt from disclosure *all* of the material [in a record] solely on the grounds that the record includes some information [that infringes on privacy concerns]." *CREW v. DOJ*, 746 F.3d 1082, 1094 (D.C. Cir. 2014) (cleaned up).[4] The DoD must redact information that infringes on privacy interests and release the non-exempt information.

III. Conclusion

The denial did not separate exempt from non-exempt information, as required by statute. Nor did it offer any justification of the wholesale withholding of the responsive records. While some of the responsive material may be covered by exemptions, none of the exemptions claimed are boundless, and the DoD must redact and release non-exempt information. At the minimum, we request a Vaughn index explaining the decision to withhold each responsive record.

Sincerely,

Ronald A. Fein
Legal Director

Benjamin Horton
Legal Fellow

[4] The privacy exemption claimed by the DoD was not the broader exemption 7(C), related to investigations, but the narrower exemption 6. *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989).