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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CECIL D. ANDRUS, *Plaintiff*, vs. UNITED STATES DEPARTMENT OF ENERGY *Defendant.*	No. 1:15-cv-453-BLW **PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** (*Docket No. 15*)

INTRODUCTION

Buried in the middle of DOE's 30-page Response/Reply brief (*Docket No. 19)* is a telling footnote which confirms that DOE continues to play "hide the ball" in bad faith violation of its FOIA duty to release information sought by Governor Andrus. *See id,* p. 10, n. 5.

That footnote says DOE "intended to make a discretionary release" of eight documents previously withheld on deliberative process privilege grounds, but they were "inadvertently not released until April 8, 2016." *Id.* They involve DOE communications with Congressional staff, which Gov. Andrus's opening brief showed are obviously not privileged and were wrongly withheld by DOE. *See* Andrus Opening Brief (*Docket No. 15-1*), p. 9. A few days after that brief was filed, DOE produced the documents as a "further response" to the FOIA request. *See* Shumaker Decl., filed herewith, Exhibit A (copy of April 8, 2016 letter and documents).

As the Court will see, these eight documents are just copies of an email chain updating some Congressional staff about the DOE's waiver request of the Batt Agreement. *Id.* They are routine communications that contain nothing reflecting DOE internal decision-making. Yet DOE withheld them from Gov. Andrus for well over a year now on specious deliberative process privilege grounds – it took not only filing this lawsuit but also the opening summary judgment brief to pry them loose. And despite releasing them, DOE continues to withhold the same information in other redacted documents. Shumaker Decl., ¶ 5.

The belated release of these improperly withheld documents underscores DOE's bad faith violations of FOIA. As explained below, the Court should order DOE to submit all remaining withheld or redacted documents for *in camera* review so the Court can directly evaluate whether DOE has carried its burden of justifying withholding the information under the narrow FOIA exceptions, and order DOE to fully release all documents that have no valid privilege.

ARGUMENT

I. THE COURT SHOULD CONDUCT *IN CAMERA* REVIEW AND ORDER RELEASE OF IMPROPERLY WITHHELD/REDACTED DOCUMENTS.

Under Claim Two, DOE's recent release of the eight previously withheld documents proves that the agency has abused the deliberative process privilege and continues to unlawfully withhold requested information in bad faith violation of FOIA. In light of these developments, the Court should order DOE to produce all remaining withheld/redacted documents for *in camera* review, so the Court can determine directly whether DOE has met its burden of demonstrating that the narrow FOIA exceptions apply.

Gov. Andrus's Opening Brief (*Docket 15-1*) established numerous grounds challenging DOE's invocation of FOIA Exemption 5 to withhold information sought in his January 2015 FOIA request. DOE's response boils down to the assertion that the Court must presume DOE's good faith in applying Exemption 5 privileges. But the April 8, 2016 disclosure underscores DOE's bad faith in invoking FOIA exceptions to wrongly withhold documents.

Specifically, DOE advised the Court that it fully responded to Gov. Andrus's FOIA request through the July 2015 "initial response" and the October 2015 "final response." *Docket No. 11-5,* Exs. 4 & 6. Yet after the initial summary judgment briefs were filed, DOE sent Gov. Andrus the eight previously-withheld documents through the April 8, 2016 "further response." Shumaker Decl., Ex. A. The April 8th response does not explain why it was provided after the October 2015 "final" response; and DOE's Response/Reply Brief (p. 10, n. 5) simply asserts that DOE "intended to make a discretionary release," but the documents were "inadvertently not released" until April 8th without any further explanation. Given this record, DOE's claimed FOIA exemptions are not entitled to a presumption of good faith, and the Court should order

DOE to produce all the withheld and redacted documents in their original form for *in camera* review by the Court.

FOIA authorizes the Court to examine the disputed documents *in camera* to determine whether DOE has properly asserted FOIA exemptions and properly segregated non-exempt information. 5 U.S.C. § 552(a)(4)(B). The Court may require *in camera* review in its discretion, if it finds that the agency's FOIA affidavits and *Vaughn* index are inadequate to provide a sufficient basis for a claimed exemption. *Church of Scientology v. U.S. Dept. of Army*, 611 F.2d 738, 742-43 (9th Cir. 1979); *Pollard v. F.B.I.*, 705 F.2d 1151, 1154 (9th Cir. 1983). *See also Hamdan v. U.S. Dept. of Justice*, 797 F.3d 759, 780-81 (9th Cir. 2015) (FOIA declarations that were not detailed and self-contradictory were not entitled to good faith presumption); *Papa v. USA*, 281 F.3d 1004, 1013 (9th Cir. 2002) (FOIA affidavits must be "relatively detailed and non-conclusory" to justify summary judgment for agency); *Lane v. D.O.I.*, 523 F.3d 1128, 1136 (9th Cir. 2008) (a "somewhat conclusory" affidavit from a FOIA officer is not an adequate basis for a court's decision).

As explained in Gov. Andrus's opening brief, and now underscored by the April 8th disclosure, the Court does not have an adequate record to evaluate DOE's claimed FOIA exemptions, thus warranting *in camera* review. DOE's *Vaughn* index and the two affidavits from FOIA officer Morris make only generalized and conclusory assertions that fail to provide adequate explanations for the asserted FOIA exemptions. This is starkly illustrated by the eight documents just released: nothing in the *Vaughn* index or Morris affidavits discloses how, when, or why DOE determined to withhold these Congressional communications as privileged. Neither do the *Vaughn* index or affidavits explain why DOE then changed its mind and disclosed the documents after this litigation was initiated. The only reasonable conclusion is that DOE

carelessly asserted the deliberative process and other privileges, but then back-tracked after it was sued and realized it could not defend the withholding of these documents.

In short, because DOE has failed to provide a sufficient basis for asserting that it has properly applied FOIA exemptions, and in light of the unexplained recent release of eight documents that were wrongly withheld, the Court should order *in camera* review of the remaining disputed documents to asses DOE's claimed privileges and segregability – and then order DOE to fully release all documents that were improperly withheld or redacted.

II. DOE HAS NOT PROPERLY ASSERTED THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES.

The eight recently-released documents illustrate DOE's bad faith in invoking the deliberate process privilege to wrongly withhold information from Gov. Andrus, and it likely the Court will find similar improprieties in other documents withheld on deliberate privilege grounds when it conducts *in camera* review. Obviously, the Court should require DOE to release all documents for which it finds the deliberative process privileged was wrongly invoked.[1]

Moreover, the following responses to DOE's Response/Reply brief are relevant to the Court's *in camera* review in determining whether DOE has improperly asserted attorney-client or attorney work product privileges:

A. Attorney-Client Privilege.

DOE argues that Gov. Andrus's arguments regarding the attorney-client privilege are speculative. DOE Response/Reply at 18. But the only facts DOE offers to support its assertion of

[1] DOE argues that Gov. Andrus "conceded" certain documents were properly withheld by failing to counter every explanation in DOE's opening brief, citing a criminal case where the prosecution waived a harmless error argument not included in its opening brief. *See* DOE Response/Reply at 13, n. 7, *citing U.S. v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011). Here, Gov. Andrus has plainly challenged all of DOE's withholdings under FOIA Exemption 5, which includes all of DOE's vague and redundant explanations in its *Vaughn* index. *See* Gov. Andrus Opening Brief, at 11-12 (*Docket No. 15-1)*.

the privilege is that the *Vaughn* index says the withheld documents include requests for legal advice, and all of the e-mail authors and recipients are either DOE attorneys or employees. *Id.* at 20. DOE asserts the Court must accept its representations because Gov. Andrus has not identified any reasons to doubt its exemption claims. *Id.* at 21.

But there are good reasons to doubt DOE's exemption claims: The eight documents (CI 3-10) recently released by DOE contain only factual information, yet that same information that is still being withheld in other documents (NE 24-26). Shumaker Decl., ¶ 5.

Moreover, DOE misunderstands the standard that prohibits withholding "secret law" under the attorney-client privilege. DOE's Response/Reply (p. 19) asserts that the withheld documents cannot contain agency law, because only this Court is empowered to interpret the Batt Agreement. But DOE is confusing agency law with actual law. An agency's legal conclusions are agency law when the agency "is attempting to develop a body of coherent, consistent interpretations" of actual laws, regardless of whether the agency's opinions are legally binding. *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997). Whether DOE has properly asserted the attorney-client privilege thus again can be best determined by *in camera* review.

B. Work Product.

DOE asserts that documents withheld under the work product privilege were prepared in anticipation of either the 1992 Notice of Violation or the Batt Agreement. DOE Response/Reply at 21. DOE argues that Gov. Andrus conceded that some of the documents were properly withheld merely because he has not countered DOE's bare assertions regarding the Batt Agreement. *Id.* Again, Gov. Andrus has challenged all of DOE's withholdings in the contested documents, and does not have the benefit of knowing what information has been withheld.

Gov. Andrus has thus far provided examples to demonstrate that DOE has not met its

burden and is not entitled to a presumption that it applied the FOIA exemptions in good faith. Regarding the work product privilege, DOE has still failed to identify any foreseeable litigation for four of the documents withheld under the privilege (GC-6, -7, -10, -15). Thus, DOE has not met its burden for asserting the privilege regarding those four documents, and is not entitled to a presumption that it has applied the privilege in good faith to any of the withheld documents.

III. CLAIM ONE IS NOT MOOT, AND DOE CONTINUES TO VIOLATE FOIA'S STATUTORY DEADLINE.

Regarding Claim One, DOE faults Gov. Andrus for supposedly failing to cite the amended opinion in *Hajro v. U.S. Citizenship and Immigration Servs.*, 811 F.3d 1086 (9th Cir. 2015). *See* DOE Response/Reply, p. 3, n. 2. But DOE is flatly wrong: Gov. Andrus correctly cited the amended *Hajro* opinion, which held that a pattern or practice of FOIA deadline violations is an exception to mootness. *See* 811 F.3d at 1103 (amended opinion). It is DOE that has misread the amended *Hajro* opinion, not Gov. Andrus.

While misreading *Hajro*, DOE asserts that the Court should rely instead on the Ninth Circuit's decision in *Tri-Valley Cares v. DOE*, 203 Fed. Appx. 105, 107 (9th Cir. 2006). Yet *Tri-Valley* recognized that evidence of either agency bad faith or a pattern and practice of FOIA deadline violations are exceptions to mootness. *Id.* Both are present here; and the record shows that the First Claim is not moot, whether the Court looks to *Hajro* or *Tri-Valley Cares*.

Specifically, DOE waited until July 10, 2015 to provide its initial response to Gov. Andrus's January 20, 2015 FOIA request, far beyond the 20-day statutory deadline. *Docket No. 11-5,* Ex. 4. Then DOE waited another three months to provide its second response on October 5, 2015. *Docket No. 11-5,* Ex. 6. DOE stated that second response was a "final" response to the FOIA, *id.*, which is the basis for DOE's argument that Claim One is moot since all responsive documents have supposedly been produced.

Yet after Gov. Andrus moved for summary judgment, DOE provided a third "further" response on April 8, 2016, with the eight documents that it previously withheld. Shumaker Decl., Ex. A. DOE continues to withhold other documents containing the same Congressional communications as were just produced, on the same specious deliberative process privilege grounds. *Id.*, ¶ 5. Where Gov. Andrus has now been waiting more than 16 months for a complete response to his January 2015 FOIA request, and still all responsive documents have not been produced, his Claim One that DOE violated the FOIA statutory deadline is not moot and he is entitled to summary judgment on that claim.

Moreover, DOE's series of belated responses – which continued well after this case was filed – evidences that this case is just one in DOE's pattern and practice of FOIA deadline violations, of which there are many other documented examples.[2] These facts demonstrate DOE's policy of refusing to "abide by the terms of the FOIA, and not merely isolated mistakes by agency officials." *Hajro*, 811 F.3d at 1103 (quoting *Payne Enters., Inc. v. U.S.*, 837 F.2d 486,

[2] The Court may take judicial notice of many other federal court decisions and complaints which evidence DOE's pattern and practice of FOIA deadline violations. *See, e.g.,* Complaint, *Tri-Valley Cares v. D.O.E.*, No. 3:13-cv-2596 (N.D. Cal. June 7, 2013) (DOE failed to respond to five FOIA requests for over one year); Complaint, *S. Alliance for Clean Energy v. D.O.E*, 1:10-cv-01335 (D.D.C. Sept. 9, 2010) (DOE violation of FOIA deadline); Complaint, *Tri-Valley Cares v. D.O.E.*, No. 3:10-cv-5923 (N.D. Cal. Dec. 28, 2010) (DOE deadline violations on numerous FOIA requests); Mem. Op., *Nuclear Watch N.M. v. D.O.E.*, No. 6:06-cv-00221 (D.N.M. Sept. 19, 2007)) (E.C.F. No. 59) (DOE took 17 months to produce first response; pattern or practice established by informal agency procedures); *Info. Network for Responsible Mining v. D.O.E*, No. 06-cv-02271, 2008 WL 762248, *2 (D. Col. 2008) (late response); *Donham v. D.O.E.*, 192 F. Supp. 2d 877, 882 (S.D. Ill. 2002); *N.R.D.C. v. D.O.E.*, 191 F. Supp. 2d 41, 41 (D.D.C. 2002) (DOE had not responded to request for two years; court ordered DOE to complete its response within new timeframe); *Gilmore v. D.O.E.*, 33 F. Supp. 2d 1184, 1187-88 (N.D. Cal. 1998) (DOE's failure to make a timely determination was an improper withholding even though it was later determined that the documents were properly withheld; DOE's motion to dismiss pattern or practice claim denied); *Lawyers Alliance for Nuclear Arms Control v. D.O.E.*, 766 F. Supp. 318, 319 (E.D. Penn. 1991) (administrative remedies exhausted when DOE's response was late; no jurisdictional or standing challenges were made); *Coastal States Gas Corp. v. D.O.E.*, 644 F.2d 969, 971 (3d Cir. 1981) (administrative remedies exhausted when DOE's response was late).

491 (D.C. Cir. 1988)). Thus, Gov. Andrus's FOIA deadline violation claim is not moot, and summary judgment should be entered for him on Claim One. *See Gilmore v DOE*, 33 F. Supp.2d 1184, 1188 (ND Cal 1998) (entering summary judgment on timeliness claim).

IV. DOE'S EXHAUSTION ARGUMENT SHOULD BE REJECTED.

The fact that DOE violated FOIA's statutory deadline by failing to provide a timely response to the January 2015 FOIA means that Gov. Andrus was not required to exhaust administrative remedies. FOIA expressly provides that a requester may go straight to district court if the agency fails to make a determination within the 20 working days response time provided in the statute. 5 U.S.C. § 552(a)(6). Once an agency violates the FOIA deadline, no exhaustion of remedies is required. *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 184 (D.C. Cir. 2013).

Nonetheless, Gov. Andrus did attempt to exhaust administrative remedies by appealing the DOE's July 2015 response, and the Court should not penalize that good faith effort by imposing an exhaustion requirement for DOE's tardy October 2015 response. In denying Gov. Andrus's appeal, the Office of Hearings and Appeals upheld all DOE's withholdings – including 11 documents that we now know were wrongly withheld.[3] DOE's October 2015 response came after the initial complaint was filed in this case, and does not prevent this Court from proceeding on the substance of Gov. Andrus's exemption claims for all documents in dispute. *See Carter, Fullerton & Hayes, LLC v. Federal Trade Commission*, 637 F. Supp. 2d 1, 7-8 (D.D.C. 2009).

Moreover, DOE was fully on notice of the challenges Gov. Andrus would make before it released the October 2015 response, because of his prior administrative appeal. Gov. Andrus has not raised any new substantive arguments regarding the October 2015 response that he did not

[3] Specifically, documents labeled NE-24 to NE-26 consist of redacted information that was fully released in the eight documents (CI 3-10) released on April 8, 2016. Shumaker Decl., Ex. A.

raise over the July 2015 initial response. As the District Court for the District of Columbia has explained, administrative exhaustion is important to put the agency on notice regarding which aspects of its response are being contested, because "there are a number of areas in which a requestor can challenge an agency's response. . . ." *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 100 (D.D.C. 2013). Thus, DOE has not been deprived of the opportunity to exercise its discretion and expertise, because it has "been notified of which aspects of the response are being contested." *See In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986) (finding a lack of jurisdiction only "[w]here no attempt to comply fully with agency procedure has been made").[4]

V. THE APA CLAIM IS PROPER.

The Third Claim invoking the APA to review DOE's violation of its own regulations is proper, because those regulations require release of information that FOIA does not. Most of the cases cited by DOE (Response/Reply at 5) hold that an APA claim is not proper when it seeks relief that is identical to the relief available under FOIA. *See Rimmer v. Holder*, 700 F.3d 246, 261 (6th Cir. 2012); *Harvey v. Lynch*, 123 F. Supp. 3d 3, 8 (D.D.C. 2015) (holding that APA relief is not proper when based on regulations that implement FOIA's deadlines); *EPIC v. NSA*,

[4] DOE's Response/Reply again cites many exhaustion cases, but none resembles the unique facts here. Virtually all involve dismissal of claims that were not raised in an administrative appeal. *See Hall & Assocs. v. EPA*, 77 F. Supp. 3d 40, 43, 46 (D.D.C. 2014) (exemption challenges dismissed because appeal only challenged agency's failure to respond and excessive processing fees); *Dettmann v. U.S. Dep't of Justice*, 802 F.2d 1472, 1476-77 (D.C. Cir. 1986) (challenge to adequacy of search dismissed because appeal only challenged exemptions); *Kenny v. U.S. Dep't of Justice*, 603 F. Supp. 2d. 184, 190 (D.D.C. 2009) (challenge to agency's forwarding documents to FBI dismissed because appeal only challenged scope of the search); *Monaghan v. FBI*, 605 F. App'x 596, 599 (9th Cir. 2013) (fee waiver issue raised for first time in response to motion to dismiss); *Texas Roadhouse v. EEOC*, 2015 WL 925894 (W.D. Ky. 2015) (new request added in response to motion to dismiss); *Miller v. FEC*, 2013 WL 4243044 (S.D. Ohio 2013) (exemption challenge raised for the first time in response to motion for summary judgment); *Pinson v. DOJ*, 2016 WL 29245 (D.D.C. 2016) (new FOIA requests in complaint). In *Muset v. Ishimaru*, 783 F. Supp. 2d 260, 372 (E.D.N.Y. 2011), unlike here, the requestor filed no administrative appeal at all.

795 F. Supp. 2d 85, 96 (D.D.C. 2011) (APA claim rejected because NSC not required to respond to FOIA requests). Unlike those cases, DOE's substantive FOIA regulation requires release of information that could be withheld under FOIA's discretionary exemptions. *See* 10 C.F.R. §1004.1. Thus, FOIA does not provide a remedy for DOE's failure to release information under its own regulation. *See El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health and Human Servs.*, 396 F.3d 1265, 1272-73 (D.C. Cir. 2005).

The only case cited by DOE that has addressed the DOE FOIA regulation is *Minnesota v. D.O.E.*, 1982 WL 1155 (D. Minn. Dec. 14, 1982). That court held it lacked jurisdiction under *Chrysler v. Brown*, 441 U.S. 281 (1979), a "reverse FOIA" case which held a Dept. of Labor regulation unenforceable because it was an interpretive agency regulation. *See* 441 U.S. at 300-04. The district court in *Minnesota* failed to recognize, contrary to *Chrysler*, that the DOE FOIA regulation here was adopted as substantive regulation. *See* 10 C.F.R. §1004.1. *Minnesota* was thus wrongly decided, and should not be followed here.

CONCLUSION

For the foregoing reasons and those previously briefed, the Court should conduct *in camera* review to determine whether DOE has met its burden of withholding the requested information, and grant summary judgment to Gov. Andrus, requiring DOE to disclose all documents that it has wrongly withheld or redacted.

Dated: May 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2016, I caused the foregoing PLAINTIFF'S REPLY BRIEF ON MOTION FOR SUMMARY JUDGMENT, along with the accompanying DECLARATION OF MARC SHUMAKER and EXHIBIT A thereto to be electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the counsel of record listed below:

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