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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

CECIL D. ANDRUS,)	
)	No. 1:15-cv-453-BLW
<i>Plaintiff,</i>)	
)	PLAINTIFF’S SEPARATE
vs.)	STATEMENT OF
)	UNDISPUTED FACTS
UNITED STATES)	
DEPARTMENT OF ENERGY)	
)	
<i>Defendant.</i>)	

Pursuant to Local Civil Rule 7.1(b)(1), Plaintiff submits this Separate Statement of Undisputed Facts in support of his Motion for Summary Judgment:

The Batt Agreement

1. During Governor Andrus’s final term in office, the State of Idaho challenged DOE’s mismanagement of nuclear wastes at what is now called the Idaho National Laboratory (“INL”), resulting in federal litigation before this Court. *See Public Service Co. v. Andrus*, No. 91-cv-035-EJL (D. Idaho); *United States of America v. Andrus*, No. 91-cv-054-EJL (D. Idaho).

2. In 1995, the State of Idaho, through Governor Philip Batt (who succeeded Governor Andrus) and Idaho Attorney General Alan Lance executed a settlement agreement with the U.S. Department of Energy (“DOE”) and the U.S. Navy (the “Batt Agreement”) to resolve the INL litigation, which governs the treatment and removal of nuclear waste at INL through the year 2035. *See* 1995 Settlement Agreement (*Docket No. 11-5, Ex. A*).

3. Paragraph D.2.e of the Batt Agreement prohibits (with one exception not relevant here) any shipments of spent nuclear fuel (“SNF”) from commercial power plants to INL, until a permanent storage facility has been established outside of Idaho. *Id.* at 4.

4. On January 6, 2011, current Idaho Governor C.L. “Butch” Otter and Idaho Attorney General Lawrence Wasden executed a Memorandum of Agreement (the “2011 MOA”) with DOE, which agreed that DOE could seek – and the Idaho officials might grant – a waiver of paragraph D.2.e to allow future shipments of “research quantities” of commercial spent nuclear fuel to INL. *See* “Memorandum of Agreement Concerning Receipt, Storage, and Handling of Research Quantities of Commercial SNF at the INL” (*Docket No. 11-5, Ex. B*). The MOA was signed by Richard B. Provencher, manager of DOE’s Idaho Operations Office. *Id.* at 5.

5. In December 2014, pursuant to the 2011 MOA, DOE requested “conditional approval” from Governor Otter and Attorney General Wasden for a waiver of paragraph D.2.e. of the Batt Agreement to allow two proposed shipments of commercial spent nuclear fuel to the INL. *See* Letter from DOE Manager Richard Provencher to Governor Otter, Dec. 16, 2014 (*Docket No. 11-5, Ex. C*). The letter

requesting the waiver was signed by Richard B. Provencher, manager of DOE's Idaho Operations Office. *Id.* at 2.

6. Neither the State of Idaho nor the DOE provided advance public notice regarding DOE's waiver request. In early 2015, Governor Andrus learned about DOE's request for a waiver of paragraph D.2.e. of the Batt Agreement. *See Attachment A hereto, Document ID-1.* Both former Governors Andrus and Batt publicly voiced strong opposition to DOE's request because the Batt Agreement flatly bars shipping commercial spent nuclear fuel to INL and DOE is badly out of compliance with the agreement's cleanup requirements. *Id.*

Plaintiff's FOIA Request

7. On January 22, 2015, Governor Andrus submitted a FOIA request to DOE seeking all documents relating to DOE's December 2014 requested waiver of the Batt Agreement for the proposed commercial spent nuclear fuel shipments and the 2011 MOA. Letter from Cecil D. Andrus to Alexander Morris, Jan. 22, 2015 (*Docket No. 11-5, Ex. 1*).

8. Governor Andrus subsequently agreed to narrow the scope of his request to relate just to the December 2014 waiver request. *See Letter from Laird Lucas to Shonda Humphrey, DOE, March 18, 2015 (Docket No. 11-5, Ex. 2).* Governor Andrus also agreed that the search for responsive documents would be limited to the time period between January 1, 2012, and January 22, 2015. *See E-mail from Laird Lucas to Shonda Humphrey, DOE, April 28, 2015 (Docket No. 11-5, Ex. 3).*

DOE's July 2015 Initial FOIA Response

9. DOE provided an initial response to Governor Andrus's FOIA request on July 10, 2015. *See* Letter from Alexander C. Morris to Cecil D. Andrus, July 10, 2015, (*Docket No. 11-5*, Ex. 4). In this initial response, DOE provided a letter and an index of the documents released, with forty-one documents. *Id.* The letter and index explain that DOE withheld information from thirty of the documents under FOIA Exemption 5. *Id.*

10. DOE has submitted the July 2015 response letter and index to the Court but not the documents provided along with the July 2015 response. *See Docket No. 11-5*, Ex. 4. The complete set of documents as redacted by DOE and produced with the July 2015 response are thus provided herewith as Attachment A. *See* Attachment A hereto.

11. The July 2015 initial response letter indicated that FOIA Exemption 5 was being asserted to redact information in Attachment A under three claimed privileges, the deliberative process privilege, attorney-client privilege, or attorney work product privilege. *See Docket No. 11-5*, Ex. 4. However, neither the response letter nor the redacted documents indicate which privilege applied to any specific document or redaction. *See id.* & Attachment A. Furthermore, DOE did not indicate in the response letter whether it had taken reasonable steps to segregate factual information from exempt information, or identify any reasonably foreseeable harm that could justify withholding the information from the public. *Id.*

12. The first response included an index, which listed the responsive documents from four specific DOE offices of origin. *See Docket No. 11-5*, Ex. 4 at *2. The index identified two documents from the Idaho Office of Operations ("ID"), twenty-nine documents from the Office of Nuclear Energy ("NE"), ten documents from the

Office of Congressional and Intergovernmental Affairs (“CI”), and zero documents from Office of the Executive Secretariat (“ES”). *Id.* The index identified the number of exemptions claimed, but did not indicate which documents relate to the exemptions. *Id.*

13. The July 2015 response letter did not include a response from the Office of General Counsel (“GC”), did not identify a responsible official for GC, and did not indicate whether GC had located any responsive documents or would assert any exemptions to withhold information. *Id.* Specifically, the first response stated only that “[t]his letter will service as a final response for ES, ID, CI, and NE. GC will respond under separate cover.” *Id.*

14. The July 2015 response letter concluded by identifying Alexander C. Morris as the responsible DOE official and informed Governor Andrus that he must administratively appeal the decision within thirty calendar days or lose the right to judicial review in district court. *Id.* at *5.

Plaintiff’s Administrative Appeal

15. On August 10, 2015, Governor Andrus timely filed an administrative appeal challenging “DOE’s partial denial of his FOIA request through the unlawful and excessive redaction of information under FOIA Exemption 5.” *See* Letter from Laird Lucas to Director Marmolejos, Aug. 10, 2015 (*Docket No. 11-5*, Ex. 5), at 2.

16. The administrative appeal alleged that DOE’s conclusory and generalized statements in the July 2015 initial response did not provide “detailed justification” for withholding information under Exemption 5, and that DOE failed to take reasonable steps to segregate non-exempt information. *Id.* at 4.

17. The administrative appeal also requested that DOE follow its own regulations and release all material withheld under Exemption 5 because disclosure is in the public interest. *Id.* at 5.

18. On August 20, 2015, the DOE's Office of Hearings and Appeals ("OHA") denied Governor Andrus's appeal. *See* Letter from Director Marmolejos to Laird Lucas, Aug. 20, 2015 (submitted as Attachment C hereto). OHA concluded that an adequate *Vaughn* index was not required at the administrative level, and that DOE had released enough information in the documents for Governor Andrus to understand DOE's basis for withholding information under Exemption 5. *Id.* at 4. OHA denied Governor Andrus's request for disclosure in the public interest under DOE regulations by restating the statutory language of Exemption 5. *Id.* The decision stated that it was "a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B)." *Id.* at 5.

19. Pursuant to this language of the OHA appeal denial, Governor Andrus filed this action on September 29, 2015. *See* Complaint (*Docket No. 1*).

DOE's Final October 2015 FOIA Response

20. On October 5, 2015, after this case was filed, DOE provided a second response to Governor Andrus on his January 2015 FOIA request. *See* Letter from Alexander C. Morris to Cecil D. Andrus (*Docket No. 11-5*, Ex. 6). The October 2015 response letter began by stating: "This is the final response to the request for information that you sent to the [DOE] under the [FOIA]." *Id.* at *1.

21. The October 2015 final response included a second index and stated that DOE was providing thirty-eight additional documents from DOE's Office of General

Counsel labeled “GC 1-38.” *Id.* at *7. In the second response, DOE asserted Exemption 5 to withhold information from thirty-three of the responsive documents. *Id.*

22. Again, DOE has not submitted the actual documents included with the October 2015 final response to the Court, see *Docket No. 11-5*, Ex. 6, so Plaintiff is submitting them herewith as Attachment B. *See* Attachment B hereto.

23. Like the July 2015 initial response, the October 2015 final response letter indicated that FOIA Exemption 5 was being asserted to withhold information under claimed deliberative process, attorney-client, and attorney work product privileges. *See Docket No. 11-5*, Ex. 6. The final response letter was copied nearly verbatim from the first response letter, and neither the October 2015 response letter nor the redacted documents indicate which privilege applied to any specific document or redaction.

Compare Docket No. 11-5, Exs. 4 & 6.

24. Unlike the July 2015 initial response, however, the October 2015 final response asserted that segregation of factual information was impossible because it is inextricably intertwined with privileged information in all thirty-three partially withheld documents. *Id.*

25. DOE’s October 2015 response was a final determination on Governor Andrus’s January 2015 FOIA request under 5 U.S.C. § 552(a)(6)(A)(i). Governor Andrus did not receive this final determination for more than eight months after he submitted the FOIA request (*see supra* ¶ 7); more than five months after he agreed to narrow the request in March and April 2015 (*see supra* ¶ 8), and after he already filed the complaint in this case (*see supra* ¶ 19).

DOE's Draft and Final *Vaughn* Indexes

26. On December 18, 2015, counsel for DOE provided counsel for Governor Andrus with a draft *Vaughn* index, submitted as Attachment D hereto. The draft index was the first time DOE provided a document-specific justification for withholding information under the claimed FOIA Exemptions, including which Exemption 5 privilege was being asserted in each document. *Id.* However, the draft index did not indicate which privilege applied to specific redactions within each document where multiple privileges were asserted. *Id.*

27. On February 19, 2016, DOE submitted a final *Vaughn* index to the Court with its motion for summary judgment in this case. *See Docket No. 11-2.* The final *Vaughn* index is double the length of the draft index and contains forty-two changes in privilege assertions under Exemption 5. *Compare Docket No. 11-2 with Attachment D* hereto. Like the draft index, the final index does not indicate which privilege applies to specific redactions within each document where multiple privileges are asserted. *Id.*

28. The final *Vaughn* index contains six new assertions of the deliberative process privilege (GC-3, GC-5, GC-15, GC-16, GC34), four new assertions of the attorney work product exemption (GC-7, GC-8, GC-10, GC-15), and eighteen new assertions of the attorney-client privilege (GC-3, GC-5, GC-7, GC-8, GC-12, GC-16–GC-18, GC-25, GC-26, GC-28–GC-33, GC-35, GC-36). *See Docket No. 11-2.*

29. The final index also dropped thirteen prior assertions of the attorney work product exemption (NE-15, NE-16, NE,-20–NE-22, GC-1, GC-2, GC-4, GC-5, GC-16, GC-28, GC-30, GC-34) and one assertion of the attorney-client privilege (GC-34). *Id.*

30. Although DOE has attempted to minimize the significance of the proposed commercial spent nuclear fuel shipments at issue in the December 2014 waiver request by describing them as “research quantities,” DOE has briefed Idaho’s Leadership in Nuclear Energy (“LINE”) Commission on the possibility of future “research” at INL involving more than 20 metric tons of spent fuel. *See* Guest Opinion by Gov. Andrus, Sept. 12, 2015 (submitted as Attachment E hereto).

Respectfully submitted,

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