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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

New Jersey Coalition Against Aircraft
Noise

Plaintiff,

v.

Federal Aviation Administration

Defendant

Hon. William G. Bassler

Civil Action No. 04-5555 (WGB)

Reply Brief in Support of the
Defendant's Motion for Summary Judgement

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POINT 1

THE DOCUMENTS ARE PRIVILEGED
BECAUSE THEY ARE DRAFTS CONTAINING
AGENCY-SELECTED FACTUAL INFORMATION
AND RELEASE WOULD REVEAL AGENCY DELIBERATIONS

It is now apparent that plaintiff does not contend that the scope of the search for documents was unreasonable or inadequate, or that there are any documents not either disclosed or identified as withheld.¹ Plaintiff's Brief p. 15, n. 2. Therefore, the only remaining issue is whether the agency properly claimed the deliberative process privilege with respect to the documents described in the McCarthy Declaration.

In that regard, plaintiff makes no claim that documents are not predecisional, nor could there reasonably be such a claim. The Decision to which the documents relate is the release of the final Draft Environmental Impact Statement ("DEIS") that is in the process of being prepared. The documents described in the McCarthy Declaration are clearly deliberative with respect to the DEIS, in that any facts related therein are facts selected by the agency's employees for the purpose of discussion and study. The Agency and its employees need to be free to consider many alternatives in terms of design, information, models, etc., in the course of determining which to adopt and which to discard in the

¹ Plaintiff appears to suggest that documents were withheld because of the difference between the two lists that describe them. See, e.g. Feder Dec. ¶ 8. However, it is clear that the same documents were merely described differently by the two people who compiled the lists. Declaration of Mary McCarthy II ¶¶ 4-8,

process of developing the DEIS. Disclosing earlier drafts of those selected facts piecemeal would reveal the agency's thinking process in arriving at whatever it decides is important for the DEIS. When the DEIS is released, all of the data that went into that decision will also be publicly available. Plaintiffs will be free to criticize the decision then, based upon the final results of the fact selection process and modeling.

The *Vaughn* index accompanying Ms. McCarthy's declaration clearly sets forth the reasons supporting invocation of the deliberative process privilege. Items 1, 3 and 4 were disclosed to plaintiffs. Item 2 was withheld because "At the time of the request, the study area for the Airspace Redesign Project (the "Project") was in flux and there had been no final decision on the boundaries of the study area." That the study area may have been subsequently further defined or the DEIS moved further toward completion does not render the document discoverable. *Judicial Watch, Inc. v. Clinton*, 880 F.Supp. 1,10 (D.D.C. 1995) (agency under no obligation to disclose documents that were not final on the date FOIA request is submitted); *Church of Scientology of Texas v. Internal Revenue Service*, 815 F.Supp. 1138, 1148 (W.D.Tex. 1993) (documents generated or obtained after date of request need not be disclosed); 49 C.F.R. § 7.14(d) (FOIA request may only seek records available on date request received.) Accordingly, plaintiffs' reliance upon documents or events occurring after the date their request was received is insufficient to demonstrate that the privilege was not properly invoked.

The rest of the documents described in the *Vaughn* index, numbered 5 through 27, are documents containing information selected by agency employees out of all the possible information, and the selected information is subject to change as the DEIS is finalized. See, e.g., no. 6 (“These decisions will be reconsidered during the span of the Project and are subject to change.”) ; No. 8 (“The data is subject to change based on Agency review.”) no. 9 (“The information contained in the documents is preliminary and subject to change during the life of the Project. The data was the basis for internal discussion, validation of design and to prepare inputs for analysis.”) Like the documents in *National Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114 (9th Cir.1988), release of documents containing work product that is subject to change before the final DEIS would reveal the Agency’s thought process by disclosing ideas that may have been considered but were later discarded.

Plaintiff’s brief fails to even address the fact that the documents they seek are drafts subject to alteration in the process of making final decisions as the Agency’s thinking on the subject solidifies. “Subjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent.” *Id.* at 1120. Disclosure of revisions of draft documents under consideration before the final study plan is completed, and comparing the drafts to the final documents released with the DEIS, would reveal the decision-making process itself. *Id.* at 1119; See, *Dudman Communications v. Dept. of Air Force*, 815 F.2d 1565, 1568-69 (D.C.Cir. 1987)

(holding that releasing an earlier draft of a revised document would “discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions”); *Russell v. Dept. of Air Force*, 682 F.2d 1045, 1048-49 (D.C.Cir. 1982) (same with respect to multiple revisions).

It is respectfully submitted that the Agency properly documented its claim of deliberative process privilege as to the draft documents, and the Court should grant summary judgement and dismiss the complaint.

POINT 2

THE COURT DOES NOT NEED TO PERFORM AN *IN CAMERA* REVIEW

Plaintiff requests that the Court conduct an *in camera* review of the privileged documents. The FAA does not object to *in camera* review if the Court feels that review of any particular document would assist the Court in rendering a decision. However, *in camera* review of the documents by the Court is neither necessary nor productive, because *in camera* review of draft documents would not necessarily reveal their preliminary, tentative or draft status, nor would *in camera* review be able to identify whether subsequent drafts changed information or whether the information was incorporated into a subsequent final document. The fact that the documents were preliminary at the time of the request and subject to subsequent amendment is established by the McCarthy Declaration and description of the documents in the attached index. Accordingly, it is the Agency’s

position that *in camera* review would not be a productive use of the Court's resources.²

POINT 3

PLAINTIFF HAS FAILED TO MEET ITS INITIAL
BURDEN OF PROVING THAT PUBLIC DOMAIN
INFORMATION DUPLICATES ANY PARTICULAR
DOCUMENT, AND ACCORDINGLY FAILS TO
DEMONSTRATE WAIVER OF THE PRIVILEGE

Plaintiff argues that the FAA has waived its privilege claim because, they allege, the Agency shared copies of the documents with RTCA. In support, they rely upon three allegations 1) the French Controller's Website,³ which has a map and diagram dated more than a year after their request, 2) vague, suspicious speculations based upon their interpretation of the "highly cooperative and collaborative" nature of the working relationship between RTCA and the FAA, and

² Plaintiff's suggestion that they have proven bad faith based upon the claim that the FAA is "stonewalling" because it has consistently invoked its claim of privilege to the documents is specious, as is plaintiff's claim that it was entitled to a *Vaughn* index during the administrative phase. "The *Vaughn* index is a tool designed to aid *the court* in determining whether the agency has properly withheld the information requested. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (*Vaughn I*) *cert. denied*, 415 U.S. 997, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974)." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1047 n.1 (3d Cir. 1995) (emphasis added). "Agencies need not provide a *Vaughn* Index until ordered by a court after the plaintiff has exhausted the administrative process. *Judicial Watch*, 880 F.Supp. at 11. Plaintiff was entitled to notice that responsive documents were withheld due to privilege, and nothing more.

³ The full site can be viewed at:
<http://www.sncta.fr/espace/regionparisienne/washington/mardi%2028%20septembre/28sept-PM/FrenchBrief0409.ppt>

3) Mr. Watrous' statement that one of the RTCA committees viewed "power point presentations" containing "[b]road concepts" that were not provided to committee members in either paper or electronic form. Watrous Dec. § 14. None of the allegations is sufficient to support plaintiff's burden of proof as to waiver.

Plaintiff seriously misrepresents the burden of proof necessary to establish waiver. Plaintiff's Brief p. 24-25. In fact, it is plaintiff's burden to "point[...] to specific information in the public domain *that appears to duplicate that being withheld.*" *Afshar v. Dept. of State*, 702 F.2d 1125, 1130 (D.C.Cir. 1983) (emphasis added). This burden has been described as requiring plaintiff to show that the "disclosure is 'as specific as' and 'match[es]' the sought material." *Assassination Archives and Reserch Center v. Central Intelligence Agency*, 334 F.3d 55, 59-60 (D.C.Cir. 2003), quoting *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (D.C.Cir. 1990). The information in the public domain must "precisely track the records sought to be released." *Assassination Archives*, 334 F.2d at 60. In other words, it is plaintiff's burden to show, for each privileged document for which it argues waiver, that there is in the public domain specific information, matching the privileged document, sufficiently detailed to suggest that the document itself, or the information contained therein, has been released to third parties.

In light of the correct burden of proof it is clear that plaintiff has utterly failed to demonstrate waiver of the privilege with respect to any of the documents to which the Agency claims privilege. The map obtained from the French Controller's Website does not match any of the documents described in the

Vaughn index.⁴ It is not a modeling report, and in itself is not responsive to any of plaintiffs FOIA request. See, Complaint, Exh. A. Furthermore, the map is dated well after the June, 2003, cut-off date for the FOIA request and in that respect adds nothing to the question whether, on the cut-off date, the FAA had waived its claim of privilege. *Judicial Watch, Inc.*, 880 F.Supp. at 10; *Church of Scientology*, 815 F.Supp. at 1148. Plaintiff has not identified a single privileged document matching the map.

Plaintiff's rank speculation about the nature of the relationship between the RTCA and the FAA, or its suspicions that someone *must* have shared information, does not reveal any public record information that "precisely track[s]" any of the documents listed in the *Vaughn* index. Courts have never accepted a plaintiff's speculative suspicions to overturn agency affidavits submitted in good faith. See, *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1200-1202 (D.C.Cir. 1991). It is respectfully submitted that plaintiff's vague speculations are entitled to no weight, and that they fail to establish plaintiff's burden to identify public domain information that precisely matches information in the privileged documents.

⁴ Plaintiff's map is labeled "Project Area Configuration Rules." See, Belzer Dec. Exh. 6. The "Item depicted in Vaughn Index Item 24" is titled "NY/NJ/PHL Airspace Redesign Map Study Area. See, Feder Dec. ¶ 15. The Study Area map is different from Configuration Rules map. Declaration of Mary McCarthy II ¶ 9. Furthermore, as with Item 2 of the *Vaughn* index, "At the time of the request, the study area for the Airspace Redesign Project (the "Project") was in flux and there had been no final decision on the boundaries of the study area."

Finally, the Power Point presentation referred to by Mr. Watrous no longer exists, and furthermore, did not disclose the specific information contained in the privileged documents. Declaration of Mary McCarthy II ¶ 10 . That presentation contained only “[b]road concepts suggesting major traffic flows and attendant operational safety and efficiency impact,” Waltrous Dec. ¶ 14, and Plaintiff has failed to identify any information in the public domain that appears to duplicate any of the privileged documents. Furthermore, the presentation occurred after the cut-off date for plaintiff’s FOIA request, and therefore does not prove that waiver occurred before the cut-off date. See, Belzer Dec. ¶ 22, p. 9, quoting from Attachment 2 (briefing occurred August 2003). Accordingly, plaintiff has failed to demonstrate that the FAA has waived the privilege with respect to any particular document, and the complaint should be dismissed.

POINT 4

FAA IS ENTITLED TO WORK WITH
SUBCOMMITTEES, AND PLAINTIFF HAS
NOT DEMONSTRATED A VIOLATION OF FACA

Plaintiff’s complaints that the FAA has provided information to, and received information from, RTCA subcommittees fail to establish any violation of FACA. Plaintiff’s have no evidence to suggest that any of the privileged documents were shared with anyone at RTCA.

Furthermore, it is simply not a violation of FACA for FAA officials to attend closed subcommittee meetings, participate in the meetings, and share information

with participants, so long as the subcommittee reports its recommendations to the parent committee, and the parent committee then considers the recommendations and forwards them to the FAA. See, *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 447 F.Supp. 524, 530 (D.D.C.) (agency employees met with task forces), *aff'd on other grounds*, 711 F.2d 1071 (D.C.Cir. 1983). This is precisely what occurred, as established by Mr. Watrous' declaration and Plaintiff's own declarations. RTCA recommendations were discussed and publicized. Cf., Obrock Dec. Exh 2 and 3. Subcommittee recommendations were discussed at the RTCA meetings, and plaintiff's representatives apparently chose not to add to the discussion. Plaintiff has failed to present any credible evidence that the Agency shared any of the privileged documents with RTCA or its subcommittees, and accordingly, the complaint should be dismissed.

CONCLUSION

For the foregoing reasons the complaint should be dismissed.

Respectfully submitted,

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