IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLIANCE DEFENDING FREEDOM,	)	
Plaintiff,	)	
v.	)	Case No. 1:15-cv-00525-EGS
INTERNAL REVENUE SERVICE,	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR AN ORDER TO COMPEL
A DETAILED VAUGHN INDEX

Plaintiff Alliance Defending Freedom (ADF), by counsel, respectfully moves to compel the Defendant Internal Revenue Service (IRS) to produce a detailed *Vaughn* index that justifies withholding thousands of responsive records under the Freedom of Information Act (FOIA). In support of this Motion, ADF states as follows:

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*, is designed to pierce the veil of administrative secrecy. The law promotes government transparency and accountability by opening agency records to the public upon request. Although an agency may withhold records under FOIA exemptions, the agency must justify each withholding with enough detail for the FOIA requester and the court to meaningfully evaluate its legitimacy. This level of detail not only holds the agency accountable, but also helps balance FOIA's inherently asymmetrical distribution of knowledge to ensure a fair adversarial process. Over four decades ago, this Circuit

established the *Vaughn* index as the standard procedure by which agencies justify their withholdings.

But the Internal Revenue Service (IRS) refuses to produce a detailed *Vaughn* index here. In response to Alliance Defending Freedom's (ADF) FOIA request, the IRS produced thousands of heavily redacted records and kept thousands more behind its administrative veil. Before the parties may even discuss whether those withholdings were proper, the IRS has the legal obligation to identify the withheld records and explain why they are exempt.

ADF offered to narrow the scope of a *Vaughn* index by type of withholding, exemption, and date—but the IRS rejected the offer. The IRS not only refuses to produce a *Vaughn* index, it also refuses to conduct meaningful discussions with ADF about how the parties can resolve outstanding issues without court intervention. The IRS's conduct to date is less than forthcoming. Twenty-one months into this FOIA process, ADF is scarcely closer to uncovering the new church audit procedures the IRS claims to have adopted.

For these reasons, ADF cannot consent to anything less than the IRS producing a full *Vaughn* index. ADF does not know what records are being withheld. Nor does it have enough information about the withheld records to know whether the *Vaughn* index could be reasonably narrowed further without detrimentally affecting ADF's right to access public records. ADF therefore respectfully requests that this Court compel the IRS to produce a detailed *Vaughn* index.[1]

[1] As previously offered, ADF reaffirms its willingness to limit the requested *Vaughn* index to documents withheld in full under exemption (b)(5) that are dated after January 1, 2010.

FACT SUMMARY

In July 2014, ADF sent the IRS a FOIA request seeking access to:

> (1) All documents related to any existing, proposed, new, or adopted procedures for church tax inquiries or examinations from January 2009 to the present.
>
> (2) All documents related to proposed or adopted changes to Treasury Regulations §301.7611-1 from January 2009 to the present.
>
> (3) All documents related to new IRS policies or procedures referenced in Freedom From Religion Foundation's (FFRF) July 17, 2014 press release.

The IRS responded in late August by unilaterally granting itself an unauthorized extension of time to the end of September 2014 to produce any of the requested records. Weeks passed; the IRS produced no records. At the end of September 2014, the IRS sent ADF another letter giving itself a longer, two-month extension to the end of November 2014 to produce any records. But November, December, and January came and went, and still the IRS produced no records. It was not until February 2015 that ADF received correspondence from the IRS. But that correspondence—yet again—merely unilaterally extended the IRS's response deadline to March 31, 2015. March 31 came and went, and the IRS did not produce any records or give any explanation for its continued delay. *See* Compl. ¶¶5-9.

The IRS's perpetual stonewalling left ADF with only one choice—filing a lawsuit to force the IRS to comply with Congress' mandate under FOIA. Under this Court's supervision, and a full twelve months after ADF initially sent its FOIA request, the IRS began producing records on a monthly basis from July through November 2015. According to its final production letter, the IRS identified a total of 16,416 pages of responsive records. *See* Exhibit A pg. 5. The

IRS claims to have withheld over 10,000 pages in full—well over half of all responsive pages—and released another 2,000 pages with redactions. *See* Exhibit C. It did not provide exact totals. Combined, the IRS withheld over 70% of all pages responsive to ADF's request.

The IRS has redacted nearly all substantive email content in the 2,000 pages that were produced. It generally left email salutations and conclusions visible, but redacted the content in between. While the IRS stamped the redactions with (b)(3), (b)(5), or (b)(6), it provided no further justification. And the IRS's fourth rolling document production—out of five—*re*produced records that it had already produced.

The records withheld in full are even more concerning. Some IRS production letters alleged that these records were withheld under the (b)(3) and (b)(5) exemptions, *see* Exhibit A pg. 1-2, 4, while the other production letters did not allege any basis for the withholding, *see id*. pg. 3, 5. ADF has no way of knowing the total number of records withheld in full, the type of records at issue, or even on what basis the IRS claims a privilege.

ADF reasonably asked the IRS to produce a *Vaughn* index to both help ADF assess the withholdings' validity and narrow the issues for summary judgment. *See* Exhibit B. Given the volume of documents withheld, ADF offered to narrow the scope of this index to pages withheld in full, under exemption (b)(5),[2] that were dated January 2010 forward. *Id.* But the IRS flatly refused to produce a *Vaughn* index. *See* Exhibit C.

Instead, the IRS proposed that it produce a declaration "addressing" a representative sampling of no less than 500 pages withheld under exemption (b)(5). *See* Exhibit D. It claimed

[2] At the time, ADF had completed the majority of its document review, but reserved the right to request an index of (b)(3) or (b)(6) redactions should that prove necessary. ADF subsequently completed its review, and reaffirms its willingness to forgo justifications for records withheld under exemptions (b)(3) and (b)(6).

that the "majority" of its withholdings fell under exemption (b)(5) and consisted "primarily" of draft guidance or discussion related to such guidance. It offered to consider a request by ADF to narrow the sample, but this gesture was little more than symbolic given that ADF had scant information about the records withheld.

Concerned about the adequacy of representative sampling, but attempting to find common ground, ADF asked the IRS to clarify its proposal. In a February 9, 2016, letter to counsel, ADF cited several areas that were unclear. *See* Exhibit E. First, the IRS's proposal did not specify the total records from which it intended to draw its sample. ADF had no idea how many records the IRS withheld in full or in part, nor how those totals decreased after eliminating the records outside ADF's parameters (documents dated January 2010 forward, documents withheld under exemption (b)(5), and documents withheld in full). Second, the IRS's proposal did not state how it would choose the sample. The IRS promised to "exercise discretion"—another symbolic but meaningless offer—but did not describe a methodology demonstrating that the sample would truly be representative of the over 10,000 pages withheld. Finally, the IRS's proposal ambiguously offered to "address" documents, but did not state whether the declaration would describe the classes of information withheld in broad generalities, or include specific details for each record (e.g. date, author, recipient, type, subject matter, and any other information necessary to demonstrate that it fell within the claimed exemption).

But the IRS refused to clarify its proposal. *See* Exhibit F. Making no effort to reach agreement, it suggested that the parties take this matter to the Court. The parties filed their fourth Joint Status Report on February 16, 2016, informing the Court that they could not agree on a *Vaughn* index. The Court then issued a Minute Order on March 8, 2016, directing ADF to file a Motion to Compel no later than April 8, 2016.

ARGUMENT

As discussed in detail below, both law and equity weigh in favor of requiring the IRS to produce a detailed *Vaughn* index that justifies withholding over 70% of all pages responsive to ADF's FOIA request.

I. This Circuit established the *Vaughn* index as the normal procedure by which agencies justify their withholdings.

The IRS has a legal obligation to justify every document it withheld. FOIA establishes a "strong presumption in favor of [record] disclosure," *Chiquita Brands Intern. Inc. v. S.E.C.*, 805 F.3d 289, 294 (D.C. Cir. 2015), so every requested document or segregable portion of a document must be disclosed unless the agency can establish that it falls within an enumerated exemption, *see* 5 U.S.C. § 552(a)(4)(B).

Blanket, conclusory claims of privilege will not suffice. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 955 F.Supp.2d 4, 15 (D.D.C. 2013). The agency's justifications must be sufficiently detailed to "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Campaign For Responsible Transplantation v. U.S. Food & Drug Admin.*, 219 F.Supp.2d 106, 111 (D.D.C. 2002) (internal quotation marks omitted).

FOIA rightly recognizes that in a records-request dispute, the agency holds all the cards—or, more specifically, all the evidence. Faced with this "asymmetrical distribution of knowledge" and the agency's "nearly impregnable defensive position," the FOIA requester has no meaningful way of evaluating—much less contesting—the withholdings unless the agency systematically identifies and thoroughly justifies each withholding. *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006).

In this case, the IRS withheld thousands of records and the vast majority of pages responsive to ADF's records request. Because of the magnitude of these withholdings, the IRS bears a heavy burden of overcoming the presumption in favor of disclosure and proving that each withholding is exempt. By this motion, ADF simply asks that the IRS produce what it is legally obligated to disclose—information describing and justifying its withholdings.

The D.C. Circuit established decades ago that a *Vaughn* index is the standard method by which agencies justify their withholdings without disclosing confidential information. *See Judicial Watch*, 449 F.3d at 146; *see also Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (first establishing the *Vaughn* index). A *Vaughn* index must adequately describe each document withheld or redacted, and explain why a particular FOIA exemption applies. *See DiBacco v. U.S. Army*, 795 F.3d 178, 186 n.2 (D.C. Cir. 2015) (as to documents withheld in their entirety); *see also Prison Legal News v. Samuels*, 787 F.3d 1142, 1148 (D.C. Cir. 2015) (as to released documents redacted in part). The *Vaughn* index also serves a vital role in the adversarial process. It "forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible…." *Judicial Watch*, 449 F.3d at 146.

In sum, a *Vaughn* index is a necessary prerequisite that allows the adversarial process to function. It is the basic default procedure for FOIA litigation, and best effectuates FOIA's intent. As a result, a *Vaughn* index is necessary here to ensure that ADF can meaningfully evaluate the claimed exemptions and contest them as needed.

II. The IRS refused to cooperate with ADF's efforts to narrow documents that need justification or disclose information about the records withheld.

This motion to compel should not have been necessary. The parties should have been able to agree about how the IRS would fulfill its burden of proof. But the IRS refused to cooperate with ADF's good faith efforts.

Even though the IRS bears the burden of justifying every document withheld or redaction made, ADF voluntarily offered to narrow the scope of records that needed to be included in a *Vaughn* index—and, by extension, relieve some of the IRS's burden of proof. ADF offered to limit the *Vaughn* index to documents dated January 2010 forward, that were withheld under exemption (b)(5), and that were withheld in full. ADF voluntarily gave up its right to information about the records withheld from 2009, the over 2,000 pages of records concealed under blanket redactions, and all withholdings under exemptions (b)(3) and (b)(6). Without more information about the withholdings, or detrimentally affecting its legal position, ADF could not reasonably narrow its request any further.

But the IRS did not extend that same cooperative courtesy. It flatly rejected ADF's *Vaughn* index request. After returning with a vague representative sampling proposal, the IRS made no further attempts to resolve the issue. It refused to negotiate, or even answer clarifying questions about its *own* proposal.

As a result, ADF has almost no information about the records withheld and cannot reasonably reduce the scope of its request. It already narrowed the *Vaughn* index parameters to the extent it could, and cannot reasonably limit that request any further without more detailed information about the over 10,000 pages of withheld records.

The IRS disclosed little information about its withholdings. Of the records produced, the IRS redacted nearly all substantive email content and stamped those redactions with (b)(3), (b)(5), or (b)(6). It provided no other explanation. As for the records withheld in full, the IRS claims that those records total over 10,000 pages. ADF still does not know the total number of pages that have been withheld in full, nor how many total records are at issue, nor how those totals decreased after eliminating records withheld under exemptions (b)(3) and (b)(6) and records created before January 2010.

The IRS claims to have "primarily" withheld most of the fully-withheld records under exemption (b)(5), although it has not quantified that number. ADF does not know whether all records withheld under exemption (b)(5) were withheld under deliberative process, or whether some were also withheld under the attorney-client or attorney work product privilege. *See Citizens for Responsibility & Ethics in Wash.*, 955 F.Supp.2d at 16 (noting the three distinct privileges arising under exemption (b)(5)). Critically, each privilege has a different factual standard of proof. *See id.*

ADF also does not know what types of records the IRS withheld in full. The IRS asserts that many of the fully-withheld records relate to draft guidance and discussions about that guidance. But it did not clarify whether those records were emails, draft rules, internal memorandums, and so forth. This distinction matters because the type of record determines the likelihood of finding reasonably segregable factual material.

The whole point of a *Vaughn* index is to supply this information. The burden falls to the IRS—not ADF—to propose and justify narrowing the *Vaughn* index's parameters or deviating from this standard procedure. It could not be otherwise. The IRS possesses both the burden of proof and all the evidence. Expecting ADF to attempt to speculate as to which unidentified

records it needs the IRS to justify withholding is akin to ordering food at an Eritrean restaurant for the first time without a menu—it is an ineffective, and almost certainly unsatisfactory, shot in the dark.

In sum, ADF has no way of knowing what records the IRS withheld in full because the IRS refused to cooperate and disclosed hardly any information about those records. As a result, the IRS should not be allowed to shirk its FOIA obligations: it should produce a full *Vaughn* index.

III. Any alleged burden on the IRS is not dispositive.

The IRS protested that creating a *Vaughn* index will require a substantial time investment and be voluminous. But time or volume alone cannot be dispositive. The IRS squandered 12 months before even responding to ADF's FOIA request. As it individually handled each record to determine what portions of each document were non-privileged and segregable, the IRS should have tracked the information it needed to justify those withholdings. A *Vaughn* index is the standard procedure in this Circuit. ADF's request for a *Vaughn* index should have come as no surprise to the IRS.

As for volume, some *Vaughn* indexes total into the thousands of pages, *see, e.g., Judicial Watch*, 449 F.3d at 146-47 (the agency produced a 1,500 page *Vaughn* index plus a supporting declaration)[3] and other agencies have produced these indexes without complaint. And if the withheld records include draft guidance or email strings, then these records undoubtedly include multiples pages each. This means that the IRS will not create 10,000 individual entries in a

[3] Similarly, in *Judicial Watch, Inc. v. U.S. Department of Justice*, 57 F.Supp.3d 48 (D.D.C. 2014) the Court ordered an agency to produce a *Vaughn* index, which itemized 15,662 records and totaled 1,307 pages, *see* http://www.judicialwatch.org/blog/2014/10/obama-asserts-fast-furious-executive-privilege-claim-holders-wife-2/.

Vaughn index—the total entries will likely be significantly less. The IRS's concern about the investment of time and resources required to create a *Vaughn* index might have been taken more seriously had it promptly complied with FOIA's requirements to date.

IV. ADF needs the *Vaughn* index to meaningfully evaluate the claimed exemptions and participate in the adversarial process.

Any burden on the IRS is outweighed by ADF's need for the information. A full *Vaughn* index is the only way ADF can meaningfully evaluate the claimed exemptions and fully participate in the adversarial process. *See Judicial Watch*, 449 F.3d at 146 (a *Vaughn* index "enables the adversary system to operate by giving the requester as much information as possible"). The IRS possesses all the evidence. It interpreted ADF's FOIA request, set the record search parameters, determined which retrieved records were relevant, and decided what portions of those records to disclose or withhold. With this asymmetrical distribution of knowledge, ADF has no meaningful way of contesting these withholdings unless the IRS systematically identifies and explains why it has kept certain records behind the administrative veil.

Specific details are particularly important since the IRS claims to have withheld many records under the deliberative process privilege. "The need to describe each withheld document when Exemption 5 is at issue is particularly acute because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." *Animal Legal Defense Fund, Inc. v. Dep't of Air Force*, 44 F.Supp.2d 295, 299 (D.D.C. 1999) (internal quotation marks omitted). The deliberative process privilege prompts a fact-intensive inquiry to determine whether the records are both predecisional and deliberative. *See Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 463 (D.C. Cir. 2014) (describing the standard of proof for the deliberative process privilege). Not all guidance, whether labeled "draft" or otherwise,

automatically qualifies as predecisional. And deliberation takes into account whether the information flows from subordinate to superior, or vice versa. The individual document plays an important role in determining whether the privilege applies, thereby underscoring the need for a record-by-record *Vaughn* index.

A full *Vaughn* index is also the only way ADF can know with any certainty that the IRS carefully reviewed each document and fulfilled its obligation to release segregable information. It helps ensure that the IRS does "not claim exemptions too broadly, thereby sweeping unprotected information within the statute's reach." *Judicial Watch,* 449 F.3d at 147. In the course of creating a *Vaughn* index, government agencies commonly produce records that had been previously—and mistakenly—withheld. The IRS's blanket redaction of nearly all substantive email content it produced, and total withholdings of over 70% of all responsive pages, calls into serious question whether it carefully segregated all non-privileged information from the records withheld in full.

ADF already made a good-faith effort to narrow the scope of records that it needs included within a *Vaughn* index. ADF reaffirms its willingness to limit the requested *Vaughn* index to records withheld in full under exemption (b)(5) that are dated after January 1, 2010. For those records, it respectfully requests that the IRS supply the following information: Bates number, date, author(s), recipient(s), subject matter, total page numbers, and reason for being withheld under exemption (b)(5). If the records can be grouped and categorized to expedite the process, then ADF is willing for that to be done. *See id.* ("Especially where the agency has disclosed and withheld a large number of records, categorization and repetition provide efficient vehicles by which a court can review withholdings that implicate the same exemption for similar

reasons."). ADF simply does not have enough information to know what these categories might reasonably be.

CONCLUSION

In conclusion, ADF tried diligently, but unsuccessfully to resolve this dispute informally. The IRS refused to cooperate or negotiate in good faith. It dumped thousands of heavily redacted records on ADF, and withheld many thousands more in full. In light of the IRS's burden of proof, its pattern of stonewalling, and ADF's need for the information, ADF respectfully requests that this Court direct the IRS to produce a full *Vaughn* index for records withheld in full under exemption (b)(5) that are dated after January 1, 2010.

Dated: April 8, 2016

Respectfully submitted,

/s/ Michael Bekesha
Michael Bekesha
D.C. Bar No. 995749
JUDICIAL WATCH, INC.
425 Third Street S.W., Suite 800
Washington, DC 20024
(202) 646-5172

/s/ Christiana M. Holcomb
Christiana M. Holcomb*
CA Bar No. 277427
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001

**Admitted pro hac vice*
Not licensed in DC
Practice limited to federal court

Attorneys for Plaintiff
Alliance Defending Freedom

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[PROPOSED] ORDER

Upon consideration of Plaintiff's Motion for an Order to Compel a Detailed Vaughn Index and its Statement of Points and Authorities in support of that Motion, it is hereby

ORDERED that Plaintiff's Motion is GRANTED.

Dated: _____ ____, 2016.

EMMET G. SULLIVAN
United States District Judge