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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Irvin Muchnick, an individual Plaintiff, vs. U.S. Department of Homeland Security, an agency of the United States Government Defendant	) Case No. 3:15 cv – 03060 CRB)))))) Date: January 15, 2015) Time: 10:00 am) Courtroom: 6, 17th Floor) Hon. Charles R. Breyer)

Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant's Motion for Summary Judgment

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. Summary of Argument

This FOIA case presents the Court with the need to balance the classic countervailing policies concerning how much privacy should be accorded to an individual whose information is in the possession of a government agency as well as any needs for that agency to preserve its own legitimate non-public information and practices. As will be demonstrated, first, Defendant has failed to provide Plaintiff and the Court with sufficient facts and information to evaluate Defendant's positions concerning the applicability of certain exemptions; this lack of sufficient factual basis negates Defendant's right to claim that all of the documents of Defendant should be withheld and also that no portions of withheld documents are subject to disclosure even with redaction, this because Defendant has failed to show that portions are non-segregable; and secondly, the Defendant has ignored the special circumstances presented by the facts of this case, and thereby seeks to stand on arguments that, based on the scant information provided about the withheld documents, are not on all fours with the facts and issues presented. Plaintiff submits that until Defendant provides sufficient facts about the contents of the documents, Defendant is precluded from claiming that it has met the applicable burden of proof that permits it to shield almost all of the identified documents from disclosure and, moreover, has failed to carry its burden on a motion for summary judgment.

II. Issues to Be Decided:

1. Has Defendant met its burden to demonstrate that its *Vaughn* Index and its supporting Declaration provide sufficient factual basis about the documents withheld by Defendant as required under the precedent and accepted practice to permit Plaintiff or the Court to determine whether the documents have been justifiably withheld under the three exemptions relied upon by the Defendant?

2. Has Defendant met its burden to provide sufficient factual basis for the Court to determine whether or not the withheld documents contain segregable content that would allow Defendant to provide at least portions of the withheld documents in redacted form?
3. Should the Court conduct an *in camera* review of the documents withheld by the Defendant in order to evaluate a) whether the documents properly fall within one or more of the three exemptions relied upon by the Defendant and b) whether the documents contain segregable portions such that the Defendant should be compelled to redact only portions that properly fall within a particular claimed exemption?
4. Is the Defendant entitled to have summary judgment granted in its favor?

III. Factual Background about Plaintiff and the Subjects of His Investigation

Plaintiff Irvin Muchnick ("Plaintiff") is a free-lance journalist who over the past three years has been investigating and writing about sexual abuse in amateur sports, and for nearly a year has been focused on the Irish-born swim coach George Gibney and his relationship with USA Swimming and the American Swimming Coaches Association. (Declaration of Irvin Muchnick in Support of Opposition to Motion for Summary Judgment (hereinafter "Muchnick Declaration")). The main purposes of Muchnick's investigations are 1) to expose Gibney's past and possibly ongoing evil and criminal activities in the United States, 2) to expose any malfeasance by USA Swimming and/or the American Swimming Coaches Association in abetting Gibney and other swimming coaches to enter and reside in the United States, and 3) to expose any improprieties or negligence on the part of Defendant U.S. Citizenship and Immigration Services, an agency within the Department of Homeland Security (hereinafter "Defendant"), in connection with its apparent decisions to permit Gibney and other swimming coaches to be granted the "legal" right to enter and reside in the United States. (Muchnick Declaration) Submitted as Exhibits A-C to the Muchnick Declaration are articles from the *Irish*

Times from 2015 describing how and why the Irish government has over the past few years taken increased interest in Gibney; there has been a clamor within Ireland to bring Gibney to justice, as well as to understand why he was not brought to justice many years ago. (See article entitled "Independent TD seeks extradition of 'notorious abuser'" and attached as Exhibit A to Muchnick Declaration) There is also no doubt that the U.S. government was aware of Gibney's past and the horrifying accusations: the four pages out of the located 102 responsive pages released by the agency that actually contained text included a 2-page public alert published by AbuseWatch.net, an international watchdog organization, concerning George Gibney, and is submitted as Exhibit D to the Muchnick Declaration. That public alert in the government files describes in detail the reported allegations and investigations into Gibney's longstanding pattern of sexually abusing youngsters and why AbuseWatch.net was seeking more information about Gibney and his whereabouts. Submitted as Exhibit E is that same public alert as a pdf color document that was downloaded in November of 2015 as it was found in a Google search. (Muchnick Declaration) The significance of Gibney's case in Ireland, and the controversies surrounding his flight from Ireland, are reported in this same public alert located in the Citizenship and Immigration Services' own files. The remaining 98 pages were completely blank, except that each of the 98 pages contained a one-line reference citing in a perfunctory manner the specific FOIA exemption under which the agency was withholding the particular document. (Muchnick Declaration)

IV. Defendant's Document Production, Claimed Exemptions and *Vaughn* Index

In support of its Motion for Summary Judgment, Defendant has filed a *Vaughn* Index and one Declaration. Defendant had previously released what it maintains are all of the materials responsive to the Plaintiff's FOIA request in Defendant's files: 102 pages of which only four were presented without redaction and all of the rest are blank pages (Muchnick Declaration) Defendant contends in its Motion that its supporting documentation establishes that it released all

reasonably segregable, non-exempt information, and that it properly withheld the challenged materials under the following FOIA exemptions:

5 U.S.C. § 552(b)(6) (hereinafter "Exemption 6") which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties;

5 U.S.C. § 552(b)(7)(C) (hereinafter "Exemption 7(C)"), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties;

5 U.S.C. § 552(b)(7)(E), (hereinafter "Exemption 7(E)") which concerns records or information compiled for law enforcement purposes the release of which would disclose techniques and procedures for law enforcement investigations or prosecutions

V. Defendant's Vaughn Index Is Deficient

The Vaughn Index submitted with the Declaration of Jill A. Eggleston is woefully deficient. (Plaintiff indeed stipulated that it no longer required the production of certain previously listed documents Defendant has deleted from the preliminary draft *Vaughn* Index submitted by Defendant to Plaintiff weeks before the finalized *Vaughn* Index that has been attached to the Motion. (Gordet Declaration in Support of Plaintiff's Opposition to Motion for Summary Judgment, hereinafter "Gordet Declaration)) For many of the documents identified in the final *Vaughn* Index, it is impossible to have any idea whatsoever about the nature of the document, or its purpose. For others, there is some inkling of the nature of the document, usually based on the title, but it is impossible to know whether the document falls within the claimed exemption(s), this because the explanatory descriptions on the right side column are rotely repeated, with only several exceptions, and are all conclusory, with no specifics that have reference to the content of the particular document described.

VI. Applicable General Legal Principles about FOIA with Special Reference to the Facts and Issues of this Instant Case

FOIA was enacted by Congress for the purpose of "'facilitat[ing] public access to Government documents." ' *Davin v. United States Department of Justice,* 60 F.3d 1043, 1049 (3rd Cir. 1995) (quoting *U.S. Department of State v. Ray,* 502 U.S. 164, 173 (1991)). Consistent with the purpose of creating an expedient mechanism for disseminating information and holding government agencies accountable, FOIA directs government agencies to promptly produce any requested materials unless that information is exempt from disclosure pursuant to one of the nine exemptions enumerated in the FOIA statute, 5 U.S.C. § 552(b)(1)-(9). *Id.* (citing *Coastal States Gas Corp. v. Dep't of Energy,* 644 F.2d 969, 974 (3d Cir.1981). Thus, the Supreme Court has held that FOIA "creates a strong presumption in favor of disclosure." *Davin, supra* at 1049 (citing *Department of Air Force v. Rose,* 425 U.S. 352, 361, (1976)). To this end, FOIA mandates that a district court review *de novo* the agency's decision to withhold requested information. *Davin, supra at,* 60 F.3d 1049. The burden of demonstrating that a particular exemption applies falls squarely on the agency. In addition, the statute requires the agency to disclose "[a]ny reasonably segregable portion of a record ... to any person requesting such record after deletion of the portions which are exempt under [section 552(b)]." 5 U.S.C. § 552(b).

Because "the review of FOIA cases is made difficult by the fact that the party seeking disclosure does not know the contents of the information sought and is, therefore, helpless to contradict the government's description of the information or effectively assist the trial judge," the reviewing court generally will require the government agency to prepare a *Vaughn* Index and supporting affidavits to ensure a meaningful adversarial process. *Davin,* 60 F.3d at 1049 (citing *Ferri v. Bell,* 645 F.2d 1213, 1222 (3d Cir.1981), *modified* 671 F.2d 769 (3d Cir.1982)); *King v. U.S. Dep't of Justice,* 830 F.2d 210, 217-18 (D.C.Cir.1987)). In this regard, the Third Circuit

endorsed the following observation of the United States Court of Appeals for the District of Columbia Circuit in *King, supra:*

> The significance of agency affidavits in a FOIA case cannot be underestimated. As, ordinarily, the agency alone possesses knowledge of the precise content of documents withheld, the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected. As we observed in *Vaughn v. Rosen,* "[t]his lack of knowledge by the party seeing [*sic*] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution," with the result that "[a]n appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a lower court's factual determination." Even should the court undertake in camera inspection of the material-an unwieldy process where hundreds or thousands of pages are in dispute"[t]he scope of the inquiry will not have been focused by the adverse parties...."
>
> Affidavits submitted by a governmental agency in justification for its exemption claims must therefore strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation. The detailed public index which in *Vaughn* we required of withholding agencies is intended to do just that: "to permit adequate adversary testing of the agency's claimed right to an exemption," and enable "the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Thus, when an agency seeks to withhold information, it must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply."

McDonnell v. United States, 4 F.3d 1227, 1241 (3rd Cir. 1993) (quoting *King,* 830 F.2d at 218-19) (footnotes omitted). The Court of Appeals in *King* further opined:

> Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review."

King, *supra*, 830 F.2d at 219 (footnotes omitted).

While an agency need not repeat itself when its withholdings "implicate the same

exemption for similar reasons," it may not simply explain itself by "generalities." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 147 (D.C. Cir. 2006) (quoting *Mead Data Cent., Inc. v. Dep't of the Air Force,* 566 F.2d 242, 251 (D.C. Cir. 1977)). Defendant in the instant case does not provide explanations for its withholdings that are tailored to the content of the individual documents. *See Hussain v. United States Dep't of Homeland Security,* 674 F. Supp. 2d 260, 267-68 (D.D.C. 2009) In the *Hussain* case, the Court was unable to determine the specific kinds of documents that the government agency was withholding pursuant to Exemption 7(C) and denied in part the government's motion for summary judgment. Defendant here has provided no meaningful descriptions of the documents withheld to permit the Plaintiff or the Court to make a determination of the applicability of Exemption 7(C).

Moreover, the *Hussain* decision found that when "third-party records" are being withheld the government agency must meet its burden to explain why the plaintiff or the Court should conclude that the third-party records implicate privacy interests or are of no public interest. *Hussain*, *supra*, at 270-71.

Numerous courts have held that for all claimed exemptions the agency must identify, with some detail, what material it is redacting from the particular documents, and may not only refer to a generalized justification for redaction. *See, e.g., Defenders of Wildlife v. United States Border Patrol*, 623 F. Supp. 2d 83, 89-90 (D.D.C. 2009).

Although a *Vaughn* Index is an established means of supporting claims to withhold documents under specific exemptions, its use is layered on a background presumption going back several decades that document-by-document explanations of withheld information are required. *See, e.g., King*, 830 F.2d at 224 ("*Vaughn*'s call for specificity imposes on the agency the burden of demonstrating applicability of the exemptions invoked as to each document or segment withheld. The Court of Appeals for the D.C. Circuit has defined the *Vaughn* index as 'consist[ing] of one document that adequately describes each withheld record or deletion and sets

forth the exemption claimed and why that exemption is relevant. Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.")

VII. The Small Number of Withheld Documents Further Underlines Defendant's Inadequate Support for Refusing to Release Documents or to Redact Documents

Cases in the D.C. Circuit seem to hint at the idea of a sliding scale inversely correlating the number of withheld documents and the level of detail required to justify their withholding. *See, Citizens for Responsibility & Ethics in Washington v. United States Department of Justice,* 955 F. Supp. 2d 4 (Dist. D.C. 2013) In the instant case, the number of pages at issue is puny compared to most FOIA cases, particularly reported decisions, and Defendant cannot hide behind an excuse that the task would be onerous. The inadequacy of the *Vaughn* Index and its accompanying Declaration contaminates Defendant's assertions that it has met its burdens under the claimed exemptions. The following discussion concerning the weighing of policy and privacy interests under the Exemptions 6 and 7(C), on the scant record before the Court, results in the conclusion that the Defendant has failed to show that there are legitimate privacy interests that must be protected.

VIII. An Analysis of Third Party Privacy Interests is Out Weighed by the Public Interest in this Situation Based on Facts Presented by Plaintiff Applied to Exemptions 6 and 7(C)

"The privacy interests of third persons whose names appear in FBI files, the public interest in disclosure, and a proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances." *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991)

Thus, whether disclosure would amount to a clearly unwarranted invasion of privacy is

usually judged by a balancing test that weighs the public's right or interest in the information against the individual's privacy interests. *See Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999) It is well-accepted that courts hold that the only legitimate public interest in this balancing analysis is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Id.* (quoting *United States Department of Defense v. FLRA*, 510 U.S. 487, 497, (1994)). Some courts go further and hold that there must be some evidence of malfeasance or serious government impropriety before the court will even lightly impinge on an individual's privacy rights, such as the lower court decision in *Mezerhane de Schnaap v. USCIS*, 67 F. Supp. 3d 95 (D.D.C. 2014).

However, the countervailing view was articulated by Judge Berzon in a dissent in a case with similarities to the instant case:

> As the majority correctly notes, only a disclosure that "would `she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know `what their government is up to,'" qualifies as a cognizable public interest under FOIA. *FLRA,* 510 U.S. at 497, 114 S.Ct. 1006 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 773, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). But that does not mean, as the majority's analysis at some points suggests, that the plaintiff must have demonstrated that the government's behavior may have been *improper or inefficient.* "[P]ublic understanding of the operations or activities of the government," *Reporters Comm.,* 489 U.S. at 775, 109 S.Ct. 1468, includes not only exposure of government misfeasance, but also of governmental effectiveness and other aspects of internal agency functioning.

Prudential Locations v. U.S. Department of Housing and Urban Development, 739 F.3d 424, 440 (9th Cir. 2013), Judge Berzon dissenting

Indeed, the disclosure of information in an A-File, even the names in that file, must be determined on a case by case basis with a weighing of the particular privacy interests at stake: ""we take our guidance from the Court's subsequent statement in Ray that 'whether disclosure of a list of names is a significant or a de minimis threat [to privacy] depends

upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.' *Union Leader v. U.S. Department of Homeland Security*, 749 F, 3d 45 (1st Cir. 2014) quoting from *Ray, supra,* 502 U.S. 164, 176 n. 12 (1991)

In the instant case, Defendant can point to no harmful or significant consequences to any third party: the presumed subject, Gibney, is notorious already for his reported criminal and nefarious acts, (see Exhibits A –E to the Muchnick Declaration) so it is difficult to perceive what harmful or significant consequences would result from disclosing documents assembled or prepared by the government concerning Gibney.

IX. The First Circuit's *Union Leader* Decision Charts a Course for Weighing Privacy Versus the Public's Right to Know under Exemption 7(C)

In *Union Leader v. U.S. Department of Homeland Security*, 749 F, 3d 45 (1st Cir. 2014), the First Circuit held that the privacy rights of arrestees were less significant than the newspaper's right in investigating the conduct of the immigration agency and knowing what the government is up to, even though there were no allegations of wrongdoing. As stated by the court:

> Disclosure of the redacted names will enable the Union Leader to investigate public records pertaining to the arrestees' prior convictions and arrests, potentially bringing to light the reasons for ICE's apparent torpor in removing these aliens. [citation]](“Disclosure of the records would likely reveal much about the diligence of the FBI's investigation and the DOJ's exercise of its prosecutorial discretion: whether the government had the evidence but nevertheless pulled its punches.”). The redacted names are therefore more than mere “information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.” [citation] Instead, their disclosure will forward the legitimate public interest in “knowing what [the] Government is up to,” id.—a public interest that ICE itself implicitly acknowledged in its issuance of a press release trumpeting the Operation Cross Check arrests. That public interest outweighs the arrestees' attenuated privacy interests in their underlying arrests and convictions, which are already matters of public record. We therefore hold that Exemption 7(C) is inapplicable in these circumstances.

Union Leader, supra, at 56.

The *Union Leader* court discussed at length *New York Times Co. v. U.S. Department of Homeland Security*, 959 F.Supp.2d 449 (S.D.N.Y. 2013), which found Exemption 7(C) inapplicable in circumstances roughly similar to those of the case before it. As explained by the First Circuit, the New York District Court recognized that disclosure of the names would implicate a privacy interest under certain precedents, specifically "that of convicted criminals in not releasing in compiled form information which is already public"— but found that interest "significantly diminished" given the public availability of the underlying information. *Id*. at 455. Similarly, based on the information provided by Defendant, scant as it is, it would be surprising if any of the information assembled or adduced by the Defendant goes beyond the type of information found in the AbuseWatch article produced by Defendant submitted as Exhibits D and E. Weighing these interests, the Court should conclude that the issues raised by Plaintiff's investigative journalism, including how well Defendant discharged its responsibilities, require a full disclosure of the withheld documents with only redaction of details such as date of birth, Passport Number, etc.

X. It Cannot Be Assumed that the Withheld Documents Allegedly Exempted under Exemption 7(E) (Concerning Law Enforcement) Fall within the Required Guidelines

As stated by the Ninth Circuit:

> The "law enforcement" exemption allows the government to withhold "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."[citation]In order to withhold documents pursuant to the "law enforcement" exemption, USDA "must establish that it is a law enforcement agency, that the withheld documents were investigatory records compiled for law enforcement purposes, and that disclosure of those documents would interfere with pending enforcement proceedings." [citation].

Lion Raisins, Inc. v. USDA, 354 F.3d 1072, 1081-1082 (9th Cir. 2004):

It seems obvious that there is no "pending" enforcement proceedings that involve Gibney or any other third party. The few documents that are identified with dates are old, and there is no indication that any of the undated documents relate to any pending enforcement proceedings. Under the holding of *Lion Raisins*, Exemption 7(E) is completely inapplicable.

The insufficient factual support described at length in Section V. above comes home to roost again with special applicability to Exemption 7(E). It has been held that when a *Vaughn* Index only recites the language of the statute and does not explain "why the release of the information would compromise law enforcement by, for example, revealing investigatory techniques that are not widely known to the general public" with at least some specificity, it is inadequate to justify withholding under Exemption 7(E). *Boyd v. BATF*, 2006 U.S. Dist. LEXIS 71857 at *30 (D.D.C. 2006) ("Descriptions such as 'techniques involving consensual monitoring' . . . and 'investigative techniques,' . . . alone are inadequate."). The government agency in *Hussain*, *supra* at 271, provided more information about the specific law enforcement techniques used by its agents than did Defendant in the instant case, but the court there found the showing inadequate to justify the application of the exemption. Defendant's *Vaughn* Index and supporting Affidavit are once again exposed as woefully inadequate, this time with special reference to Defendant's claims under Exemption 7(E).

There is still another reason why Exemption 7(E) should not apply in the instant case. Although "FOIA makes no distinction between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions," *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002), an agency that has a mixture of law enforcement and administrative functions must clearly establish that records pertain to its law-enforcement duties. *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982 (requiring a mixed-duties agency to establish a "nexus between [its] investigation . . . and one of [its] law

enforcement duties"). "A record is deemed to have been compiled for such a purpose if it was created or acquired in the course of an investigation 'related to the enforcement of federal laws,' and 'the nexus between the investigation and one of the agency's law enforcement duties [is] based on information sufficient to support at least a colorable claim of its rationality.'" *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (quoting *Pratt*, 673 F.2d at 420-21). Thus, the first part of this analysis is satisfied if the agency is "able to identify a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible . . . violation of federal law." *Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Commission,* 467 F. Supp. 2d 40 (D. D.C. 2006), relying on *Pratt*, 673 F.2d at 420. Here the Defendant has made no showing concerning exactly which individual or individuals may have been involved in a violation of Federal law. Based on the scant information provided by Defendant, there is absolutely no indication that Gibney was in any way investigated for violating any U.S. laws or any laws of Ireland. In any case, under the *Quinon* and *Pratt* decisions, Defendant would have needed to present some evidence that this formed part of its investigation about Gibney or anyone else related to Gibney's visa application(s). Moreover, Defendant has made no showing concerning what aspects of the inner workings of the immigration agency are described in any of the withheld documents. *See Assembly of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 919 (9th Cir. 1992) ("The case hinges on whether disclosure of the requested information would reveal anything about the agency's decisional process. This is a fact-based inquiry where deference to the district court's finding is appropriate."). Doing a background check, or not doing a background check, hardly seems to be classified information that must be shielded from the public. Again, details such as date of birth, Passport Number may be easily redacted out of the documents.

XI. Defendant Has Made Practically Zero Showing on Segregability so Clearly Has Failed to Meet its Burden

Defendant has the burden of demonstrating that it has released all reasonably segregable portions of each of the withheld documents or portions of documents, or providing a factual recitation as to why certain materials are not reasonably segregable. *Davin,* 60 F.3d at 1052 (citing 5 U.S.C. § 552(a)(4)(B)). Because the emphasis of FOIA is on *information* rather than documents, an agency cannot base withholding an entire document or page of information simply on a showing that it contains some exempt material. *Mead Data Central, Inc. v. U.S. Dep't of Air Force,* 566 F.2d 242, 260 (D.C.Cir.1977). In 1974, Congress amended FOIA to specifically incorporate this requirement. *See* 5 U.S.C. § 552(b). In the District of Columbia Court of Appeals, it has been clearly established that "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central,* 566 F.2d at 260 (citations omitted).

In determining whether the agency has satisfied its burden on segregability, the court must narrowly construe the exemptions with the focus on disclosure. *Davin,* 60 F.3d at 1052 (citing *Wightman v. Bureau of Alcohol, Tobacco & Firearms,* 755 F.2d 979, 982 (1st Cir.1985)). A conclusory statement to the effect that the agency has provided the requestor with all reasonably segregable portions of the non-exempt information, without any supporting justification, will not satisfy the agency's burden regarding segregability on summary judgment. *Davin,* 60 F.3d at 1052; *Mead Data Central,* 566 F.2d at 261. Rather, the agency must provide a detailed justification for its decision that non-exempt material is not segregable, which includes a description of "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead Data Central,* 566 F.2d at 261. In determining whether the agency has satisfied its burden of proof regarding segregability, the Court of Appeals in *Davin* required the agency to "describe the process by which [it] determined that all reasonably segregable material of each of the withheld documents or portions of documents had been released" and to "provide a factual recitation of why certain materials [were] not reasonably segregable ." *Davin,* 60 F.3d at 1052. The Court of Appeals rejected as wholly conclusory a declaration that was "comprised of assertions that documents were withheld

because they contain the type of information generally protected by a particular exemption." *Id.*

It is well-established that if a record contains information that is exempt from disclosure, any reasonably segregable information must be released after deleting the exempt portions, unless the nonexempt portions are inextricably intertwined with exempt portions. *See Trans-Pacific Policing Agreement v. United States Customs Service,* 177 F.3d 1022, 1027-28 (D.C. Cir. 1999*)*; *Defenders of Wildlife v. United States Border Patrol*, 623 F. Supp. 2d 83, 90 (D.D.C. 2009) "To withhold the entirety of a document, DHS 'must demonstrate [to the Court] that it cannot segregate the exempt material from the non-exempt and must disclose as much as possible.'"

Indeed, the FOIA statute states: "Any 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(b). To satisfy this burden, an agency is "required to provide the court with its *reasons* -- as opposed to its simple conclusion -- for its inability to segregate non-exempt portions of the documents, and also to provide the court with a description of 'what proportion of the information in a document is non-exempt, and how that material is dispersed throughout the document.'" *Lawyers' Committee for Civil Rights of San Francisco Bay Area v. Dep't of the Treasury*, 2008 U.S. Dist. LEXIS 87624, 2008 WL 4482855, at *14 (N.D. Cal. 2008) (emphasis in original) (quoting *Mead Data Ctr., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). Defendant offers repeatedly as its explanations only conclusory statements concerning the non-segregability of the documents. Its Declarant's statements are inadequate to meet Defendant's burden with regard to segregability because these repeated statements do not show with reasonable specificity why the documents cannot be further segregated and additional portions disclosed. *Defenders of Wildlife v. United States Border Patrol*, 623 F. Supp. 2d at 90-91: "[F]or *each* entry the defendant is required to 'specify in detail

which portions of the document are disclosable and which are allegedly exempt.'" (emphasis in original)

For example, Document 17 in Defendant's *Vaughn* Index has an explanation in the right hand column that refers to "redaction" of the document, but the middle column asserts that the document is being withheld in full. This is conclusory and circular. It would seem as though the term "redacted" is not an accurate description when the entire document is held in secret, and the term "withheld" would appear to be accurate. In any case, the explanations on the right hand column list some very specific withheld data, such as date of birth, etc., but this only supports Plaintiff's contention that such details can be easily redacted and permit portions, perhaps large portions, of the document, to be produced. Instead, as noted from Document 6 in Defendant's *Vaughn* Index, the entire document has been withheld, with no explanation whatsoever as to why the entire document must be withheld, or, in other words, why anyone should believe that the document contains absolutely no segregable content that could be released to Plaintiff and to the public.

XII. It is Premature for the Court to Conduct an *In Camera* Review

Plaintiff submits that Defendant has a legal obligation to provide both the Court and Plaintiff with sufficient facts concerning its claimed exemptions and its purported non-segregability before the Court should undertake an *in camera* review. *Lion Raisins, Inc. v. United States Department of Agriculture,* 354 F.3d 1072; (9th Cir. 2004) (relying on *Wiener v. FBI*, 943 F.2d 972, 978 (9th Cir. 1991). Plaintiff has a right to know much more about the contents of these withheld documents. An *in camera* review could potentially continue to shroud the withhold documents in an unacceptable cloak that would potentially deny Plaintiff the ability to seek further recourse, depending on the outcome of the Court's *in camera* review, assuming the Court eventually undertakes such an *in camera* review.

XIII. Conclusion – Summary Judgment Should Be Denied

Judge Berzon has summarized Plaintiff's position:

"A nontrivial privacy interest does not exist merely because the government asserts it. Rather, FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray,* 502 U.S. 164, 173 (1991); *Maricopa Audubon Society v. U.S. Forest Serv.,* 108 F.3d 1089, 1092 (9th Cir.1997); 5 U.S.C. § 552(a)(4)(B). Like all parties on summary judgment, the government must adduce specific evidence to carry its burden. *See* Fed. R. Civ. P. 56(c)."

Prudential Locations v. U.S. Department of Housing and Urban Development, 739 F.3d 424, (9th Cir. 2013), Judge Berzon dissenting

Defendant has failed to provide facts about the withheld documents that would permit the Court or Plaintiff to make any determination about the applicability of the three claimed exemptions, and about the legitimacy of Defendant's claims that the content cannot be segregated such that each identified document could, at a minimum, be produced in a redacted form rather than completely withheld. Lastly, from the few facts disclosed by Defendant, the conclusion should be that the public's interest in knowing how a notorious child sex abuser could be given free entry into the United States outweighs the ability of this notorious child abuser to bottle up information that almost everyone (probably) already knows. Defendant should be ordered to provide in a revamped *Vaughn* Index the types of details described in Section V. above concerning the documents and why each withheld document allegedly has no segregable information, or alternatively Defendant should produce the documents with legitimate redactions of personal details rather than the wholesale withholding of practically all of the documents listed on Defendant's *Vaughn* Index supported only by repetitious, non-specific and conclusory statements about the documents' contents.

Defendant's Motion for Summary Judgment should be denied in its entirety.

Respectfully submitted,

/s/ Roy S. Gordet

Roy S. Gordet
Attorney for Plaintiff Irvin Muchnick

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Attorney for Plaintiff Irvin Muchnick

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Irvin Muchnick, an individual Plaintiff, vs. U.S. Department of Homeland Security, an agency of the United States Government Defendant	) Case No. 3:15 cv – 03060 CRB)))))) Date: January 15, 2015) Time: 10:00 am) Courtroom: 6, 17th Floor) Hon. Charles R. Breyer)

DECLARATION OF ROY S. GORDET IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Roy S. Gordet, under penalty of perjury, declare as follows:

1. I am counsel of record for Plaintiff Irvin Muchnick. I have been actively practicing law in California since 1984.

2. Plaintiff stipulated that it no longer required the production of certain previously listed documents that Defendant has deleted from the preliminary draft *Vaughn* Index submitted by Defendant to Plaintiff weeks before the finalized *Vaughn* Index that has been attached to the Motion

I declare under penalty of perjury under the law of the United States of America that the foregoing is true.

Executed in Daly City, California on November 10, 2015

/s/ Roy S. Gordet

Roy S. Gordet

Roy S. Gordet, Cal State Bar No. 103916
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Attorney for Plaintiff Irvin Muchnick

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NORTHERN DISTRICT OF CALIFORNIA

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DECLARATION OF IRVIN MUCHNICK IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

I, Irvin Muchnick, under penalty of perjury, declare as follows:

1. I am the Plaintiff in this action. I have personal knowledge of those statements in this Declaration.

2. I am a free-lance journalist. I live in Berkeley, California. I am the author of three books and hundreds of articles for major newspapers and magazines (including cover stories for *The New York Times Magazine* and others). Over the past three years I have been investigating and writing about sexual abuse in amateur sports, and for nearly a year I have focused on the Irish-born swim coach George Gibney and his relationship with USA Swimming and the American Swimming Coaches Association. I have been publishing my findings at my website, http://ConcussionInc.net; in interviews with *Outside* magazine, the *Miami New Times*, and numerous radio outlets; and in various other outlets, including an opinion piece for the *Denver Post*.

3. The main purposes of my Gibney investigation are 1) to expose Gibney's past and possibly ongoing evil and criminal activities in the United States, 2) to expose any malfeasance by USA Swimming and/or the American Swimming Coaches Association in

abetting Gibney and other swimming coaches to enter and reside in the United States, and 3) to expose any improprieties or negligence on the part of Defendant U.S. Citizenship and Immigration Services, an agency within the Department of Homeland Security, in connection with its apparent decisions to permit Gibney and other swimming coaches to be granted the "legal" right to enter and reside in the United States.

4. Submitted as Exhibits A – C are three articles from 2015 that appeared in the online edition of one of Ireland's leading newspapers, *The Irish Times*, covering efforts of persons in Ireland, who are led by a member of the country's national legislature, to seek extradition of Gibney to Ireland, and other related issues. These articles originally appeared at the website www.IrishTimes.com which is a professional and full-color site, but these reprints available on the Internet have been stripped down to the text of the articles.

5. Submitted as Exhibit D is the AbuseWatch.net article that was produced by Defendant pursuant to my FOIA Request.

6. Submitted as Exhibit E is that same AbuseWatch public alert as an electronic color pdf document that was downloaded in November of 2015 as it was readily found in a Google search on George Gibney.

7. The significance of Gibney's case in Ireland, and the controversies surrounding his flight from Ireland, are reported in this same public alert located in the Citizenship and Immigration Services' own files. The remaining 98 pages were completely blank, except that each of the 98 pages contained a one-line reference citing in a perfunctory manner the specific FOIA exemption under which the agency was withholding the particular document.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true.

Executed in Berkeley, California on November 9, 2015

Irvin Muchnick

Independent TD seeks extradition of 'notorious abuser'

Marie O'Halloran

Last Updated: Wednesday, March 4, 2015, 01:00

A call has been made for the Government to seek the extradition of a "notorious" swimming coach accused of multiple cases of sex abuse who was granted a visa to live in the United States.

Independent TD Maureen O'Sullivan appealed to Taoiseach Enda Kenny to "have a conversation with the Minister for Justice with a view to reopening the case with a view to extraditing this man back to Ireland".

Ms O'Sullivan, who said she would not name the coach in the Dáil, warned of an urgency to deal with the case because an investigative journalist in the US was seeking information, with the assistance of prominent American politicians, on how this man was facilitated to get into America.

The Dublin Central TD said: "I think it would leave this country, this Government, very vulnerable when this information comes to light."

Mr Kenny said "I don't know the details of the case you speak of. I'd be happy to speak to you and I'll ask the Minister for Justice for a report on this matter."

Ms O'Sullivan said young people "were abused, sexually assaulted and raped by men who were their swimming coaches".

Perpetrators

She said recovery began particularly when the perpetrators were brought to justice. "This has happened in a number of cases, the most recent in 2010 when a man was sentenced for sex offences committed between 1981 and the mid-1990s."

Calling for the extradition of this swimming coach, she said one of the victims' staunchest supporters remarked that "this country was able to extradite a celebrity chef to come back and face charges of theft of paintings but we have not managed to extradite this particular man".

"And you were so sympathetic and showed such empathy for Mairia Cahill in her situation and the way we were horrified that sex abusers in the North could move freely to another jurisdiction. That has happened in this man's case."

Ms O'Sullivan described the swimming coach as a "notorious abuser", and said he "fled Ireland and lived in a number of other places before being facilitated and helped into the United States and it is known that he worked with young people in those other countries".

She described the horror of victims' lives, "the suicide attempts, those who did commit suicide, the breakdown in relationships and marriages, the self-harm, the eating disorders and they are still paying the price because this particular individual was not brought to justice".

Minister to discuss extradition of swim coach accused of abuse

Johnny Watterson

Last Updated: Friday, March 6, 2015, 01:00

Minister for Justice and Equality Frances Fitzgerald will contact Garda Commissioner Nóirín O'Sullivan with a view to discussing the case of former Irish Olympic swimming coach George Gibney.

Independent deputy Maureen O'Sullivan received a letter this week from Ms Fitzgerald stating she would follow up on questions raised this week in the Dáil by Ms O'Sullivan, who urged the Government to seek the extradition of Mr Gibney.

Ms O'Sullivan did not mention Gibney by name in her Dáil questions but referred to him as a "a notorious swimming coach accused of multiple cases of sex abuse who was granted a visa to live in the United States".

Ms O'Sullivan received a call from the Department of Justice about the matter in the last two days but was informed that the Government cannot open the case. However as well as the issue being raised with the Garda Commissioner, Ms O'Sullivan has also contacted Taoiseach Enda Kenny's office and will talk to him early next week about the questions she raised. Mr Kenny is currently out of the country.

Ms O'Sullivan believes that there was "a litany of mistakes" in the way the case was dealt with in the past and that some of the excuses that were made then would no longer be acceptable.

Government interest

The deputy also raised the issue of Maíria Cahill and her alleged abuse by IRA members, highlighting that there was intense Government interest on how alleged sex abusers in the North could freely move to another jurisdiction as Mr Gibney has done a number of times since leaving Ireland.

The case has also been picked up in the US by investigative reporter Irvin Muchnick.

He expects to hear back from the department of homeland security's US citizenship and immigration services within the next two months regarding the details of the former coach's visa and Green Card files.

Muchnick's application is currently on file and is number 118 of 155 pending requests to homeland security. He has asked the department to supply details of who assisted or sponsored Mr Gibney in successfully attaining a Green Card.

More than 100 American swimming coaches have been jailed and/or banned for life from the sport in the past few years for offences against boys and girls. With new revelations numbers are still rising in what many people see as perhaps the biggest abuse scandal in the history of sport.

Swimming coach

Mr Gibney, national swimming coach from 1984-1991, was arrested in Ireland in April, 1993, and was charged on 27 counts of indecent assault and unlawful carnal knowledge at Dún Laoghaire District Court.

A judicial review in 1994 prevented the case from proceeding due to the length of time elapsed since the alleged incidents took place. Mr Gibney claimed that he could not remember details of the incidents that went as far back as the 60s. This was accepted.

He subsequently moved from Scotland to the US and now lives in Florida.

Minister to discuss extradition of swim coach accused of abuse

Fitzgerald responds to Dáil queries about Olympic coach George Gibney who lives in US

Johnny Watterson

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ABUSEWATCH.NET

Child AbuseWatch.net

ACTION stops Child Abuse DEAD

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If it's happening to you, DIAL 911 (TELL SOMEONE)
If you see it, DO SOMETHING - NOW

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Domestic Violence
The other half of the Family Violence Cycle

Research
Most child sex abuse result of incest

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Child Prostitution in a City Near You

FBI
FBI: A Parent's Guide to Internet Safety

FBI: WANTED
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WANTED
Information on George Gibney
(Click)

CHILD ABUSEWATCH IS LOOKING FOR INFORMATION ON THE FOLLOWING INDIVIDUAL: GEORGE (JOHN) GIBNEY

Latest Updates Here

Are you a victim of George Gibney? (Click)

George (John/Jon) **Gibney** (63) is an alleged serial child sexual predator who has a long history of accusations of sexual abuse and rape from boys and girls entrusted into his care as an Irish swimming coach. He coached swimming teams - including Olympic - in Ireland for three decades until he fled in 1994 after avoiding prosecution on a legal technicality (a loophole now fixed). He spend time in Scotland and moved to the United States in the late 1990s on a Green Card. He did not disclose his criminal past on his green card application as he would have been denied entry. In not disclosing his past, as he was obliged to, he perjured himself which may turn out to be his undoing. His history reflects a sexual preference was for boys or girls aged 11 to 17.

Justine McCarthy's Deep Deception book gives abuse victims a voice (Read)
Oct 04 2009: **The Times** "When she was 17 and one of the brightest swimming stars around, she was raped and imprisoned in a Florida hotel room by George Gibney."

Gibney raped teenage Olympic prospect (Irish Independent 031907) (Read)

In the U.S. from 1999 to date
In the U.S. Gibney worked in Colorado, Utah and California before moving to Florida in

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2007. In allowing Gibney to flee without any attempt to extradite him or to notify U.S. law enforcement about him, the Irish Department of Justice has allowed a predator to roam unencumbered in the United States. Had it not been for the diligent efforts and relentless pursuit of Gibney by Irish journalists Johnny Watterson (formerly of the Irish Tribune newspaper now with the Irish Times) and Justine McCarthy (also of the Irish Tribune and now with the Sunday Times), Gibney would have quietly disappeared into the American landscape forever.

A note on sexual predators

From the book '*Inside the Minds of Sexual Predators*' by Katherine Ramsland & Patrick Mc Grain; 'Successful (sexual) predators are often so clever and secretive that even the people closest to them fail to recognize what they are doing. They devise a convincing facade, they have a long list of prepared excuses, and when suspicions arise they're skilled at reassuring others that nothing is wrong. They exploit trust and know how to twist what people want to believe into a false sense of security...'

Predators are compulsive and their behavior is predictable as it is repetitive. Their behavior progresses as the thrill of conquests diminish over time. To supplement their needs they develop (new or existing) interests in child pornography, more challenging opportunities to molest, visit child sex tourist destinations and sometimes progress to murder. Aside from the thrill murder can add to their actions, it may be committed for practical reasons to ensure a victims silence. Predators lack conscience, remorse or many times fear of consequence.

Information on Gibney: Gibney's history is well documented in many articles on the Internet - Google 'george gibney.' Full details of his alleged crimes are recorded by Irish Journalist Justine McCarthy in her 2009 book 'Deep Deception.' Available online from Irish book Store Easons here.

(From **Pedophile Makes Home In U.S.** *By Sean O'Driscoll)*

Gibney caused a national scandal in Ireland in 1992 when he obtained a High Court order stopping his trial on 17 sexual abuse charges. Gibney argued in court that the time limit had expired on the case because most of the abuse took place between the 1960s and 1991.

However, some of the biggest names in Irish swimming protested the collapse of the trial. Other victims came forward, but Gibney had fled the country and told his lawyer that he would not return.

The stories of the abused were heard in court but they never found justice. A brother and sister told how Gibney had abused them in the back of the family car while their father was driving in the front.

Another teenager testified about an international swimming meet, when Gibney locked her in a room with him and she was abused.

An Irish government commissioned report, released in 1988, found that Gibney had abused children for three decades, including one 13-year-old girl he slapped in the face after she told him to stop the abuse. He continued to abuse her and her friends.

Gibney, who coached the...Olympic gold medalist Michelle Smith and some of the biggest names in Irish swimming, was sacked as national swimming coach in 1992. There was a huge public outcry after his replacement, Derry O'Rourke, was jailed for similar offenses, and the scandal led to a complete overhaul of Irish sports coaching.

An independent public inquiry led to the development of a new code of ethics for all Irish sports.

Articles - a sampling

Two national coaches abused young swimmers Irish Independent June 30, 08
Disgraced coach now a 'sweet' chap in US Irish Independent, 031207
Pedophile Makes Home in U.S.

Please forward information in confidence to: investigations@abusewatch.net.

INFORMATION COLLECTED IS COMPILED, INVESTIGATED AND UPLOADED TO THE LAW ENFORCEMENT AND THE DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (ICE)

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