UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

CITIZENS FOR A STRONG NEW HAMPSHIRE, INC.,	)	
Plaintiff,	)	
v.	)	No. 1:14-cv-00487
INTERNAL REVENUE SERVICE,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Pursuant to the federal Freedom of Information Act ("FOIA"), Plaintiff attempted to obtain from the IRS information directly relevant to an upcoming congressional election for the purpose of then disseminating it to the public. The IRS, however, flouted the law and utterly ignored Plaintiff's request. Only after Plaintiff was compelled to file suit—and the IRS could thus no longer disregard its request—did the Service attempt to comply with its statutory obligations. Even then, however, it performed a wholly inadequate search and withheld documents without properly justifying such withholding. The IRS's improper treatment of Plaintiff's request prevented not only Plaintiff but also the general public from obtaining important—and timely—information about individuals seeking election to public office.

"A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty." *Id.* at 26823. In enacting FOIA, Congress designated the federal courts as

the protectors against such evils, and this Court must not allow the IRS to perpetuate such injuries against the American public, including Plaintiff, by ignoring, with impunity, the clear mandates of FOIA.

II. RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant states that the 51 pages the IRS withheld "consist of five letters from Sen. Shaheen transmitting enclosed letters from constituents . . . and the Service's responses to the letters." Defendant's Memorandum in Support of Summary Judgment ("Def. MSJ Memo"), at 3 (citing Gulas Decl., ¶¶ 13, 15). Yet Gulas does not state that the documents withheld comprise only those letters and responses, addressing only "[f]ive *of* the letters received by the IRS from Senator Shaheen". *See* Gulas Decl., ¶ 13 (emphasis added). Similarly, Defendant asserts as a fact that "Gulas determined that the documents *were* confidential return information and thus protected from disclosure under section 6103," Def. MSJ Memo, at 3 (emphasis added) (citing Gulas Decl., ¶ 15), yet Gulas expressly states in ¶ 15 that "the IRS responses contained *or* consisted of return information" (emphasis added). Defendant IRS further states that it "released 45 pages in full to the plaintiff and 4 pages in part." Def. MSJ Memo, at 4. It actually released 41 pages in full and 4 pages in part. *See* Gulas Decl., ¶ 22; Def. Ex. 101.[1]

[1] Because any additional facts that would be necessary to dispute Defendant's material facts (regarding, for example, the scope and nature of Defendant's search and the identification of additional locations in which responsive information would be stored) are within the sole possession and knowledge of Defendant, Plaintiff is filing herewith a declaration, pursuant to Federal Rule of Civil Procedure 56(d), seeking to conduct limited discovery. *See* Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition" to a motion for summary judgment, then the district "court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."). *See also Vargas-Ruiz v. Golden Arch Dev., Inc.*, 368 F.3d 1, 3 (1st Cir. 2004) ("[Rule 56(d)] protects a litigant who justifiably needs additional time to respond in an effective manner to a summary judgment motion"). Recognizing, however, that any such discovery would not properly include

III. STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

On June 18, 2014, Plaintiff submitted a FOIA request to the IRS. Declaration of A.M. Gulas ("Gulas Decl.") (Doc. 12-3), at ¶ 3; Declaration of Derek Dufresne (" Dufresne Decl."), ¶ 3; Ex. A. Plaintiff requested "'[a]ny and all documents or records of emails or correspondence to or from New Hampshire Senator Senator [sic] Jeanne Shaheen and Congresswoman Carol Shea-Porter (NH-01) to or from former IRS Commissioner Doug Shulman, former Commissioner Steve Miller, and/or former head of the tax exempt groups Lois Lerner between the dates of January 1, 2009 and May 21, 2013." Gulas Decl., ¶ 3; Dufresne Decl., ¶ 3; Ex. A. The IRS received Plaintiff's FOIA request on June 24, 2014. Dufresne Decl. ¶ 4; Ex. B. On July 23, 2014, the IRS, through Ms. Denise Higley, wrote to Plaintiff that the Service would not be able to respond within the statutorily prescribed deadline, and "extended" the response deadline to October 23, 2014, because, Ms. Higley wrote, she would "need additional time to search for, collect, and review responsive records from other locations." Dufresne Decl., ¶ 4; Ex. B. On October 22, 2014, one day before the IRS's new, self-imposed deadline, Ms. Higley again wrote to Plaintiff on behalf of the IRS, stating that the Service could not yet provide a response but that she was "still working on [the] request", "need[ed] additional time to collect, process, and review any responsive documents", and would contact Plaintiff again if the IRS found itself still unable to provide a response by January 27, 2015. Dufresne Decl., ¶ 5; Ex. C. After receiving the IRS's October 22nd letter, Plaintiff filed this lawsuit on October 30, 2014. *See* Complaint (Doc. 1).

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the documents at issue in this litigation, Plaintiff is also requesting that the Court conduct an *in camera* inspection of those documents to reach a determination regarding the Exemption 3 and segregability issues. *See infra*, Part IV.B.1. Moreover, despite the filing of the Rule 56(d) declaration, it is Plaintiff's position, as set forth herein, that the undisputed material facts are insufficient to entitle Defendant to judgment as a matter of law, and that Defendant's motion for summary judgment may—and should—be denied on that ground.

In support of its motion for summary judgment, the IRS relies on the Declaration of A.M. Gulas. *See generally,* Gulas Decl. Gulas testified that it was Ross Kiser who performed the search for documents responsive to Plaintiff's FOIA request. *Id.* at ¶ 4. The search was performed in a single electronic database, E-Trak. *Id.* at ¶¶ 4-5. It was Gulas who then performed the review of the responsive documents to make the determinations regarding segregation, exemption, and disclosure. *See* Gulas Decl., ¶¶ 11, 15. And it was only following these determinations that the Service released 41 pages in full to the plaintiff and 4 pages in part. *Id.* at ¶ 22. Yet, Gulas did not become involved in this matter until *after* it turned into litigation, Gulas Decl., ¶¶ 1, 2, 4. The IRS's production of some responsive documents to Plaintiff did not occur until November 26, 2014, at which time the IRS also indicated it was withholding fifty-one (51) pages of responsive documents in their entirety. Def. Ex. 101 (Doc. 12-2).

A search using E-Trak produces limited correspondence exchanged between the IRS and Members of Congress because E-Trak is comprised only of "congressional correspondence received by the Executive Secretariat Correspondence unit," and "correspondence case files of inquiries from Congressional offices received in Legislative Affairs." *Id.* at ¶ 5. According to the Internal Revenue Manual (IRM), correspondence received by the Executive Secretariat's Correspondence unit are those "addressed specifically [and exclusively] to the Commissioner and Deputy Commissioner," not to other officials or employees of the IRS. IRM 1.1.5.2.1(2), *available at* http://www.irs.gov/irm/part1/irm_01-001-005.html, attached hereto as Exhibit D.[2] In

[2] When considering a motion for summary judgment, "[t]he court may judicially notice a fact that is not subject to reasonable dispute [that] can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Such facts include those available on an official government website, *see Gent v. Cuna Mut. Ins. Soc'y,* 611 F.3d 79, 84 (1st Cir. 2010) (citing *Denius v. Dunlap,* 330 F.3d 919, 926-27 (7th Cir. 2003) (explaining that documents available on official government websites are proper subjects of judicial notice under Fed. R. Evid. 201)). It is also "well-accepted that federal courts may take

addition, correspondence exchanged directly between IRS officials and members of Congress and not involving a specific inquiry would *not* be included in Congressional correspondence received in Legislative Affairs and entered into the E-Trak system. IRM 4.90.1.7, *available at* http://www.irs.gov/irm/part4/irm_04-090-001.html, attached hereto as Exhibit E. In conducting its search, the IRS did not search for direct communications between Shaheen, Shea-Porter, Shulman, Miller, and/or Lerner, electronically or otherwise, nor did it search the custodial e-mail accounts of former Commissioners Shulman and Miller, or former Director of Exempt Organizations, Lois Lerner. *See generally*, Gulas Decl. As the IRS previously acknowledged in another case involving a FOIA request for IRS employee communications and emails, there are two IRS systems for tracking employee email messages—the Information Technology E-discovery Office (IRS-IT EDO), Declaration of Neguiel Hicks, ¶ 9, *Judicial Watch, Inc. v. IRS*, No. 14-01039 (D.D.C. Oct. 10, 2014) ECF No. 10-3, attached hereto as Exhibit F (explaining IRS-IT EDO collects ESI, including emails, on a custodian-by-custodian basis) and the Personal Storage Table (PST), *id*. at ¶¶ 6-7 (explaining that PST files are compressed files commonly used for archiving and maintaining email messages and attachments of IRS employees). The IRS did not search these locations for information responsive to Plaintiff's FOIA request. *See generally*, Gulas Decl.

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judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand." *Kowalski v. Gagne*, 914 F.2d 299, 305 (1st Cir. 1990) (citing *E.I. Du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986) (taking judicial notice of a complaint filed in a state action). Plaintiff therefore respectfully requests that this Court take judicial notice of the facts identified herein that are available on the IRS website and on the official websites of the U.S. House of Representatives Committee on Ways and Means, the U.S. House of Representatives Committee on Oversight and Government Reform, and U.S. Congressman Jim Jordan, as well as the documents cited by Plaintiff that have been filed in other court proceedings.

At the time of the Service's filing of the Gulas Declaration, more than 30,000 missing emails sent by Lois Lerner had been recovered by the Treasury Inspector General (TIGTA). *See* Press Release, Congressman Jim Jordan, Jordan Statement on Recovery of 30,000 Lois Lerner E-mails (Nov. 21, 2014), *available at* http://jordan.house.gov/news/documentsingle.aspx?DocumentID=397873, attached hereto as Exhibit G. At the time of the filing of the Gulas Declaration, the IRS had acknowledged in at least one other case that in light of the recent discovery of these emails, it should supplement its FOIA responses. *See* IRS Status Report, *Judicial Watch, Inc. v. IRS*, No. 13-01599 (D.D.C. Nov. 21, 2014), ECF No. 38, attached hereto as Exhibit H. The IRS failed to acknowledge any such obligation, or even mention these recovered emails, in responding to Plaintiff's FOIA request. *See generally*, Gulas Decl.; Defs. Ex. 101.

In addition to her custodial email account, Lois Lerner also conducted official business using a personal email account. *See* Dave Camp, U.S. House of Representatives Committee on Ways and Means, Letter to Attorney General Eric H. Holder, Jr., at 12-13 (Apr. 9, 2014), http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf, attached hereto as Exhibit I (referring Lerner to the Department of Justice for investigation of potential criminal activities, including disclosure of confidential taxpayer information to federal employees *outside of the IRS* in violation of § 6103 *using her personal email* to conduct official business). *See also* Darrell Issa and Jim Jordan, U.S. House of Representatives Committee on Oversight and Government Reform, Letter to IRS Commissioner John Koskinen, 1 (June 9, 2014), *available at* http://oversight.house.gov/wp-content/uploads/2014/06/2014-06-09-DEI-Jordan-to-Koskinen-IRS-DOJ-Disks-tax-exempt-applications.pdf, attached hereto as Exhibit J (expressing concern about and requesting explanation for IRS/Lois Lerner's transmission of over

one million pages of information, including confidential taxpayer information, to the FBI). The IRS did not search Ms. Lerner's personal email account. *See generally*, Gulas Decl.

The Service failed to provide any assurance in its declaration that the search it conducted was reasonably calculated to uncover all relevant documents requested by Plaintiff in its FOIA request. *See id*. Similar allegations of improper withholding of documents responsive to FOIA requests currently lie against the IRS, at least two (2) of which allege improper or unreasonable searches. *See* Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, *Judicial Watch, Inc. v. IRS*, No. 13-1759, at 2-3 (D.D.C. Oct. 22, 2014) ECF No. 20 (alleging the IRS improperly limited its search to formal audit documents and purposefully excluded from its search databases and recordkeeping systems containing communications requested including all e-mails, correspondences, directives, etc. regarding audits); Motion for Discovery, *Judicial Watch, Inc. v. IRS*, No. 13-01559, at 1 (D.D.C. Sept. 17, 2014) ECF No. 31 (asserting that the IRS still failed to provide information required by the Court including information relating to missing documents, despite two (2) opportunities to do so and seven declarations); Complaint, *Judicial Watch, Inc. v. IRS*, No. 15-220 (D.D.C. Feb. 15, 2015); Complaint, *Judicial Watch, Inc. v. IRS*, No. 15-237 (D.D.C. Feb. 18, 2015), attached hereto as collective Exhibit K.

Gulas expressly testified that some of the documents the IRS withheld "contained *or* consisted of return information." Gulas Decl., ¶ 15 (emphasis added). Gulas's only statement regarding segregability addressed the entire category of withheld documents and merely stated that "the Service has withheld in their entirety only . . . those documents wherein the portions exempt from disclosure under the FOIA are so inextricably intertwined with nonexempt material as to be non-segregable." *Id.* at ¶ 11. Gulas also testified, categorically, as to the general substance of "[f]ive of the letters received by the IRS from Senator Shaheen," *id.* at ¶ 13, but

failed to address each specific document withheld and thus failed to clarify whether the documents withheld consisted of only those five letters or other additional documents. *See generally*, Gulas Decl.[3]

IV. ARGUMENT

Summary judgment is available to a defendant in a FOIA case only "when the agency proves that it has fully discharged its obligations under the FOIA after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." *Moffat v. U.S. DOJ*, 2011 U.S. Dist. LEXIS 87396, *2-3 (D. Mass. Aug. 5, 2011). Unlike most federal litigation, in FOIA litigation, the defendant agency bears the burden of proof. *See* 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"). In a FOIA case, "the district court must determine *de novo* whether the queried agency has met [its] burden." *Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (citing *Aronson v. IRS*, 973 F.2d 962, 966 (1st Cir. Mass. 1992)). Only in limited circumstances involving an agency's interpretation and application of a FOIA Exemption 3 statute—not application of other FOIA provisions, *see infra* Part IV.B.1—has the First Circuit held a more deferential standard of review to be appropriate. *See Aronson*, 973 F.2d at 965.

The First Circuit has held that

> in keeping with FOIA's underlying presumption in favor of broad disclosure, the government agency bears the burden of proving the applicability of a specific statutory exemption. *See Carpenter*, 470 F.3d at 438; *Church of Scientology*, 30 F.3d at 228. "That burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document." *Ray*, 502 U.S. at 173.

[3] Because Plaintiff is not challenging the IRS's withholding of information pursuant to FOIA Exemption 6, facts regarding that withholding are not material to the parties' summary judgment motions.

Union Leader Corp. v. United States Dep't of Homeland Sec., 749 F.3d 45, 50 (1st Cir. 2014). "To satisfy this burden, the agency must furnish a detailed description of the contents of the withheld material and of the reasons for nondisclosure, correlating specific FOIA exemptions with relevant portions of the withheld material." *Orion Research, Inc. v. Environmental Protection Agency*, 615 F.2d 551, 553 (1st Cir. 1980). "Such a description is necessary since the party seeking disclosure does not know the contents of the withheld material whereas the agency has access to the material." *Id.* An agency affidavit that fails to "permit . . . the district court meaningfully to evaluate the [agency's] exemption claims," *Church of Scientology*, 30 F.3d at 230, is insufficient to support summary judgment in favor of the agency.

Similarly, the agency bears the burden of demonstrating the adequacy of its search for records, "judged by a standard of reasonableness [which] depends upon the facts of each case." *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993). The agency's evidence regarding its search must be "relatively detailed and nonconclusory," *id.* and "should additionally describe at least generally the structure of the agency's file system which makes further search difficult." *Id.* (quotation omitted).

A. <u>The IRS is Not Entitled To Summary Judgment Because the IRS Has Failed To Provide Information Sufficient to Enable Plaintiff to Challenge the Procedures Utilized, and Plaintiff's Evidence Rebuts Any Presumption of Good Faith.</u>

Summary judgment for the IRS in the present case is improper because the IRS's declaration fails to provide information specific enough to enable Plaintiff to challenge the procedures utilized and/or to demonstrate a reasonably thorough search, *see Landmark Legal Found. v. EPA*, 959 F. Supp. 2d 175, 181 (D.D.C. 2013) (quoting *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980)), and the additional facts presented by Plaintiff rebut any presumption that the search was made in good faith. *See Maynard*, 986 F.2d at 560

(explaining that if an agency fails to establish a reasonable search through detailed affidavits, the FOIA requester may avert summary judgment; however, if an agency demonstrates that it has conducted a reasonably thorough search, the FOIA requester can rebut the agency's affidavit by showing that the agency's search was not made in good faith, thus defeating the agency's motion for summary judgment).

In *Landmark*, the plaintiff successfully challenged the EPA's motion for summary judgment by demonstrating that, just as in the present case, the agency failed to search personal email accounts of top officials and, at least initially, excluded top leaders from the agency's search. 959 F. Supp. 2d at 181. Noting that an agency's declarations are accorded a presumption of good faith which cannot be rebutted by purely speculative claims, the court held that a single email presented by plaintiff—an email originating from the personal email account of the then-Deputy Administrator—together with press reports and Congressional investigation into the EPA's use of personal email accounts, constituted more than a speculative claim that the EPA's search should have included the personal emails of all top officials at the EPA. *Id.*

As the undisputed facts demonstrate, the IRS conducted a search using E-Trak, a database designed to track only *some* of the correspondence requested by Plaintiff. A legitimate question remains, however, regarding what files were actually searched using E-Trak and whether the IRS could have, and should have, conducted a search in other locations—specifically, the custodial email accounts of the three IRS officials, Shulman, Miller and Lerner, the personal email account of Lerner, and any back-up tapes that exist which contain responsive communications to/from Lois Lerner. The Gulas Declaration fails to acknowledge the other recordkeeping systems or databases used by the IRS to track employee email and other correspondence (including at least two other systems—the IRS IT-EDO and PST, *see supra*, Part

III, p. 5) and provides no explanation for the agency's failure to search these databases. Similarly, and despite the IRS's acknowledgment that it should supplement its FOIA requests in another case to include the Lois Lerner emails recently discovered by TIGTA, *see* IRS Status Report, *Judicial Watch, Inc. v. IRS*, No. 13-01599 (D.D.C. Nov. 21, 2014), ECF No. 38, the Gulas Declaration also fails to assure that these records were searched, despite a clear obligation to do so. *See Campbell v. United States DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998) (holding that an agency "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry"). When determining the reasonableness of an agency's search, "the court evaluates . . . what the agency knew at its conclusion rather than what the agency speculated at its inception," *id*., and in this case, the IRS had knowledge at the conclusion of its search, and at the time of submitting the Gulas Declaration, that additional files existed likely to contain documents responsive to Plaintiff's request.

Strikingly similar to the *Landmark* case, additional facts in this case highlight the Service's bad faith conduct in responding to Plaintiff's FOIA request. Just as it has in other cases involving FOIA and congressional requests for information, *see supra*, pp. 9-10 and Part III, the IRS has shirked its responsibilities with regards to Plaintiff's request for information by failing to respond in a timely and adequate manner. As Plaintiff describes in its own motion for partial summary judgment (the facts of which are incorporated by reference herein) and directly above in Part III, Defendant's search of E-Trak would not produce ***all*** of the information requested by Plaintiff in its FOIA request, including the following: (1) *all* correspondence to/from Senator Jeanne Shaheen and Congresswoman Carol Shea-Porter to/from Lois Lerner; (2) all emails, exchanged directly between the above identified New Hampshire politicians and the three individual IRS employees identified in Plaintiff's FOIA request; and (3) any other

correspondence between the above identified New Hampshire politicians and the three IRS employees not initially received in the Service's Executive Secretariat Correspondence unit or Legislative Affairs Office.

The conflicting testimony of IRS employees further compromises any presumption of good faith on the part of the agency. *See Landmark*, 959 F. Supp. at 184 ("when there is evidence of some wrongdoing such as . . . a material conflict in agency affidavits, limited discovery has been allowed") (quoting *Citizens for Responsibility & Ethics in Washington v. Nat'l Indian Gaming Comm'n*,, 467 F. Supp. 2d 40, 56 (D.D.C. 2006) (Collyer , J.)). On July 23, 2014, the IRS, through Ms. Denise Higley, informed Plaintiff that it would "need additional time to search for, collect, and review responsive records *from other locations*." Dufresne Decl., ¶ 4; Ex. B. The Service's declaration submitted by A.M. Gulas explains, however, that only a single electronic database was searched, Gulas Decl., ¶ 4, rather than a search for records located at several locations, as previously represented by Ms. Higley. Furthermore, while Ms. Higley wrote on behalf of the Service that she was searching for, collecting, and reviewing responsive records between July 23 and October 22, 2014, *see* Exs. B & C, it was not until after more than five months of delay, and only after Plaintiff filed suit, that *Ross Kiser* (not Ms. Higley) collected, and A.M. Gulas reviewed, responsive documents. *See* Complaint (Doc. 1) (filed October 30, 2014); Gulas Decl., ¶¶ 1, 2, 4, 11, 15, 22.

Where outstanding issues of material fact exist preventing summary judgment, the Court must determine the proper resolution. *Landmark*, 959 F. Supp. 2d 184. In any of the above circumstances (insufficient declaration, unreasonable search, or bad faith)—all of which are present in this case—a new search and/or limited discovery can serve as the proper remedy. *See id.* at 185 (finding evidence of bad faith and ordering the agency to submit to discovery to allow

plaintiff to determine the scope of EPA's record systems and adequacy of EPA's search); *Weisberg*, 627 F.2d at 371 (finding that the district court should have permitted limited discovery of the individuals responsible for the agency search where the agency affidavits were insufficient). While "discovery is the exception, not the rule in FOIA cases," the "major exception to this limited scope of discovery is when plaintiff raises a sufficient question as to the agency's good faith in processing documents." *Landmark*, 959 F. Supp. 2d at 184 (quoting U.S. Dep't of Justice, Guide to the Freedom of Information Act 812 (2009 Ed.) (collecting cases)).[4]

Plaintiff has raised a legitimate question regarding the reasonableness of the IRS's search for responsive documents and its good faith in conducting that search. The IRS's improper limitation of its search and obvious exclusion of the email accounts of all three IRS officials (as well as recovered emails of which the IRS was aware when it filed the Gulas Declaration), coupled with the conflicting representations provided to Plaintiff by IRS employees Higley and A.M. Gulas, indicates both an objectively unreasonable search and bad faith on the part of the agency in responding to Plaintiff's FOIA request. Accordingly, the Court should deny Defendant's motion for summary judgment and issue an order (1) permitting Plaintiff to conduct limited discovery (on the same topics as set forth in the accompanying Rule 56(d) declaration) to obtain evidence of material facts about the scope of the IRS's record systems and its search that are currently within the sole possession and knowledge of the IRS and (2) requiring Defendant to conduct a new search.

[4] *See also Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 2006 U.S. Dist. LEXIS 34857, 2006 WL 1518964 (D.D.C. June 1, 2006) (Sullivan , J.) (finding discovery warranted in a FOIA action where the government had engaged in extreme delay); *Citizens For Responsibility & Ethics in Washington*, 467 F. Supp. 2d at 56 (citing *Long v. U.S. Dep't of Justice*, 10 F. Supp. 2d 205 (N.D.N.Y. 1998)).

B. Because the IRS Has Failed to Demonstrate Proper Withholding, the IRS Is Not Entitled to Summary Judgment, And This Court Should Undertake *In Camera* Review of the Documents Withheld.

The IRS contends it has properly withheld from Plaintiff fifty-one (51) documents that are responsive to Plaintiff's FOIA request because Plaintiff is not authorized, pursuant to 26 U.S.C. § 6103(a), to obtain those documents. As such, the IRS claims these documents fall under FOIA Exemption 3, which provides that FOIA's disclosure requirement "does not apply to matters that are . . . specifically exempted from disclosure by statute . . . if that statute—requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A)(i)-(ii). For its part, 26 U.S.C. § 6103(a) provides that "[r]eturns and return information shall be confidential, and except as authorized by this title . . . shall [not be] disclose[d] . . . ." Plaintiff does not dispute that § 6103 is an Exemption 3 statute, and that ***if*** the documents the IRS has withheld here consist of nothing more than "return information," they have been properly withheld. The evidence demonstrates two significant problems with the IRS's position on this issue, however, which preclude entry of summary judgment in favor of the IRS and necessitate *in camera* review of the documents at issue.

1. <u>The IRS Has Failed to Demonstrate That the Documents Withheld Consist Entirely of Exempt Return Information</u>.

It is the agency's burden to affirmatively demonstrate proper withholding under FOIA. *Union Leader Corp.*, 749 F.3d at 50. The evidence the IRS has provided here, however, falls short of making any such demonstration and, in fact, affirmatively suggests that at least some of the documents have been withheld improperly. Plaintiff does not dispute that "return information" is exempt from disclosure under FOIA Exemption 3, *see* 5 U.S.C. § 552(b)(3) and 26 U.S.C. § 6103(a), and that return information does not cease to be such simply by the removal

of personal identifiers. *See Church of Scientology v. IRS*, 484 U.S. 9, 18 (1987). In other words, if an entire document *consists of* return (*i.e.*, exempt) information, it need not be disclosed. If a document merely *contains* exempt information, however, the law does not permit an agency to withhold the document in its entirety but instead requires redaction of exempt information and disclosure of the non-exempt information. *Church of Scientology Int'l*, 30 F.3d at 232 (because "'the focus in the FOIA is information, not documents, [] an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.'") (quoting *Krikorian v. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993)).

Importantly, the First Circuit has not eschewed FOIA's *de novo* standard generally, even in cases involving some application of FOIA's Exemption 3. Rather, it has limited application of the "deferential principles of administrative law . . ." to the court's "review of the IRS's interpretation of th[e] *Exemption 3 statute* and its application to the data at issue." *Aronson*, 973 F.2d at 965 (emphasis added). And, in order to grant such deference, the court must determine not only "that the statute in question is an Exemption 3 statute," *Church of Scientology Int'l*, 30 F.3d at 235 (citations omitted), but also "that the information requested at least arguably falls within the statute." *Id.* As explained below, the IRS's own evidence indicates that at least some of the requested information falls outside the coverage of § 6103. As such, in reviewing the IRS's interpretation and application of FOIA's general segregability requirement, *see* 5 U.S.C. § 552(b), this Court must apply FOIA's *de novo* standard.

The only evidence the IRS has provided to support its withholding of these fifty-one documents, in their entirety, is the Gulas Declaration. Yet Gulas has not testified that all of the withheld documents *are* return (and, thus, exempt) information. Rather, Gulas expressly states, with regard to the IRS's responses to Senator Shaheen's communications, that they "contained *or*

consisted of return information." Gulas Decl., ¶ 15 (emphasis added). It cannot be gainsaid that if Gulas accurately could have testified that the documents all *consist entirely of* return information, the declaration would have stated as much. The only conclusion to be reached from the IRS's evidence, then, is that at least some of the IRS's responses merely *contained*—but did not consist entirely of—exempt return information. The Service, however, has utterly failed to identify which description (contains versus consists of) applies to which specific documents. Nor has the IRS provided any explanation as to why (with regard to those documents merely *containing* return information) the exempt information was not properly redacted and the remainder of the responsive documents disclosed to Plaintiff. Gulas's categorical segregability statement regarding all of the withheld documents, *see* Gulas Decl., ¶ 11, is entirely conclusory in nature, provides no details to allow this Court to undertake a proper review of that decision, and is entitled to no deference at all. As the First Circuit has explained, it is the agency's

> obligation in the first instance to provide enough information to enable the adversary process to operate in FOIA cases. The presumption of good faith accorded to agency affidavits can only be applicable when the agency has provided a reasonably detailed explanation for its withholdings. A court . . . cannot discharge its *de novo* review obligation unless that explanation is sufficiently specific.

Church of Scientology Int'l, 30 F.3d at 233; *see also Krikorian*, 984 F.2d at 467 (explaining that "the withholding agency must supply 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").

Even under the more deferential review standard for application of Exemption 3 statutes, Gulas's declaration is insufficient to make the necessary showing of proper withholding by the IRS. *Compare Church of Scientology Int'l*, 30 F.3d at 235-36 (acknowledging *Aronson*'s holding regarding Exemption 3 deference but requiring the agency to actually address both the basis for

withholding and the segregability issue as to each withheld document and holding that "[t]he requirement that the government explain the basis for its conclusion that . . . Exemption 3[] at least arguably permits withholding of certain documents applies *a fortiori* to materials *not specifically identified as* [exempt] grand jury exhibits, but which simply were *located in* grand jury files") (emphases added) *with Gillin v. IRS*, 980 F.2d 819, 822 (1st Cir. 1992) (upholding the IRS's determination because "[a]ccording to the IRS' uncontroverted evidentiary declarations, the redacted information *consisted entirely of* [information falling within Exemption 3]") (emphasis added).

In sum, the Gulas declaration suffers the same deficiencies identified by the First Circuit in *Church of Scientology*:

> The[] declarations are written too generally to supplement the [*Vaughn*] index in any meaningful way. *They treat the documents within various exemption categories as a group, without referring to specific documents*, and make broad statements essentially explaining that the documents were withheld because they contain the type of information generally protected by that particular exemption. *The statements regarding segregability are wholly conclusory, providing no information that would enable a requester to evaluate the agency's decisions.* Thus, none of the functions of the index identified in *Maynard* are served: *the declarations do not demonstrate careful analysis of each document* by the government; *the court has not been assisted in its duty* of ruling on the applicability of an exemption; *and the adversary system has not been visibly strengthened*.

30 F.3d at 231 (emphases added) (citing *Maynard*, 986 F.2d 547).

In providing for judicial review under FOIA, Congress expressly contemplated circumstances in which, upon an agency's withholding of documents, the federal courts might need to "examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section." 5 U.S.C. § 552(a)(4)(B). In fact, the Supreme Court has explained that

> [t]he *in camera* solution has been widely recognized as the appropriate response to a variety of analogous disclosure clashes involving individual rights and government secrecy needs. . . . Congress specifically invoked *in camera* review to balance the policies of disclosure and confidentiality contained in the exemptions to the Freedom of Information Act. 5 U. S. C. § 552(a)(4)(B). Congress stated that *in camera* review would "plainly be [the] necessary and appropriate" means in many circumstances to assure that the proper balance between secrecy and disclosure is struck. S. Rep. No. 93-1200, p. 9 (1974).

Ponte v. Real, 471 U.S. 491, 514-515 (1985).

In order to provide the necessary assurances that these documents have been properly withheld, in their entirety, or, if appropriate, issue an order requiring further disclosure by the IRS, this Court's review should include an *in camera* inspection of each of the withheld documents. Indeed, some courts follow this approach as a matter of course, *see Grand Cent. P'ship., Inc. v. Cuomo*, 166 F.3d 473, 478 n.2 (2d Cir. 1999) (explaining that it is the "well settled practice of [the Second Circuit] to conduct *in camera* review of contested documents in a FOIA dispute"), while others, including the First Circuit, have explained that at least where, as here, there are relatively few documents at issue, the agency's evidence is inadequate, and/or there is evidence of bad faith on the part of the agency, *see supra* Parts III & IV.A, *in camera* inspection is appropriate. *See Rugiero v. United States DOJ*, 257 F.3d 534, 544 (6th Cir. 2001) ("A showing of bad faith would rebut the presumption of regularity the government enjoys in responding to FOIA requests and would weigh heavily in the decision to conduct an in camera review of responsive documents withheld or redacted.") (internal citation omitted); *Church of Scientology Int'l*, 30 F.3d at 233 (explaining that "*in camera* review is a tool available to a court when the government's showing otherwise is inadequate to satisfy the burden of proving the exempt status of withheld documents").[5] Because the IRS has been "given the opportunity to

[5] *See also Maynard*, 986 F.2d at 558 (explaining that the district court's "*in camera* inspection of the relatively limited number of documents . . . provided an adequate factual basis for the district

demonstrate by affidavit or testimony that the documents are clearly exempt from disclosure," *Bell v. United States*, 563 F.2d 484, 487 (1st Cir. 1977), but has failed to satisfy its burden, and indeed there is clear evidence of bad faith on the part of the IRS, it has necessitated that this Court conduct an *in camera* inspection of the fifty-one documents withheld.

2. The IRS Has Failed to Clearly Account For the Substance of All Documents Withheld.

There is a second important reason that *in camera* inspection is appropriate here. The allegations in this case should not be viewed in a vacuum, with disregard for the recent flood of serious allegations—and findings—of improper conduct on the part of the IRS, including specifically Lois Lerner (one of the three IRS officials whose communications are at issue in this case), particularly when those allegations include the unlawful disclosure of taxpayer return information in violation of § 6103. *See, e.g.*, Darrell Issa and Jim Jordan, U.S. House of Representatives Committee on Oversight and Government Reform, Letter to IRS Commissioner John Koskinen, 1 (June 9, 2014), *available at* http://oversight.house.gov/wp-content/uploads/2014/06/2014-06-09-DEI-Jordan-to-Koskinen-IRS-DOJ-Disks-tax-exempt-applications.pdf (expressing concern about and requesting explanation for IRS/Lois Lerner's transmission of over one million pages of information, including confidential taxpayer information, to the FBI); Dave Camp, U.S. House of Representatives Committee on Ways and Means, Letter to Attorney General Eric H. Holder, Jr., 12-13 (Apr. 9, 2014), *available at* http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf (referring

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court's decision and obviated the need for further *Vaughn* indices from the [agency]"); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) ("Where there is evidence of bad faith on the part of the agency, . . . [i]n camera inspection . . . is 'plainly necessary' unless it is clear to the court that the withholding by the agency would not even be sustainable after in camera inspection."); *Tax Analysts v. IRS*, 414 F. Supp. 2d 1, 5 (D.D.C. 2006) (finding that the government's "assertion [of non-segregability] can best be verified by an *in camera* inspection of the documents withheld by the agency").

Lerner to the Department of Justice for investigation of potential criminal activities, including disclosure of confidential taxpayer information in violation of § 6103).

It would be all too convenient (and easy) for the IRS to use FOIA's Exemption 3 to argue that because of § 6103(a)'s prohibition on disclosure of taxpayer return information, certain correspondence between members of Congress and the IRS is exempt from FOIA disclosure, when, in reality, such correspondence was not exchanged at the request of a taxpayer but instead evidences the IRS's unlawful disclosure of taxpayer return information in violation of § 6103. *See* 26 U.S.C. § 6103(f) (outlining limited circumstances in which IRS may lawfully disclose taxpayer information to congressional *committees* but not an individual member who is not acting as an authorized agent of such a committee).

In fact, the IRS's own evidence leaves open this very possibility. The Gulas Declaration merely describes the categorical nature of "[*f]ive of the letters* received by the IRS from Senator Shaheen." Gulas Decl., ¶ 13 (emphasis added). Nowhere, however, does the declaration provide a clear indication of whether any other correspondence the IRS officials exchanged with either Senator Shaheen or Congresswoman Shea-Porter is contained within the documents being withheld and, if so, the nature of that correspondence. *See id.* at ¶ 17 (listing the Bates numbers of the documents withheld by the IRS but failing to address each document separately and thus failing to clarify whether these Bates numbers consist of *only* the five letters referenced in ¶ 13). To reach any conclusion in this regard would require a significant assumption. FOIA neither places such a burden on Plaintiff, *see Church of Scientology Int'l*, 30 F.3d at 228 (acknowledging that "[t]he government bears the burden of demonstrating the applicability of a claimed exemption" as to each document withheld), nor authorizes any such assumption on the part of this Court. *See id.* at 233-34 (explaining that "[a] court may not without good reason second-

guess an agency's explanation, but it also cannot discharge its *de novo* review obligation unless that explanation is sufficiently specific").

In short, because of the shortcomings of the IRS's evidence, including the Service's failure to sufficiently demonstrate the nature of each document for which it claims exemption, this Court should undertake *in camera* inspection of the documents to ensure that the IRS has adequately accounted for the substance of each withholding and is not being permitted to use FOIA Exemption 3 (and/or a carefully drafted declaration) to shield detection of its own statutory violations.

CONCLUSION

For the foregoing reasons (as well as those provided in Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment and incorporated by reference herein), Defendant has failed to demonstrate either a reasonable search or proper withholding under FOIA and is therefore not entitled to summary judgment. This Court should issue an order (1) permitting Plaintiff limited discovery regarding the scope of the IRS's record systems and search, (2) requiring the IRS to conduct a new and proper search, and (3) requiring the IRS to submit for *in camera* review the fifty-one documents it withheld from Plaintiff allegedly pursuant to FOIA's Exemption 3.

DATED: February 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2015, I filed and served a copy of the foregoing Memorandum in Opposition to Defendant's Motion for Summary Judgment, as well as the declaration and exhibits in support and the proposed order filed therewith, via the ECF System, on counsel for the defendant.

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