

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

CENTER FOR INTERNATIONAL)
ENVIRONMENTAL LAW,)
1367 Connecticut Avenue)
Suite 300)
Washington, D.C. 20036,)

Plaintiff,

vs.

OFFICE OF THE UNITED STATES TRADE)
REPRESENTATIVE, and ROBERT B.)
ZOELLICK, in his official capacity as the)
United States Trade Representative,)
600 17th Street, N.W.)
Washington, D.C. 20508,)

Defendants.

Civil Action No. 01 CV 00498 (RWR/JMF)

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

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Defendants.

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**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

This Court should grant the Center for International Environmental Law’s (“CIEL” or “Plaintiff”) motion for summary judgment because the Office of the United States Trade Representative and Robert B. Zoellick, in his official capacity as United States Trade Representative (collectively, “USTR” or “Defendants”) still have not adequately identified or described how disclosure of four documents¹—is reasonably expected to damage US national security. Consequently, USTR has not met its burden of proving proper classification of each of these documents pursuant to Executive Order 12958, as required by Exemption 1 of the Freedom of Information Act, as amended, 5 U.S.C. § 552 (“FOIA”). Therefore, USTR is unlawfully withholding these documents in violation of FOIA. The Court must enjoin such withholding and order USTR to produce these four documents to CIEL.

I. Facilitating Democratic Participation by Concerned Citizens Cannot Constitute a Legitimate Harm to National Security Especially When the President and USTR Have Hailed the FTAA Negotiations As Promoting Democracy

Here is how Ms. Vargo explains that disclosure is reasonably expected to damage US national security. *First*, if USTR discloses the information that CIEL has requested, then “constituencies” or “internal groups” in the countries of the US negotiating partners may become aware of the US position. *Declaration of Regina Vargo* (“*Vargo Declaration*” or “*Vargo Decl.*”) at ¶¶ 8-9). *Second*, those informed citizen groups may ask their governments who represent them at the negotiating table not to support such a proposal tabled by USTR. *Vargo Decl.*, ¶ 9. *Third*, those governments might actually adopt the position of their citizens and oppose the US proposals for the investment section of the FTAA. *Id.* *Fourth*, the United States would then be faced with “possible deadlock or lengthy delay” in what the USTR considers “a critical area of the FTAA negotiations.” *Id.*

¹ These four documents are listed on the revised *Vaughn* index, dated January 11, 2002, as

In other words, disclosure of the withheld information would facilitate democratic public participation in the countries of US negotiating partners and such participation would make it more difficult for USTR to prevail in the negotiation of the investment section of the FTAA. For this reason, USTR argues that it “need[s] to keep secret what position the United States is advocating at the FTAA negotiations.” *Def’s. Response Brief* at 9.

USTR’s concern that democratic processes in foreign countries pose a danger to US national security is belied by statements of President George W. Bush and US Trade Representative Robert B. Zoellick that one goal of the FTAA negotiations is to foster democracy in those very same countries. In an effort to build Congressional and international support for the FTAA and other trade agreements, President Bush has stated that “[f]ree trade brings greater political and personal freedom.” President Bush, Address to the Joint Session of Congress, at 7 (February 27, 2001), *available at* <http://www.whitehouse.gov/news/release/2001/02/20010228.html>. *See also* Remarks by the President to the Council of the Americas, at 2 (May 7, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/05/print/20010507-6.html> (“[W]hen we promote open trade, we are promoting political freedom.”). Moreover, President Bush promoted the FTAA at a meeting of the heads of state of the FTAA negotiating partners at the April 2001 Summit of the Americas by claiming that the agreement would create “habits of liberty. And habits of liberty create expectations of democracy.” *See* United States Trade Representative Robert B. Zoellick, Statement before the Subcommittee on Trade of the US House of Representatives, at 1 (May 8, 2001), *available at* http://www.ustr.gov/speech-test/zoellick/zoellick_3.pdf (quoting President Bush).

US Trade Representative Zoellick has also claimed that the FTAA negotiations foster democracy. In testimony to the US Congress and in a speech to the Council of the Americas, Ambassador Zoellick stated that the US focus and commitment to free trade in the context of the FTAA “was made in tandem with an unambiguous pledge to support democracy.” United States Trade Representative Robert B. Zoellick, Statement before the Subcommittee on Trade of the US House of Representatives, at 1 (May 8, 2001), *available at* http://www.ustr.gov/speech-test/zoellick/zoellick_3.pdf; United States Trade Representative Robert B. Zoellick, “Free Trade and the Hemispheric Hope,” Statement before Council of the Americas Conference, at 3 (May 7, 2001), *available at* http://www.ustr.gov/speech-test/zoellick/zoellick_2.pdf. He also has testified to Congress that the FTAA, “is part of [President Bush’s] larger vision of expanding freedom” and promoting “democratic values.” United States Trade Representative Robert B. Zoellick, statement before the House Committee on Ways and Means, at 1 (March 7, 2001), *available at* http://www.ustr.gov/speech-test/zoellick/rz_t2.pdf.

In light of the President’s and Ambassador Zoellick’s clear statements that one US objective for the FTAA negotiations is to promote democracy, there can be no reasonable expectation of damage to national security from a disclosure that might facilitate public participation in the democratic decision making of our negotiating partners.

II. USTR’s Affidavits, Including the Addition of the *Vargo Declaration*, Do Not Provide the Detail and Sufficient Specificity Concerning a Reasonably Expected Damage to US National Security to Satisfy Executive Order 12958 and the Decisions of the D.C. Circuit.

USTR does not dispute that the D.C. Circuit has repeatedly held that

a district court may award summary judgment to an agency invoking Exemption 1 only if (1) the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the

exemption claimed, and (2) the affidavits are neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency.

King v. U.S. Dept. of Justice, 830 F.2d 210, 217 (D.C. Cir. 1980). See also *Oglesby v. US Dept. of Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996) (agency affidavit must “contain[] sufficient detail to forge the logical connection between the information [withheld] and the claimed exemption” (quotation omitted)). USTR attempts to distinguish decisions applying this standard by noting that they concerned factual situations different from the present case. See *Defendants’ Reply to Plaintiffs’ Motion for Summary Judgment* (“*Defs. Response Brief*”) at 2-5. However, USTR fails to explain why these factual differences justify withholding Documents 1, 8, 38, and 43 on the basis of explanations that are less detailed and specific than explanations that courts in this circuit have repeatedly found insufficient. See *Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendants’ Motion for Summary Judgment, and in Support of Plaintiff’s Motion for Summary Judgment* (“*Plaintiff’s Brief*”) at 10-15.

USTR cites *Billington v Department of Justice*, 11 F. Supp. 2d 45, 57 (D.D.C. 1998), *aff’d in part, vacated in part* by 233 F.3d 581 (D.C. Cir. 2000), for the proposition that “‘affidavits regarding FOIA’s national security exemptions [can] be somewhat less than specific.’” See *Def. Response Brief* at 2. USTR misquotes the *Billington* decision, however. The Court did *not* hold that such affidavits could be “less than specific,” but rather that, in certain circumstances, such affidavits could be “somewhat less specific.” See *Billington*, 11 F. Supp. 2d at 57. Thus, the Court did not, as USTR suggests, deviate from the requirement that affidavits be specific. To the contrary, the Court required the affidavits supporting the Exemption 1 withholding to “fairly describe[] the content of the material withheld and adequately state[] the grounds for nondisclosure.” *Id.* (citing *Spannaus v. Dep’t of Justice*, 813 F.2d 1285, 1288 (4th Cir. 1987)). The Court further required that the grounds for nondisclosure

be “reasonable and consistent with the applicable law.” *Id.* In other words, USTR’s affidavits must still contain enough detail and sufficient specificity to demonstrate a logical connection between the harm to national security and the disclosure of the documents withheld. Section 1.1(l) of Executive Order 12958 defines that “damage to national security” as “harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information.” 60 Fed. Reg. 19,825 (April 17, 1995), *as amended by* Exec. Order No. 12,972, 60 Fed. Reg. 48, 863 (Sept. 18, 1995) (“Executive Order 12958”).

Despite USTR’s claim that the revised *Vaughn* index and the *Declaration of Peter Davidson* (“*Davidson Declaration*” or “*Davidson Decl.*”) together suffice to satisfy the D.C. Circuit’s specificity requirement, *see Defs. Response Brief* at 2, USTR nevertheless felt a need to supplement those submissions by attaching the *Vargo Declaration* to its reply brief. However, as discussed above and detailed further below, that declaration does not, either alone or in conjunction with USTR’s other submissions, provide the explanation required under FOIA.

Ms. Vargo’s declaration does not provide enough detail and sufficient specificity with regard to how either disclosure of Documents 1, 8, 38 or 43, or identification of the US proposals in the previously released draft FTAA investment section, could be reasonably expected to damage US national security. *First*, Ms. Vargo does not explain how it can be “reasonable” to expect that disclosure to Plaintiff, a citizen group in the United States, would cause the “possible deadlock or lengthy delay” in other countries that, in turn, purportedly harms the foreign relations of the United States. *Second*, Ms. Vargo does not provide sufficient explanation to permit the court to assess whether it is “reasonable” for USTR to expect that US proposals could

“become an immediate target for pressure on certain national governments from internal groups.” *Vargo Decl.* at ¶ 9.

CIEL is not asking USTR to “be so specific as to cause the very harm that the exemption was intended to avoid.” *Fitzgibbon v. U.S. Secret Service*, 747 F. Supp. 51, 55-56 (D.D.C. 1990), because the additional details that both FOIA and the case of law this court require USTR to provide do not pertain to the substance of the documents, which was the concern of the *Fitzgibbon* court. Instead, CIEL is asking USTR to explain with enough detail and sufficient specificity the likelihood that damage to national security can reasonably be expected to result from disclosure to a US citizen group. Absent that explanation, the declarations and *Vaughn* indices provided by USTR do not meet its burden of proving proper classification pursuant to Exemption 1 of FOIA.

III. USTR Has Not Refuted CIEL’s Evidence that There Can Be No Reasonable Expectation of Harm to National Security Because the United States Routinely Discloses US Negotiating Positions Previously Shared with Foreign Governments.

In its opening brief, CIEL contended that the United States routinely discloses its negotiating positions during other treaty negotiations so no harm can reasonably be expected to result from disclosure of US negotiation positions for the FTAA. *See Plaintiff’s Brief* at 18. In its opposition, USTR’s counsel completely sidesteps this issue by responding *without any support* that “[t]he United States decides on a case-by-case basis whether it is appropriate to share its negotiation positions with the American public.” *Def’s. Response Brief*, at 9.

Even if it had supported its “case-by-cases basis” contention, USTR has not explained what harm could be reasonably expected to occur from disclosure of FTAA documents that was not a concern in the case of other international negotiations. Members of the foreign public presumably would have had the same objections to accepting US proposals in those negotiations as in the FTAA negotiations. This is particularly true because most of the nations involved in the FTAA negotiations were involved in these other negotiations. *See* List of Signatories to the Stockholm Convention on Persistent Organic Pollutants *at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty34.asp>; List of Parties, Signatories, and Observers to the Kyoto Protocol *at* <http://unfccc.int/resource/kpstats.pdf> and <http://www.cop4.org/particip/dellist.pdf>.

Absent an explanation of why disclosure of these documents would cause harm that was not expected to occur during the negotiation of other agreements, USTR has not demonstrated that disclosure of Documents 1, 8, 38, and 43 can reasonably be expected to result in damage to national security as Executive Order 12958 requires. Therefore, USTR continues to withhold these documents unlawfully in violation of FOIA.

IV. The FTAA Operating Rules Cannot Be the Basis for a Reasonable Expectation of Harm and Do Not Bar this Court from Ordering USTR to Disclose the Documents in Compliance with FOIA

In its opening brief, CIEL demonstrated that allowing USTR to cite a non-disclosure operating rule as justification for withholding information would give USTR absolute discretion to withhold documents in violation of Congress’s intent to guarantee that there be judicial scrutiny over every agency decision to withhold information under FOIA. *Plaintiff’s Brief* at 19 and note 8. Failing completely to respond to CIEL’s argument, USTR simply states that “to breach this confidential process risks making the United States appear untrustworthy in the

negotiations [which] increases the probability of damage to U.S. foreign relations with respect to the creation of the FTAA.” *Def’s. Response Brief* at note 2. The operating rule cannot, however, support the application of Exemption 1 or prevent this Court from ordering the disclosure of the documents.

First, as CIEL argued previously, accepting USTR’s claim would allow USTR to avoid judicial scrutiny of document withholding decisions simply by agreeing to confidentiality rules before creating otherwise disclosable documents. In other words, USTR would be able avoid disclosing documents by manufacturing a harm to national security. *See Plaintiff’s Brief* at 18-21 and note 8.

Second, USTR has provided no evidence that the operating rules create any binding obligation on the United States that would be breached by disclosure of the document. According to the Davidson Declaration, the FTAA operating rules are simply an “expectation” of confidence that has arisen among the negotiating parties. *Davidson Decl.*, ¶ 2 (“Under the operating rules of the FTAA negotiations, Western Hemisphere countries participating in this broad negotiation submit their negotiating positions in confidence and *are expected* to maintain each other’s proposals in confidence.” (Emphasis added.)).

Third, even if the operating rules were binding on USTR in the context of the FTAA negotiations, such an obligation cannot negate contrary obligations arising out of federal law.² Only treaties, Congressional-executive agreements and, under circumstances not present here, sole Executive agreements formed subsequent to the enactment of a statute can prevail over that statute when there is an inconsistency between the two. *See* RESTATEMENT (THIRD) OF THE

² In the case of Exemption 1, FOIA requires USTR to disclose documents unless it can show that doing so could reasonably be expected to damage US national security; the operating rule

FOREIGN RELATIONS LAW OF THE UNITED STATES (“REST. 3RD”), § 115, cmt. c and reporter’s note 5. *See also* REST. 3RD, § 303 (explaining the distinctions among treaties, Congressional-executive agreements, and sole Executive agreements). The alleged FTAA operating rule is none of these, and, therefore, USTR’s commitment to the operating rule cannot prevail over USTR’s obligations under FOIA.

The operating rule is neither a treaty nor a Congressional-executive agreement because USTR committed to the rule in the absence of any Congressional approval or any prior Congressional grant of authority. *Id.* § 303(1)-(2), cmts. d and e. The rule is not a sole Executive agreement because it was not made pursuant to an independent Constitutional authority of the President. *Id.* § 303(4). Instead, the operating rule is part of the negotiation of a trade agreement, placing it within the constitutional authority of Congress to regulate commerce with foreign nations. US. Const., art. 1, sec. 8, cl. 3.

Even if USTR could demonstrate that the FTAA operating rule was a sole Executive agreement, FOIA would still obligate USTR to produce the documents. “[A] sole executive agreement made by the President on a matter expressly within the constitutional authority of Congress, such as the regulation of commerce with foreign nations, is subject to the controlling authority of Congress and will not be given effect in the face of an inconsistent Congressional act.” *Id.*, § 115 and reporter’s note 5. In *U.S. v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-660 (4th Cir. 1953), *aff’d on other grounds*, 348 U.S. 296 (1955), the Fourth Circuit held that

whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.

prohibits such disclosure regardless of any showing of harm. *See Davidson Decl.*, ¶ 2. There is therefore an inconsistency between the operating rules and FOIA.

Justice Jackson echoed this holding in his earlier concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952):

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

In the instant case, the operating rule is part of the negotiation of a trade agreement, placing it within the constitutional authority of Congress to regulate commerce with foreign nations, *see* U.S. Const., art. I, § 8, cl. 3, and is inconsistent with the terms of FOIA, a prior Congressional act. Therefore, the FTAA operating rule falls squarely within the context of the Fourth Circuit’s holding in *Guy W. Capps*. such that USTR may not avoid complying with FOIA.

The United States has had no difficulty complying with FOIA in other international contexts. For example, the United States explicitly recognized that FOIA requires it to release certain documents despite a confidentiality agreement in a dispute under an international trade agreement. In the arbitration of *Methanex v. United States*, an international dispute under NAFTA, the United States entered into an agreement to hold documents confidential. *Declaration of Scott Pasternack*, February 13, 2002, Exhibit 1 at preamble (“based on the Parties’ agreement”) and ¶ 1. The agreement specifies, however, that the Parties may nevertheless “make such disclosure of Documents or information as is required by law.” *Id.*, Exhibit 1 at ¶ 2. The agreement further expressly recognized that FOIA could require disclosure of documents. *Id.*, Exhibit 1 at ¶ 13. The United States’ agreement in the *Methanex* case demonstrates not only the United States’ understanding that a confidentiality rule or agreement

cannot preclude the application of FOIA but also that it is possible for the United States to craft such agreements so as to ensure that the application of FOIA does not automatically cause the United States to breach the agreement.

Consequently, this Court should not hesitate to rule that USTR has failed to meet its burden of proof under FOIA—as CIEL has demonstrated throughout this reply—and enjoin the unlawful withholding even if such a ruling will cause USTR to change its policy regarding the FTAA operating rule.

V. CONCLUSION

Plaintiff has shown that USTR has not adequately identified or described how the disclosure of Documents 1, 8, 38, and 43 could reasonably be expected to damage national security and, therefore, has not met its burden of proving the proper classification of these four documents. Consequently, USTR is unlawfully withholding this information. The Court should grant Plaintiff's motion for summary judgment, enjoin USTR's unlawful withholding, and order USTR to produce Documents 1, 8, 38, and 43 to Plaintiff immediately upon receipt of this Court's order.

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