

**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

**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**

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I. INTRODUCTION

The Center for International Environmental Law (“CIEL” or “Plaintiff”) opposes the motion filed by 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”) asking for summary judgment on its withholding of four documents under the Freedom of Information Act (“FOIA”) pursuant to 5 U.S.C. § 552(b)(1) (“Exemption 1”) and moves for summary judgment to enjoin the continued withholding of these four documents. The Court should deny USTR’s motion and grant Plaintiff’s motion because USTR has failed, on five separate occasions, to identify or describe damage to national security that can reasonably be expected to result from disclosure of these documents. Consequently, USTR has not met its burden of proving proper classification of each of the documents pursuant to Executive Order 12958, as required by Exemption 1 of FOIA. Because USTR is unlawfully withholding these documents in violation of FOIA, the Court must enjoin such withholding and order USTR to produce the four documents to CIEL.¹

On July 14, 2000, CIEL submitted a request to USTR under FOIA asking, *inter alia*, for US documents circulated or tabled during sessions of the FTAA Negotiating Group on Investment held in February and May 2000. USTR has notified CIEL of four

¹ USTR’s response to CIEL’s FOIA request identified a total of 46 responsive documents. *See* Exhibit 4 to the Supplemental Declaration of Stephen J. Porter. CIEL is not opposing USTR’s claim that it has met its burden of proof for withholding the other 41 responsive records pursuant to the deliberative process privilege (*i.e.*, Exemption 5 of FOIA). *See* 5 U.S.C. § 552(b)(5). In addition, CIEL withdraws its claim that USTR’s withholding of information violates FOIA and is unlawful only as that claim pertains to those 41 documents that USTR is withholding on the basis of the deliberative process privilege.

documents that respond to CIEL's request—indicated on its *Vaughn* indices as Documents 1, 8, 38, and 43—but is withholding them pursuant to Exemption 1 of FOIA. These documents relate to investment rules that will become binding on the United States upon adoption of the FTAA and that would affect the ability of the United States to protect human health and the environment.² Disclosure of all or part of the documents would permit Plaintiff and other members of the US public to provide useful and informed input to the US government concerning appropriate parameters of those rules. However, as negotiations move closer to completion, the ability of the US government to modify its position decreases, reducing the value of public input. If the public is not informed of the exact terms of the investment rules until the conclusion of the process, then any opportunity for meaningful input is lost.

To withhold information pursuant to Exemption 1 of FOIA, USTR is required to identify or describe how disclosure of the withheld information reasonably could result in damage to the national defense or foreign relations of the United States, as Executive Order 12958 requires. The explanations that USTR provides in the agency affidavits and the revised *Vaughn* index that pertain to the continued withholding of Documents 1, 8, 38, and 43 do not meet this requirement. *First*, they fail to identify or describe the

² Investment protection provisions in the NAFTA have been the basis for a \$1 billion challenge to a California plan to phase out the use of the harmful gasoline additive MTBE and a \$16 million award to the US-based Metalclad corporation after local Mexican government officials refused to authorize the company to build a hazardous waste facility that could have contaminated drinking water. *See Methanex Corporation v. The United States of America, Notice of Intent to Submit A Claim to Arbitration, as Amended*, at <http://www.methanex.com/investmentcentre/mtbe/noticeofintent.pdf>; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (2000), at <http://www.state.gov/documents/organization/3998.pdf>. Such challenges

damage to national security with sufficient detail to satisfy the legal requirements. *Second*, several of the harms are not logically connected to Exemption 1 because they do not pertain to the United States. *Third*, they do not explain how disclosure of these four documents is reasonably expected to result in damage to national security when the United States has already published information that likely appears in the withheld documents and when the United States routinely discloses documents such as these in connection with other treaty negotiations. *Finally*, the asserted operating rule of the FTAA negotiations on which USTR relies to allege harm to national security cannot justify the withholding of these four documents pursuant to Exemption 1.

III. STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

This case concerns USTR's refusal to disclose the Plaintiff four documents containing US proposed text and commentary on the investment portion of the Free Trade Agreement of the Americas. USTR has provided these documents to foreign government representatives during the February 2000 and May 2000 meetings of the Negotiating Group on Investment ("NGI") for the FTAA. *Vaughn Index (revised 1/11/02)*, Documents 1, 8, 38, and 43.

The United States routinely discloses its negotiating positions to members of the US public during the course of multilateral treaty negotiations. Such disclosure occurred during the negotiation of the Kyoto Protocol to the United Nations Framework Convention on Climate change at a time when the United States was tabling such negotiating positions. *Declaration of Donald M. Goldberg ("Goldberg Decl.")*, ¶¶ 3-5.

weaken the ability of the United States to protect the environment and human health. Extending these rules in an FTAA agreement could further weaken that ability.

Such disclosure also occurred during the negotiation of the Stockholm Convention on Persistent Organic Pollutants. *Declaration of Claudia Saladin* (“*Saladin Decl.*”), ¶ 3.

CIEL submitted a request under FOIA to USTR on July 14, 2000 (the “FOIA Request”) asking for these records and related items. Specifically, CIEL requested, *inter alia*,

US documents circulated or tabled during the fifth and sixth sessions of the FTAA Negotiating Group on Investment held in February and May 2000, respectively. This would include both proposed text and any commentary, including but not limited to a discussion of what is meant by the phrase ‘in like circumstances.’

Supplemental Declaration of Stephen J. Porter, at Exhibit 1 (“*Porter Supp. Decl.*”). In a letter dated July 21, 2000, USTR informed CIEL that it had received the FOIA Request on July 19, 2000, and had initiated the search process. *Porter Supp. Decl.*, Ex. 2.

After receiving nothing further from USTR for nearly three months, CIEL repeated its request in a letter to USTR, dated October 5, 2000. *Porter Supp. Decl.*, Ex. 3. USTR eventually responded on October 25, 2000, informing CIEL that it had “located a total of forty-six (46) documents that are responsive to [CIEL’s] request. Of those, [USTR was] withholding forty-six (46) documents in full based on 5 U.S.C. § 552(b)(5), which pertains to certain inter- and intra-agency communications protected by the deliberative process privilege.” *Porter Supp. Decl.*, Ex. 4. USTR did not provide any further details to explain the withholding.

On November 13, 2000, CIEL timely appealed USTR’s refusal to USTR’s Freedom of Information Appeals Committee. *Porter Supp. Decl.*, Ex. 5. In a letter dated December 20, 2000, the Chair of the USTR Freedom of Information Appeals Committee affirmed USTR’s refusal to disclose the requested documents. *Porter Supp. Decl.*, Ex. 6.

In addition, the Committee denied CIEL's request to identify the documents and provide a fuller explanation of the reasons for USTR's decision to withhold them. *Id.*

Because of the change in presidential administrations, CIEL notified USTR on January 25, 2001, that

[t]he previous administration denied [CIEL's FOIA Request], asserting the deliberative process exemption under 5 U.S.C. § 552(b)(5) Although this request is now ripe for action in federal district court and we are fully prepared and committed to pursuing such action, we want to offer you the opportunity to revisit this decision before filing suit.

Porter Supp. Decl., Ex. 7. On March 2, 2001, the Associate General Counsel for USTR responded, "We have reviewed both the substantive law and the administrative procedure that led to our decision to deny disclosure of these documents. Based on that review, we do not consider that there is a basis for changing our decision." *Porter Supp. Decl.*, Ex. 8.

Having exhausted its administrative remedies, CIEL filed this action against USTR on March 7, 2001. *Porter Supp. Decl.*, Ex. 9. CIEL agreed to USTR's request for an additional 30 days to respond in exchange for USTR's agreement to provide its *Vaughn* index when USTR filed its answer. *Porter Supp. Decl.*, ¶ 14.

On July 3, 2001, the United States and the 33 other nations negotiating the FTAA published on the Internet the draft text of the investment portion of the FTAA. *See FTAA—Free Trade Areas of the Americas, Draft Agreement, Chapter on Investment*, Doc. No. FTAA.TNC/w/133/Rev.1 (July 3, 2001), attached at *Porter Supp. Decl.*, Ex. 10. That draft contains multiple proposals for each provision of the proposed agreement without identifying the negotiating party that provided each proposal.

After USTR filed an Answer and a *Vaughn* index on May 14, 2001, CIEL moved on July 24, 2001, for additional *Vaughn* information because the initial *Vaughn* index lacked the specificity that FOIA requires. *Porter Supp. Decl.*, ¶ 16. On November 28, 2001, Judge John M. Facciola granted CIEL's motion and ordered USTR to provide by December 28, 2001, additional *Vaughn* information with greater specificity, including a showing of damage to national security to comply with Executive Order 12958. *Memorandum Opinion*, Civil Action No. 01-498 (RWR/JMF) (Nov. 28, 2001) at 5-6, attached at *Porter Supp. Decl.*, Ex. 11. USTR requested and received an extension until January 11, 2002, and then filed a revised *Vaughn* index and the declarations of Peter Davidson and Sybia Harrison together with its motion for summary judgment.

III. STANDARD OF REVIEW

When a government agency refuses to disclose records in response to a FOIA request on grounds of one or more FOIA exemptions, “the court shall determine the matter *de novo*,” 5 U.S.C. § 552(a)(4)(B), and “the burden is on the agency to sustain its action.” *Id.* See also *McGehee v. CIA*, 697 F.2d 1095, 1100 (D.C. Cir. 1983).

“It is well settled in Freedom of Information Act cases as in any others that summary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law.” *McGehee v. CIA* at 1101-02 (quotation omitted).” Most FOIA actions are resolved by summary judgment. *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998).

IV. ARGUMENT

THE COURT MUST DENY USTR’S MOTION AND GRANT PLAINTIFF’S MOTION BECAUSE USTR HAS NOT MET ITS BURDEN OF IDENTIFYING AND EXPLAINING A REASONABLE EXPECTATION THAT DISCLOSING DOCUMENTS 1, 8, 38, AND 43 WILL DAMAGE NATIONAL SECURITY

Exemption 1 allows USTR to withhold Documents 1, 8, 38, and 43 only if these documents are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact *properly classified* pursuant to such Executive order.” 5 U.S.C. § 552(b)(1) (emphasis added). Pursuant to Executive Order No. 12,958, an agency may classify materials not classified before the receipt of a FOIA request if “[1] the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and [2] the original classification authority is able to identify or describe the damage.” 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” or “Executive Order”), §§1.8, 1.2(a)(4).

After five separate opportunities,³ USTR still has not satisfied these requirements. Rather than identifying or describing the damage, USTR relies on three single-sentence conclusory statements that releasing the documents will damage national security:

³ USTR could have provided its explanation in:

1. USTR’s October 25, 2000 response to Plaintiff’s July 14, 2000 FOIA request, *Porter Supp. Decl.*, Ex. 4;
2. the decision of the FOIA Appeals Committee, *Porter Supp. Decl.*, Ex. 6;
3. the March 2, 2001 response from USTR’s Associate General Counsel to Plaintiff’s January 25, 2001 letter, *Porter Supp. Decl.*, Ex. 7;

1. “[R]elease of the information would also damage the United States or its trading partners’ ability to negotiate freely in the formulation of this treaty.” *Memorandum of Points and Authorities in Support of Defendants’ Motion for Summary Judgment* at 7 (“*Def. Brief*”) (citing *Declaration of Peter B. Davidson* (“*Davidson Decl.*”) at ¶ 4 (“disclosure of these documents would create policy obstacles for our hemispheric trading partners which would seriously affect their ability to conclude a free trade agreement”)).
2. “The release of these documents would harm the United States’s relations with the negotiating partners because the contents of the negotiations are expected to be maintained in confidence.” *Def. Brief* at 7 (citing *Davidson Decl.* at ¶ 2 (“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.”)).
3. “[R]elease of the information may hamper the ability of the United States to negotiate future investment agreements with foreign countries.” *Def. Brief* at 7 (citing *Declaration of Sybia Harrison* (“*Harrison Decl.*”) at ¶ 15).⁴

None of these purported explanations satisfies the legal requirements for classification or supports withholding the documents.

Although USTR is correct that courts frequently defer to agency affidavits, such deference is not appropriate where, as in this case, the information in the affidavits do not identify or describe damage to national security with sufficient specificity to satisfy the legal requirements of the Executive Order and, in turn, Exemption 1. *See Campbell v.*

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4. the initial *Vaughn* index filed with USTR’s Answer, *Porter Supp. Decl.*, ¶ 14; and
 5. the *Davidson Decl.* and the revised *Vaughn* index filed with its opening papers.

⁴ Although USTR’s brief cites this statement as a reason that release of Documents 1, 8, 38, and 43 could damage national security, the declarant who made the statement twice states that the reason relates only to the 41 other documents withheld pursuant to the deliberative process privilege exemption (*i.e.*, Exemption 5). *See Harrison Decl.* at ¶ 11 and ¶ 17.

Dept. of Justice, 164 F. 3d 20, 30 (D.C. Cir. 1998) (“[D]eference is not equivalent to acquiescence.... To justify summary judgment, a declaration must provide detailed and specific information demonstrating that material withheld is logically within the domain of the exemption claimed.”); *Ray v. Turner*, 587 F.2d 1187, 1190-95 (D.C. Cir. 1978) (Congress’ 1974 amendments to FOIA granted the judiciary authority to review an agency’s classification of records in accordance with the operative Executive Order for purposes of withholding such records pursuant to Exemption 1). *See generally* Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 89-93 (1992). “Reasonable specificity in affidavits connotes a quality of reliability,” *Ray v. Turner*, 587 F.2d at 1195.

A. USTR failed to adequately identify or describe how disclosure of Documents 1, 8, 38, and 43 could be reasonably expected to damage national security.

In a previous order in this case, Judge Facciola ordered USTR to explain “how disclosure [of the documents at issue] would harm national security” and demonstrate “how it has adhered” to Executive Order 12958. *Memorandum Opinion*, Civil Action No. 01-498 (RWR/JMF) (Nov. 28, 2001) at 6. Such explanations “must be detailed enough to permit ‘meaningful review’ by [the] court.” *Id.* at 5.

Judge Facciola’s order is consistent with numerous decisions of the D.C. Circuit, which 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)). “The affidavits will not suffice if the agency’s claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping.” *Campbell*, 164 F.3d at 30 (citations omitted). *See also Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1993). Justifications given in the affidavits must “explain how disclosure of the material in question would cause the requisite degree of harm to the national security,” *King*, 830 F.2d at 224. The agency’s explanation must be “full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.” *Id.* at 218. *See also Campbell*, 164 F. 3d at 30; *Ray v. Turner*, 587 F.2d at 1195.

For the above reasons, the D.C. Circuit and this Court routinely deny summary judgment when the withholding agencies do not clearly explain how disclosure is reasonably expected to damage national security. In *Campbell*, 164 F.3d at 26, the plaintiff requested information regarding the FBI file on the civil rights activities of James Baldwin during the 1960s. The FBI’s justification for withholding the information pursuant to Exemption 1 of FOIA was that “all of the intelligence activities or methods detailed in the withheld information are currently utilized by the FBI” and “that disclosure of intelligence methods is undesirable.” *Id.* at 31. The D.C. Circuit reversed the trial court’s grant of summary judgment because the FBI did not

draw any connection between the documents at issue and the general standards that govern the national security exemption[, made] no effort to assess how detailed a description of these Hoover-era methods the documents provide, and whether disclosure would be damaging in light of the degree of detail[,and failed] to connect general statements about the content of the withheld documents with general standards for classifying information appear elsewhere in the declaration.

Id.

In *King*, 830 F.2d at 212, plaintiff requested documents concerning the plaintiff's deceased mother-in-law, the prominent civil rights attorney Carol King. The Court held that the FBI was not entitled to summary judgment even though the FBI had provided a declaration that discussed in two lengthy paragraphs how disclosure of documents concerning Ms. King "could reveal or indicate the nature, objectives, requirements, priorities, scope or thrust of the intelligence or counterintelligence investigation" and could "also lead to the exposure of intelligence sources." *Id.*, at 223 n.94. The declarant further stated,

It is in my determination that disclosure of this information would enable a hostile analyst to unravel the cloak of secrecy that protects the intelligence source's identity. Thus exposed the source's effectiveness would be terminated and in my judgment such occurrence could reasonably be expected to cause at least identifiable damage to the national security.

Id. at 223 n.96. The Court remanded for further proceedings the trial court's grant of summary judgment for records withheld pursuant to Exemption 1, holding that such explanations were inadequate because they failed to satisfy the specificity requirement and did not logically connect the harm to national security. *Id.* at 223-24.

In *Ray v. Turner*, 587 F.2d at 1189, the plaintiff requested any information the CIA possessed showing any potential links between herself and the Black Panthers. The

CIA stated that disclosure of the information could reveal “the location of CIA overseas installations, cryptonyms, a pseudonym and CIA organizational data,” and therefore should be withheld pursuant to Exemption 1, among others. *Id.* at 1196. The D.C. Circuit remanded for further proceedings because the CIA’s declaration was an insufficient, “[g]eneral statement about the danger of disclosure at large.” *Id.* at 1195.

Finally, in *Greenberg v. U.S. Dep’t of Treas.*, 10 F. Supp. 2d 3, 10 (D.D.C. 1998), plaintiffs requested material regarding certain individual and corporate involvement in an alleged secret deal between future members of the Reagan Administration and Iranian officials during the US hostage crisis in October 1980. The agency declarant stated that

release of the information I determined to be source identifying could reasonably be expected to cause serious damage to the national security by causing current intelligence sources to cease providing information, and discourage potential intelligence sources from cooperating with the FBI for fear their identities will be publicly revealed at some point . . . Such a source reaction would eliminate one of the most crucial means of collecting intelligence information and, therefore, severely hamper the FBI’s law enforcement efforts to detect and apprehend individuals who seek to damage the national security through violation of United States criminal and national security laws.

Declaration of Sherry Davis, dated Dec. 13, 1994, at ¶ 10 attached hereto at Appendix 1, this Court denied defendant’s motion for summary judgment because it found that the declaration lacked sufficient detail “to allow the Court to engage in an evaluation of its Exemption 1 claims” and found that the “account of consequences likely to follow disclosure of the information in question is similarly deficient, presenting myriad damage possibilities for each category of classifiable information.” *Greenberg* at 26-27 (citation omitted). *See also Scott v. CIA*, 916 F. Supp. 42, 47-49 (D.D.C. 1996).

In each of the preceding cases, the courts refused to grant summary judgment despite agency explanations of harm that were far more detailed than those identified by

USTR in this case. USTR has provided only three single-sentence conclusions that harm will occur, with little or no explanation of what the harm is, or why it is reasonably likely to occur.

USTR's statement that "disclosure of these texts would harm foreign relations or activities of the United States because disclosure would create policy obstacles for our hemispheric trading partners which would seriously affect their ability to conclude a free trade agreement," *Def. Brief* at 6, does not specify how the disclosure of the information contained in the documents would create such policy obstacles, what those obstacles are, or how they would harm US national security.⁵

USTR's statement that "release of the information would also damage the United States or its trading partners' ability to negotiate freely in the formulation of this treaty," *Def. Brief* at 7, does specify a harm – damage to the ability to negotiate freely. The statement does not, however, specify how disclosure of the documents could reasonably be expected to damage the ability to negotiate freely.

Finally, USTR's statement that "release of the information may hamper the ability of the United States to negotiate future investment agreements with foreign countries," *Def. Brief* at 7, also identifies a harm, but does not specify how disclosure of the documents would result in such harm.⁶ Moreover, USTR's own characterization of the harm – that releasing the information "may hamper" the United States' ability – indicates that USTR cannot "reasonably . . . expect[]" disclosure to cause this harm. *See King*, 830

⁵ USTR asserts this alleged harm only with respect to Documents 1, 38, and 43, but not to Document 8. *See Vaughn Index (revised 1/11/02)* at 3-4.

F.2d at 224 (agency must “explain how disclosure of the material in question would cause the *requisite degree* of harm to the national security” (emphasis added)).

These statements do nothing more than present the conclusion that harm will occur. They do not provide “enough detail and ... sufficient specificity to demonstrate that the material is logically within the domain” of Exemption 1. *King*, 830 F.2d at 217.

B. Even if USTR had provided sufficient explanations of harm, several of the harms asserted are irrelevant to this holding because they do not pertain to the United States.

Documents may be classified, and thus withheld pursuant to Exemption 1 if their release could damage the national security *of the United States*. See Exec. Order 12958, § 1.2(a)(4). In USTR’s statement that “disclosure of these [four documents] would harm foreign relations or activities of the United States because disclosure would create policy obstacles for our hemispheric trading partners which would seriously affect their ability to conclude a free trade agreement,” *Def. Brief* at 5-6 (emphasis added), the only possibly identifiable harm is the creation of policy obstacles for “our hemispheric trading partners,” not the United States. Similarly, harm to the United States’ “trading partners’ ability to negotiate freely in the formulation of this treaty,” *Def. Brief* at 7, does not support a finding of harm to the national security *of the United States*.

C. Disclosing Documents 1, 8, 38, and 43, cannot reasonably be expected to result in damage to national security.

1. The United States already has placed in the public domain information virtually identical to at least some of the information that likely appears in Documents 1, 8, 38, and 43.

⁶ As explained in note 4 above the statement in the declaration cited to support this explanation was made in explicit reference to documents other than the Exemption 1 documents.

In *Washington Post v. US Dept of Defense*, 766 F. Supp. 1, 10 (D.D.C. 1991), this Court stated that

[o]ur Court of Appeals has never held that unofficial disclosures or official disclosures of similar yet not identical information may be ignored by an agency in making its classification decisions. To the contrary, although it has never explicitly required such an explanation, our Court of Appeals has only allowed the withholding of information already in the public domain based upon a specific explanation for continued withholding of that information, supported by appropriate agency declarations, of why formal release of information already in the public domain threatens the national security [citations omitted].

Therefore, if a plaintiff challenging the withholding of classified documents

provides evidence that the information being withheld is already within the public domain, [the plaintiff] brings into question the [agency's] determination that release of such information might reasonably be expected to damage the national security. Such contrary evidence, in turn, requires the Court to investigate the agency's declarations more closely and determine whether the agency has answered the questions raised by the plaintiff's evidence.

Id at 12. See also *Scott v. CIA*, 916 F.Supp. at 50.

Such additional scrutiny is required in the instant case. On July 3, 2001, the United States and the 33 other nations negotiating the FTAA published on the Internet the draft text of the investment portion of the FTAA. *Porter Supp. Decl.*, ¶ 15. That draft contains multiple proposals for each provision of the proposed agreement without identifying the negotiating party that provided each proposal. *Id.* The draft text likely contains language identical to language contained in the previously shared negotiating positions that USTR is now withholding under Exemption 1. Article 16 of the draft FTAA Investment Chapter sets forth several proposed definitions of investment, investor,

and other terms, *see Porter Supp. Decl.*, Ex. 10 at 3.35-3.44, that is exactly the substance of Document 8, which USTR describes as “Paper entitled ‘Proposed Definitions of Investment, Investor and Other Terms’ . . . [This document] sets forth the language for proposed definitions of certain words with reference in the FTAA negotiation on investment.” *Vaughn Index (revised 1/11/02)* at 3-4. Similarly, Article 17 sets forth several proposed options for the subject of transparency, *Porter Supp. Decl.*, Ex. 10 at 3.44, that is exactly the substance of Document 38, which USTR describes as “Paper entitled ‘FTAA Investment Negotiating Group New Topics: Transparency’ . . . [This document] proposes draft language for the U.S. position on transparency . . .” *Vaughn Index (revised 1/11/02)* at 17. Finally, Articles 2, 3, and 4 set forth several proposed options addressing National Treatment and Most Favored Nation Treatment, respectively, *Porter Supp. Decl.*, Ex. 10 at 3.4 – 3.5, that is exactly the substance of Document 43, which USTR describes as “Paper entitled ‘National Treatment and Most Favored Nation Treatment’ . . . [The document] sets forth language for the U.S. negotiation position on the terms ‘National Treatment and Most Favored Nation Treatment’ as related to the negotiations on FTAA investment provisions.” *Vaughn Index (revised 1/11/02)* at 19. Such release by the United States and the other governments into the public domain of information that USTR continues to withhold calls into question USTR’s determination that disclosure of any part of Documents 1, 8, 38, or 43 can reasonably be expected to result in damage to the foreign relations and foreign activities of the United States.⁷

⁷ This Court rejected a similar assertion in *Students Against Genocide (SAGE) v. Department of State*, 50 F.Supp. 2d 20 (D.D.C. 1999). In that case, plaintiff moved for summary judgment in response to a decision by the Defense Intelligence Agency of the Department of Defense to withhold the one document that the agency thought might be responsive to plaintiff’s FOIA request for information concerning “massive human rights

2. The United States routinely shares its negotiating positions with members of the US public during the course of multilateral treaty negotiations.

The United States routinely discloses to the US public negotiating positions that it has provided to its negotiating partners, including those from North, Central, and South America involved with the FTAA. For example, during the negotiation of the Kyoto Protocol to the United Nations Framework Convention on Climate Change at a time when the United States was tabling negotiation positions for that protocol, the United States disclosed those positions to the US public. *See Goldberg Decl.*, ¶¶ 3-5. The Bush Administration continued this practice during the negotiation of the Stockholm Convention on Persistent Organic Pollutants. *See Saladin Decl.*, ¶ 3. Given the lack of harm resulting from public disclosure in these other international treaty negotiations, USTR must explain how disclosure of negotiating positions for the FTAA before the negotiations end could reasonably be expected to result in damage to the national security of the United States when US practice with regard to other negotiations has been to disclose such information.

D. The asserted “operating rule” of the FTAA negotiations cannot justify this withholding.

USTR asserts that “[t]he release of these documents would harm the United States’ relations with the negotiating partners because the contents of the negotiations are

violations by Bosnian Serb forces in the Srebrenica area of Bosnia and other places.” *Id.* at 22. However, unlike the instant case, “plaintiff [did] not even attempt to show that the precise information sought is already in the public domain.” *Id.* at 25. For that reason, as well as the fact that the United States had never officially disclosed the information, the Court denied plaintiff’s motion. By contrast, CIEL has shown that the precise information being withheld has been officially published in the public domain by the United States and the 33 other nations negotiating the FTAA.

expected to be maintained in confidence.” *Def. Brief*, at 7. USTR’s General Counsel states that this expectation is part of the “operating rules of the FTAA negotiations, [pursuant to which] 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.” *Davidson Decl.*, at ¶ 2. These explanations do not satisfy the requirements for classification under FOIA and the Executive Order.

USTR’s explanation constitutes an assertion that USTR can withhold *any* document – even a document whose release would otherwise cause absolutely no harm – simply by entering into a confidentiality agreement. Accepting such reasoning would give USTR absolute discretion over classification, directly undermining Congress’s express intent that courts be able to review “the inherent justification for” the classification of documents. *See* Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 77 (1992). (citing Senate Committee Report on FOIA amendments, S. Rep. No. 854, 93d Cong., 2d Sess. (1974)). *See also* *Ray v. Turner*, 587 F.2d at 1190-95. Indeed, the present Exemption 1 standards are the direct result of Congress’s refusal to give agencies such unfettered discretion.⁸

⁸ Congress clearly intended the courts to scrutinize the substance of agency classification decisions. After the Supreme Court held that courts had no power to review agency decisions to classify documents, *see EPA v. Mink*, 410 U.S. 73, 84 (1973), Congress amended FOIA to clarify its intention that courts did have such power. In developing the amendments, Congress rejected a proposal that courts defer to agency classifications unless the withholding was “without a reasonable basis.” *See* Deyling at 77 (citing S. Rep. No. 854, 93d Cong., 2d Sess. (1974)). The deletion was intended to avoid establishing “a lenient standard that would render judicial review meaningless, as judges would apply a near-presumption that executive agency decisions were reasonable.” *Id.* (citing Subcomm. on Government Information and Individual Rights, House Comm. on Government Operations & Subcomm. on Administrative Practice and Procedure, Senate

Respecting Congress's intended judicial role in classification cases therefore requires this Court to reject USTR's withholding claim unless the agency can show (1) a reasonable expectation of harm from disclosure of the documents in the absence of any operating rules regarding confidentiality or (2) a reasonable expectation of harm from the agency's refusal to operate under such rules. However, if the government cannot

Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom Of Information Act and Amendments of 1974 (Pub. L. No. 93-502) Source Book: Legislative History, Texts, and other Documents 302-05 (Jt. Comm. Print 1975)). One of the main drafters of the FOIA amendment noted that the change would "authorize a court to look behind a security classification label to see if a record deserved classification under the 'criteria' of an Executive order." *Id.* (citing Source Book at 239).

The House and Senate Committee reports demonstrate further that Congress intended courts to scrutinize classification decisions:

The Senate Report explains that the courts should "inquire during de novo review not only into the superficial evidence—a 'Secret' stamp on a document or set of records— but also into the inherent justification for the use of such a stamp." As a result, "a government affidavit certifying the classification of material pursuant to executive order will no longer ring the curtain down on an applicant's effort to bring such material to public light."

The Senate Report recognized that de novo review "may impose an additional burden on judges," and suggested that courts give "appropriate consideration" to the results of any classification review already conducted within the executive branch. The Senate, however, strongly emphasized the importance of impartial review by the courts:

It is essential ... to the proper workings of the Freedom of Information Act that any executive branch review, itself, be reviewable outside the executive branch. And the courts—when necessary, using special masters or expert consultants of their own choosing to help in such sophisticated determinations—are the only forums now available in which such review can properly be conducted.

The House Report stated that the amendment "means that the court, if it chooses to undertake review of a classification determination, including examination of the records in camera, may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order."

Id. at 79-80 (citing and quoting Source Book at 127, 182-83). *See generally*, *Ray v. Turner*, 587 F.2d 1187, 1199-1220 (DC Cir. 1978) (Wright, C.J., concurring).

describe a harm reasonably expected to result in either situation, simply accepting such operating rules cannot negate the requirements of the Executive Order and FOIA.

As explained above, USTR has not described any harm that could reasonably be expected to result from disclosure of the documents in question in the absence of the operating rules. Nor has USTR made any attempt to explain the harm that would occur if it refused to operate under such rules. Indeed, it is difficult to imagine what harm could be reasonably expected from such refusal. As described previously, the United States frequently publishes its position in international negotiations without jeopardizing its ability to conclude significant agreements. In the context of the FTAA negotiations, it is not reasonable to suppose that US insistence on publishing its own negotiating positions, would dissuade the hemisphere's other governments from negotiating a trade agreement giving them increased access to the hemisphere's largest economy.

Because USTR has provided no explanation of harm that could be reasonably expected to result from disclosing the documents in question or from refusing to operate under rules prohibiting the release of US negotiating positions, this Court should not consider the existence of such rules sufficient justification for classifying the documents or withholding them from Plaintiff.

V. CONCLUSION

Plaintiff has shown that USTR has not identified or described how the disclosure of each of Documents 1, 8, 38, and 43 could be reasonably expected to damage national security. Therefore, USTR has not met its burden of proving the proper classification of those four documents. Consequently, USTR is unlawfully withholding Documents 1, 8, 38, and 43. For these reasons, the Court should deny USTR's motion for summary

judgment, grant Plaintiff's motion for summary judgment, enjoin USTR's unlawful withholding of the Exemption 1 documents, and order USTR to produce Documents 1, 8, 38, and 43 to Plaintiff immediately upon receipt of this Court's order.

Respectfully,

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