

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

CENTER FOR INTERNATIONAL)
ENVIRONMENTAL LAW, *et al.*,)

Plaintiffs,)

v.)

OFFICE OF THE UNITED STATES TRADE)
REPRESENTATIVE, and ROBERT B.)
ZOELLICK, in his official capacity as the)
United States Trade Representative,)

Defendants.)

Civil Action No. 1:01 CV 02350-PLF

**PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION.....1

ARGUMENT.....4

I. USTR HAS NOT SATISFIED ITS BURDEN OF PROVING THAT DOCUMENTS CONTAINING INFORMATION RECEIVED FROM OR PROVIDED TO THE GOVERNMENT OF CHILE ARE PROTECTED UNDER EXEMPTION 5.....4

A. USTR Has Not Satisfied Its Burden of Proving that Documents Produced by or Shared with the Government of Chile Are "Inter-Agency or Intra-Agency" Documents.....4

B. USTR Has Not Satisfied Its Burden of Proving that Documents Produced by or Shared with the Government of Chile Are Predecisional.....8

C. The "Understanding of Confidentiality" in the U.S.-Chile FTA Negotiations Does Not Bring Shared Documents within the Scope of Exemption 5.....11

II. USTR MUST RELEASE REASONABLY SEGREGABLE PORTIONS OF DOCUMENTS DESCRIBING COMMUNICATIONS WITH THE GOVERNMENT OF CHILE.....12

III. USTR HAS WAIVED ANY PROTECTION FOR CERTAIN DOCUMENTS, INCLUDING DOCUMENTS CONCERNING PROPOSED INVESTMENT PROVISIONS OF THE U.S.-CHILE FREE TRADE AGREEMENT AND DOCUMENTS CONTAINING INFORMATION SIMILAR TO INFORMATION DISCLOSED TO THE GOVERNMENT OF CHILE.....14

IV. USTR’S INDEX OF DOCUMENTS DOES NOT IDENTIFY INFORMATION DISCLOSED OUTSIDE THE GOVERNMENT, INFORMATION SIMILAR TO DISCLOSED INFORMATION, OR FACTUAL MATERIAL SUFFICIENTLY TO PERMIT THIS COURT TO REVIEW USTR’S COMPLIANCE WITH AN ORDER REQUIRING THE RELEASE OF SUCH INFORMATION.....16

V. USTR HAS NOT SATISFIED ITS BURDEN OF PROVING DAMAGE TO NATIONAL SECURITY FROM RELEASE OF DOCUMENTS 209 AND 211-214.....17

CONCLUSION19

TABLE OF AUTHORITIES

CASES

Afshar v. Dep't of State,
702 F.2d 1125 (D.C. Cir. 1983).....16

Center for Auto Safety v. EPA,
576 F. Supp. 739 (D.D.C. 1983).....9

Cuneo v. Schlesinger,
484 F.2d 1086 (D.D.C. 1973).....13

* *Dep't of Interior v. Klamath Water Users*,
532 U.S. 1 (2001).....4, 5, 6, 7, 8, 9, 11

Formaldehyde Institute,
889 F.2d 1118 (D.C. Cir. 1989).....6, 10

Klamath Water Users v. Dep't of Interior,
189 F.3d 1034 (1999), *aff'd*, 532 U.S. 1 (2001).....5

* *Mead Data Central, Inc. v. Dep't of the Air Force*,
566 F.2d 242 (D.C. Cir. 1977).....9, 12

Montrose Chemical Corp. v. Train,
491 F.2d 63 (D.C. Cir. 1974).....12

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975).....9

North Dakota ex rel. Olson v. Andrus,
581 F.2d 177 (8th Cir. 1978).....16

Petroleum Info Corp. v. U.S. Dept. of Interior,
976 F.2d 1429 (D.C. Cir. 1992).....13

Playboy Enterprises, Inc. v. Dept. of Justice,
677 F.2d 931 (D.C. Cir. 1987).....3, 13

Public Citizen v. Dep't of Justice,
111 F.3d 168 (D.C. Cir. 1997).....6, 7, 10

Renegotiation Board v. Grumman Aircraft Engineering Corp.,
421 U.S. 168 (1975).....9

<i>Ryan v. Dep't of Justice</i> , 617 F.2d 781 (D.C. Cir. 1980).....	10
<i>The Army Times Publishing Company v. Dep't of the Air Force</i> , 998 F.2d 1067 (D.C. Cir. 1993).....	2, 13
<i>Vaughn v. Rosen</i> , 484 F.2d 823 (D.C. Cir 1973).....	2, 13
* <i>Washington Post v. U.S. Dep't of Defense</i> , 766 F. Supp. 1 (D.D.C. 1991).....	3, 14, 16

STATUTES

5 U.S.C. § 552(b)(5)	1, 2, 9, 18
----------------------------	-------------

OTHER

Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (April 17, 1995), <i>as amended by</i> Exec. Order No. 12,972, 60 Fed. Reg. 48, 863 (Sept. 18, 1995).....	18
<i>Chile Says Many Issues Still Unsettled After Latest Round of FTA Talks With</i> <i>U.S.</i> , Daily Reporter for Executives (BNA), Jan. 31, 2002	8

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**PLAINTIFFS’ REPLY IN SUPPORT OF
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INTRODUCTION

With its Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment, USTR submitted a revised Index of Documents indicating that it has identified 280 documents responsive to the request by the Center for International Environmental Law, Friends of the Earth and Public Citizen (Plaintiffs) for records relating to the negotiation of the U.S.-Chile Free Trade Agreement (U.S.-Chile FTA). *See* Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment and Reply in Further Support of Defendants’ Motion for Summary Judgment (Def. Summ. J. Opp.) at 3 and Supplemental Declaration of Susan P. Cronin, para. 5. USTR released in full eight documents to Plaintiffs.

Of the 272 documents USTR has withheld in full or in part, USTR claims that all but six are exempt from disclosure under Exemption 5 of the Freedom of Information Act (FOIA), which permits the withholding of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5

U.S.C. § 552(b)(5). For the reasons described in Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, and in Support of Plaintiffs' Motion for Summary Judgment (Pl. Summ. J. Memo.) and further described below, USTR must release the following categories of documents.

Documents Containing Information Provided by or to the Government of Chile

USTR has admitted that at least 124 of the withheld documents contain information either provided to the United States by the Government of Chile, or provided by the Government of Chile to the United States. *See* attached Appendix 1, Documents Containing Information Provided by or to the Government of Chile. The descriptions for an additional four documents strongly suggest that they were similarly shared between the negotiating governments, either because they include Spanish translations (Documents 15, 19 and 57) or are identified as "agreed" minutes from particular meetings (Document 23).

As Plaintiffs explained in their summary judgment memorandum, and as further described below, Chile is not functioning in the FTA negotiations as a consultant to USTR or any other US government agency. For that reason, communications between the United States and Chile are not protected under Exemption 5, and USTR must release any documents containing information related to such communications.

Information Provided by or to the Government of Chile that Is Reasonably Segregable from Exempt Information

Under FOIA, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. §552(b). If the disclosure of non-exempt information would disclose protected agency decisionmaking processes, USTR must identify the information and explain in detail why its disclosure would have such an effect. *The Army Times Publishing Company v. Dep't of the Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993); *Vaughn v.*

Rosen, 484 F.2d 823 (D.C. Cir 1973). Moreover, the simple act of summarizing certain material or choosing which factual information to include in a document does not necessarily constitute a part of the deliberative process such that all documents containing such summaries or selected factual information are protected. *See Playboy Enterprises, Inc. v. Dept. of Justice*, 677 F.2d 931, 936 (D.C. Cir. 1987). Because information provided by or to Chile is not protected by Exemption 5 of FOIA, USTR must identify all such information contained in documents exempt on other grounds. USTR must disclose each factual section of a document with respect to which it fails to explain specifically why disclosure of the particular section would disclose agency decisionmaking processes.

Documents Containing Information Similar to Information that Has Been Disclosed Outside the US Government

Under FOIA, an agency may not withhold any information similar to information that has already been disclosed outside the U.S. government. *See Washington Post v. U.S. Dep't of Defense*, 766 F. Supp. 1, 10, 12 (D.D.C. 1991). Information communicated with the Government of Chile has been communicated outside the government. In addition, evidence indicates that detailed information about U.S. proposals concerning investment provisions were disclosed outside the government. USTR must therefore identify and release all information similar to information communicated to or from the Government of Chile, as well as information similar to the detailed information about U.S. proposals and discussions concerning investment provisions in free trade agreements. Although USTR's Revised Index of Documents does not provide sufficient detail to identify all such information, Documents 210-214 appear to contain information similar to the disclosed investment information.

Documents With Respect to Which USTR Claims Exemption 1 Protection

Exemption 1 does not apply to documents containing information identical to information disclosed outside the U.S. government. Information identical to information contained in Documents 211-213 has been disclosed outside the government and those documents must therefore be released.

Exemption 1 also requires a showing that disclosure of the documents is “reasonably expected to result in damage to the national security.” The harms USTR asserts regarding the release of Documents 209 and 214 are not reasonable. USTR must therefore release all documents with respect to which it has claimed Exemption 1 protection.

ARGUMENT

I. USTR HAS NOT SATISFIED ITS BURDEN OF PROVING THAT DOCUMENTS CONTAINING INFORMATION RECEIVED FROM OR PROVIDED TO THE GOVERNMENT OF CHILE ARE PROTECTED UNDER EXEMPTION 5

A. USTR Has Not Satisfied Its Burden of Proving that Documents Produced by or Shared with the Government of Chile Are “Inter-Agency or Intra-Agency” Documents

Plaintiffs have demonstrated that documents prepared by one government and shared with the other during the course of the US-Chile FTA negotiations do not fall within Exemption 5 because they are not “inter- or intra-agency documents.” *See* Pl. Summ. J. Memo. at 6-15. The Supreme Court has made clear that communications with outsiders do not constitute inter- or intra-agency documents if the outsider did not create or receive the documents while serving the function of a consultant acting on behalf of the agency. *See Dep’t of Interior v. Klamath Water Users*, 532 U.S. 1, 9-12 (2001). A consultant’s “only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.” *Id.* at 11. On the other hand, where the outsider has an interest in the

subject of the communications independent of the agency, communications with the outsider cannot be considered inter- or intra-agency, and are not protected from disclosure by Exemption 5. *Id.* at 12-14. Because of the Government of Chile's obvious independent obligations and interests in the outcome of the FTA negotiations, information communicated to or from Chile is not covered by Exemption 5. *See* Pl. Summ. J. Memo. at 8-10.

Despite the lack of ambiguity in the Supreme Court's treatment of the "consultant" exception, USTR persists in arguing that documents produced by or provided to the Government of Chile are exempt from disclosure. USTR argues that any document that "play[s] a role in the agency's decision-making process [is an] inter-agency memorand[um]." Def. Opp. 6. As Plaintiffs have demonstrated, this cannot be the rule because the Supreme Court in *Klamath Water Users* affirmed a decision that explicitly refused to adopt a "role of the document" rule. *See* 532 U.S. at 16. Moreover, the Supreme Court required the agency to disclose documents that played an important role in the agency's deliberations. *See Klamath Water Users v. Dep't of Interior*, 189 F.3d 1034, 1040-42 (1999) (Hawkins, J., dissenting), *aff'd*, 532 U.S. 1 (2001).

USTR argues that the *Klamath Water Users* decision simply "carves out a narrow exception to [the 'role of the document'] rule" when the communication "is of an adversarial nature." Def. Opp. at 6. According to USTR, the Supreme Court would not require the disclosure of a communication from an outside party with an independent interest unless that interest was adverse to the interests of others. Def. Opp. at 7. While the Supreme Court did note that such adversity strengthened the conclusion that the Klamath Tribe was unlike a consultant, the Court clearly indicated that the tribe's independent interest was *alone* enough to make it unlike a consultant and remove its communications from the protection of Exemption 5. *See* 532 U.S. at 12 ("While this fact [that the Tribes communicate with the Bureau with their own

interests in mind] *alone* distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals, the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone" (emphasis added).), 14 ("Even if there were no rival interests at stake in the Oregon litigation, the Klamath Tribe would be pressing its own view of its own interests in its communications with the Bureau" (emphasis added).). The Court thus made clear that the dispositive question in assessing an Exemption 5 claim regarding communications with an outside entity is whether that entity communicated in the manner of a consultant, and a "consultant does not represent an interest of its own, or the interests of any other client, when it advises the agency that hires it." *Id.* at 11.

Contrary to USTR's assertion, *Formaldehyde Institute*, 889 F.2d 1118 (D.C. Cir. 1989), does not change the fundamental inquiry whether the outside entity is acting in the manner of a consultant. In that case, the court affirmed the withholding of a letter describing a scientific journal's review of an article submitted to it by the defendant agency. 889 F.2d at 1120. Several factors made the review letter equivalent to the work of a consultant to the agency. First, the agency "expected" the submission to result in a review of the article. *Id.* at 1124. Second, outside reviewers of a scientific article perform a function identical to the paradigmatic consultant: they have no independent interest; their "only obligations are to truth." *See Klamath Water Users*, 532 U.S. at 11.

USTR argues that the Supreme Court's reference to *Public Citizen v. Dep't of Justice*, 111 F.3d 168 (D.C. Cir. 1997), in a footnote explicitly ratified a rule that an outside party's independent interest does not affect whether a document satisfies Exemption 5. Def. Opp. at 7. USTR misreads the Court's footnote. The Court did not "expressly refuse to upset *Public*

Citizen,” Def. Opp. at 7. Rather, the Court stated that it “need not decide whether [the communications in *Public Citizen*] should be recognized as intra-agency, even if communications with paid consultants are ultimately so treated.” 532 U.S. at 12 n.4. Far from ratifying *Public Citizen*, this statement suggests some doubt whether the Court agreed with the outcome of that case. Moreover, as recognized by the D.C. Circuit itself, the statutorily mandated consultative relationship in *Public Citizen*, see 111 F.3d at 170, provides a counterbalance to any self-interest of the outside consultants in that case and therefore makes *Public Citizen* unlike either the present case or *Klamath Water Users*.

Plaintiffs have demonstrated that Chile has none of the characteristics of a consultant to USTR in these negotiations but instead has independent obligations and interests.¹ See Pl. Summ. J. Memo. at 9-10, 10-11. Although USTR reiterates its argument that the FTA negotiations are intended to result in an agreement that is beneficial to both sides, Def. Summ. J. Opp. at 8, 9, that point is irrelevant to whether Chile is a disinterested consultant to the United States. The diversity of interests between the United States and Chile in the negotiations is demonstrated by the statements of an official in the Chilean Foreign Ministry:

The Chilean official told BNA that investment issues – including investor-state protections under Chapter 11 of the North American Free Trade Agreement – will likely be the most difficult task to solve in the time frame currently allotted for the [U.S.-Chile FTA negotiations]. . . .

“We actually don’t like the wording of Chapter 11 either,” said the Chilean official. “Chile is a country where probably there will be quite a lot more regulatory changes in the future. There is still a lot of work to be done in that area, and to expose ourselves to the kind of demands by U.S. investors like what has happened with NAFTA, where the investors say regulatory changes have been tantamount to indirect

¹ Plaintiffs have also shown that the Supreme Court, the D.C. Circuit and this Court have all ordered the disclosure of communications from outsiders whose interests were as (or more) aligned with those of the agency as USTR claims Chile’s to be. See Pl. Summ. J. Memo. at 9-11, 14-15. For example, in *Klamath Water Users*, the Court refused to apply Exemption 5 even though the agency had an obligation to protect the tribes’ interests. 532 U.S. at 5, 14.

expropriation and have demanded huge compensation involving many millions of dollars, well that would be very difficult for Chile.”

Chile also says they are resisting making the entire bilateral agreement a “model” for U.S. free trade expansion elsewhere in Latin America. Officials say they want the agreement to be more specific in dealing with the realities between Chile and the United States.

“To make such a model, the U.S. wants to include a lot of issues which are not relevant to us. For example, they want to include privatization of the telecommunication sector, in Chile all telecoms are private,” said the source.

“Also, at this point it does not look like we will be able to agree on what each side wants on antidumping and intellectual property. We both have ambitious proposals in these areas and thus each side will probably have to take their proposals to other forums like the [Free Trade Area of the Americas] and [World Trade Organization].”

“Chile Says Many Issues Still Unsettled After Latest Round of FTA Talks With U.S.,” Daily Reporter for Executives (BNA), Jan. 31, 2002 (attached as Appendix 2).

For these reasons and those described in Plaintiffs’ summary judgment memorandum, communications to or from Chile cannot constitute inter- or intra-agency communications.

B. USTR Has Not Satisfied Its Burden of Proving that Documents Produced by or Shared with the Government of Chile Are Predecisional

The fact that communications between Chile and the United States during the course of these negotiations cannot constitute inter- or intra-agency communications is itself sufficient to make Exemption 5 inapplicable to documents containing information about such communications. *See Klamath*, 532 U.S. at 9 (“[T]he first condition of Exemption 5 is no less important than the second [(that the document fall within a discovery privilege)]; the communication must be ‘inter-agency or intra-agency.’”) Nevertheless, Plaintiffs’ summary judgment memorandum demonstrated that documents produced by or shared with the Government of Chile also do not satisfy the Exemption 5 requirement that they be predecisional because those documents reflect final agency decisions concerning the position of each government in its negotiations with the other. *See Pl. Sum. J. Memo.* at 15-17. The Supreme Court, the D.C. Circuit and this Court have each explicitly decided that documents shared with

an outside party who is not a consultant to the agency are not “predecisional” simply because they predate the final agreement with the party with whom the agency is negotiating. *See id.* at 16-17 (citing *Klamath*, 532 U.S. at 6 (requiring the release of documents communicated to and from the agency before the agency reached a final decision); *Mead Data Central, Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977) (explicitly rejecting claim that information was exempt because it predated final agreement on contract terms); *Center for Auto Safety v. EPA*, 576 F. Supp. 739, 743 (D.D.C. 1983) (documents shared with defendants before final agreement on consent decree not predecisional)).

USTR’s only response to these points is to reiterate its reference to *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975). *See* Def. Opp. Mem. at 6. USTR makes no attempt, however, to address the fact that the documents at issue in that case, as well as the documents held exempt in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), were never adopted by the agency as a position to be shared with anyone outside the agency. Because the Government of Chile is not performing the function of a consultant to USTR, communications with Chile during the course of these negotiations cannot be considered predecisional.

USTR argues that “all documents leading to [the final text of the free trade agreement] are predecisional.” Def. Opp. Mem. at 6. Although it is true that the U.S.-Chile FTA will not be final until both governments agree on its terms, this point is irrelevant to the Exemption 5 analysis, where the relevant “decision” must be a decision of the *agency*. *See Sears, Roebuck*, 421 U.S. 132; *Grumman Aircraft*, 421 U.S. 168; 5 U.S.C. 552(a). Because the final approval of the FTA requires the agreement of the Government of Chile, *see* Def. Summ. J. Opp. at 8 (“both governments must agree” before the FTA is final), that final approval is not a decision of USTR and cannot be the date prior to which all documents are “predecisional.” The only decisions in

the U.S.-Chile negotiations that USTR has the authority to make concern what positions the United States takes during the course of negotiations and what information USTR conveys to the Government of Chile. *See* Def. Summ. J. Memo., Exhibit 3 (Declaration of Joseph Papovich), para. 11 (“The ultimate decision on what positions the U.S. government will take [in negotiations] is up to the Trade Representative.”). For this reason, documents conveying U.S. positions or other information to Chile are not predecisional, but instead reflect a final decision.

This point further highlights the difference between communications with Chile and communications with an entity functioning as a consultant to the agency: a consultant does not have any power over the agency’s final decision. Even in *Public Citizen*, where the former Presidents had an independent interest in the information they were statutorily required to provide to the agency, the agency had the authority to make a decision contrary to a President’s recommendation. *See* 111 F.3d at 170. Similarly, in *Formaldehyde Institute*, 889 F.2d at 1123, the authors of the review letter had no authority in making the final agency decisions concerning whether and to what extent to edit the article and whether or where to public it. The same is true in *Ryan v. Dep’t of Justice*, 617 F.2d 781 (D.C. Cir. 1980), where the Senators could not control the outcome of the study for which the agency requested them to provide information. In the present case, the only decisions that are decisions of USTR concern what proposals and other information to communicate to the Government of Chile.

USTR asserts that “Plaintiffs do not dispute that releasing these documents would reveal the USTR’s decisionmaking process.” Def. Summ. J. Memo. at 4. While information provided to the Government of Chile reveals USTR’s decisions concerning what information to provide, those communications are not protected because, as described above, they are themselves the final decisions of the agency. Because information provided to Chile is not exempt, information

originating with Chile that reflects Chile's reactions to US communications also does not reveal any protected decisionmaking processes. Moreover, even if communications between Chile and the United States did reveal otherwise protected decisionmaking processes, they would only be exempt if the communications qualified as inter- or intra-agency communications, which Plaintiffs have shown they do not. *See Klamath*, 532 U.S. at 11-12 (other considerations cannot override the Exemption 5 requirement "that the communication be 'intra-agency or inter-agency'").

C. The "Understanding of Confidentiality" in the U.S.-Chile FTA Negotiations Does Not Bring Shared Documents within the Scope of Exemption 5

In USTR's first summary judgment submission, USTR suggested that a confidentiality understanding with Chile should support applying Exemption 5 to communications with the Government of Chile concerning the FTA. *See* Def. Summ. J. Memo. at 22 n.6. Plaintiffs demonstrated that the Supreme Court, the D.C. Circuit and this Court have held that needs for or expectations of confidentiality cannot bring documents that do not otherwise satisfy Exemption 5 within the ambit of that provision. Pl. Summ. J. Memo. at 17-21. USTR appears not to renew its confidentiality argument with respect to Exemption 5 in its reply, limiting that argument instead to the documents with respect to which it claims Exemption 1 protection. *See* Def. Summ. J. Opp. at 14. It nevertheless remains true that "[t]here is simply no support for [a confidentiality exemption] in the statutory [Exemption 5] text, which we have elsewhere insisted be read strictly in order to serve FOIA's mandate of broad disclosure." *Klamath*, 532 U.S. at 16. *See also id.* at 15, n.5 ("[W]e think that even communications made in support of the trust relationship [which includes a "specific fiduciary obligation to protect the confidentiality of communications with tribes"] fail to fit comfortably within the statutory text.").

II. USTR MUST RELEASE REASONABLY SEGREGABLE PORTIONS OF DOCUMENTS DESCRIBING COMMUNICATIONS WITH THE GOVERNMENT OF CHILE

In light of the “rule in [the D.C.] Circuit that non-exempt portions of a documents must be disclosed unless they are inextricably intertwined with exempt portions,” *Mead Data*, 566 F.2d at 260, Plaintiffs have requested that USTR identify and release ““purely factual, non-exempt information”” contained in documents that may otherwise be exempt from disclosure. *See* Pl. Summ. J. Memo. at 25-26 (quoting *Army Times*, 998 F.2d at 1071 (citations omitted)).

Plaintiffs do not seek factual information that would reflect otherwise exempt agency decisionmaking processes. Simply because a document is internal and designated a “summary,” however, does not mean it discloses such processes. For example, a description of a Chilean proposal – such as the one contained in Document 6, which is described in USTR’s Index of Documents as “descri[bing] and comment[ing] on a Chilean proposal on trade remedies” – does not reflect agency decisionmaking processes simply because it describes less than the entire body of Chile’s proposals for the FTA.

Although the act of selecting specific facts out of a larger group of facts can sometimes be deliberative in nature, *see, e.g., Montrose Chemical Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974), that task is not always deliberative. In the present case, for example, USTR has “formed 18 interagency working groups (which correspond to the 18 chapters of the proposed [U.S.-Chile] agreement).” Declaration of Susan P. Cronin, para. 12. If a member of one of these working groups describes Chilean proposals having to do with her group’s area of the negotiations, the fact that she describes only some proposals, rather than all Chilean proposals for the FTA, does not make the information sufficiently deliberative so as to disclose any aspect

of USTR's decisionmaking process. The D.C. Circuit addressed precisely this situation in *Playboy Enterprises*, 677 F.2d at 935, when it stated:

Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.

Because the inclusion of portions of the Chilean proposals is not "intertwined with the policy-making process of the decision maker," *id.* at 935, and "the objective... is not so much to select and edit as to reorganize and repackage," these factual portions must be disclosed. *See Petroleum Info Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1438 (D.C. Cir. 1992).

Similarly, the fact that some Chilean proposals are attached to a document that contains exempt information does not make the attached proposals themselves exempt. This is the case with respect to Document 152, which contains "instructions for the US Delegation on Competition for the May 01 session" (which qualifies for Exemption 5 status) and "attached Chilean text proposals on general provisions, transparency, final provisions and exceptions" (which consist of non-exempt, segregable factual information).

These examples demonstrate that some of the responsive documents include factual information. USTR has not, however, identified factual information contained in the documents, or explained in each case why that information is nevertheless exempt from disclosure. USTR has the burden of "demonstrating that no reasonably segregable information exists within the documents withheld." *Army Times*, 998 F.2d at 1068. To satisfy its burden, USTR must provide "[a] relatively detailed analysis in manageable segments"; "conclusory and generalized allegations of exemptions" are not acceptable. *Vaughn*, 484 F.2d 823; *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.D.C. 1973). USTR must disclose each factual section of a document with respect

to which it fails to explain specifically why disclosure of the particular section would disclose agency decisionmaking processes.

III. USTR HAS WAIVED ANY PROTECTION FOR CERTAIN DOCUMENTS, INCLUDING DOCUMENTS CONCERNING PROPOSED INVESTMENT PROVISIONS OF THE U.S.-CHILE FREE TRADE AGREEMENT AND DOCUMENTS CONTAINING INFORMATION SIMILAR TO INFORMATION DISCLOSED TO THE GOVERNMENT OF CHILE

The disclosure of information outside the federal government constitutes a waiver of any Exemption 5 protection. *See Washington Post*, 766 F. Supp. at 10, 12, and numerous other cases cited in Plaintiffs' memorandum in support of summary judgment, pp. 27-29. In such a situation, documents containing information similar to the information that has been disclosed are not exempt from disclosure under FOIA. *See Washington Post*, 766 F. Supp. at 10. As noted above, information disclosed to the Government of Chile has been disclosed outside the federal government. As a result, USTR must release all information similar to information communicated to Chile.

Plaintiffs demonstrated that Tom Niles, the President of the U.S. Council for International Business, received information concerning U.S. government investment provisions and discussions that was the same as the information contained in Documents 211-214. *See Pl. Summ. J. Memo.* at 26-27. Although USTR provides no evidence that USTR's Trade and Environment Policy Advisory Committee (TEPAC) ever received the information to which Mr. Niles' letter referred, *see Def. Summ. J. Opp.* at 11-12, USTR suggests that such issues "may have been discussed." *Id.* at 11. Likewise, USTR suggests that "the Deputy USTR might solicit advice on a particular issue from an advisor," *id.*, but never even suggests that Mr. Niles received such a solicitation on any topic, much less on the topic of U.S. investment proposals for the U.S.-Chile FTA. *Id.* In fact, despite several requests for precisely this type of information, TEPAC

has never received information of the kind described in Mr. Niles' letter. *See* Declaration of Stephen J. Porter, April 11, 2002, para. 5. USTR also appears to suggest that Mr. Niles knows only that a particular issue was discussed. *Id.* at 12-13. This suggestion is belied, however, by the detail provided by Mr. Niles concerning the issue. *See* Pl. Summ. J. Memo. at 27.

Furthermore, it appears that Mr. Niles is not the only representative of private industry who received detailed information regarding U.S. proposals and agency discussions concerning the investment provisions in free trade agreements. On August 30, 2001, Mr. Niles, along with Calman Cohen, President of the Emergency Committee for American Trade; William Reinsch, President of the National Foreign Trade Council; Jerry Jasinowski, President of the National Association of Manufacturers, wrote to U.S. Trade Representative Robert Zoellick to "set forth with greater specificity the seriousness of [their] concerns on proposals being considered by an inter-agency group that would weaken the high standards of protection for foreign investment guaranteed in NAFTA Chapter 11 and in our bilateral investment treaties." *See* Porter Decl., Exhibit 1.

Although Mr. Niles is the only one of the four authors who is on the TEPAC, the letter describes in great detail proposals being considered for investment provisions in U.S. free trade agreements:

It is therefore extremely disturbing to learn that the United States is considering proposals that will severely undermine these protections at the expense of U.S. investors. As we understand them, the proposals would:

- Delete reference to or modify the current standards for "fair and equitable treatment" and "full protection and security" – protections long asserted by the United States to be part of customary international law and set forth as such in every investment agreement signed by the United States. . . .
- Narrow the constraints on compensation for expropriation, particularly by exempting "regulatory takings" from compensation. . . .

- Politicize the investor-to-state process, including the creation of mechanisms for governments to prevent cases from moving forward or for non-party governments to influence tribunals' decisions.
- Require exhaustion of local remedies. . . .
- Permit general exemptions to investment rules ostensibly to permit protection of health, safety, and environment for American citizens. . . .

See Porter Decl., Exhibit 1. The information contained in this letter and Mr. Niles' letter of November 19, 2001, is "specific information in the public domain" that contains the same information as the classified documents. See *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

When information has been officially or unofficially disclosed outside the agency, documents containing similar information are not exempt from disclosure under FOIA. See *Washington Post*, 766 F. Supp. at 10. This is particularly true when disclosure has been on a selective basis. See *North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978). USTR has not identified the information contained in the documents responsive to Plaintiffs' FOIA request with sufficient specificity to enable the Court or Plaintiffs to identify all the documents that contain the information that has been disclosed to Messrs. Niles, Cohen, Reinsch and Jasinowski. It must do so. See *Washington Post*, 766 F. Supp. at 10. It appears, however, that at the very least, the information contained in Documents 210-214 is similar to information that has already been disclosed and that USTR must therefore release those documents.

IV. USTR'S INDEX OF DOCUMENTS DOES NOT IDENTIFY INFORMATION DISCLOSED OUTSIDE THE GOVERNMENT, INFORMATION SIMILAR TO DISCLOSED INFORMATION, OR FACTUAL MATERIAL SUFFICIENTLY TO PERMIT THIS COURT TO REVIEW USTR'S COMPLIANCE WITH AN ORDER REQUIRING THE RELEASE OF SUCH INFORMATION

As noted above and in Plaintiffs' summary judgment memorandum (pp. 30-32), USTR does not describe the documents adequately to permit this Court or Plaintiffs to assess the accuracy of USTR's exemption claims. Plaintiffs appreciate that USTR's revised Index of

Documents adds information specifying a number of documents that were exchanged between the United States and Chile. However, USTR's Index does not explain which documents contain factual information or, for such documents, why the information should not be disclosed. Nor does the index identify documents that contain information similar to information that has been disclosed to the government of Chile or to other members of the public such as the authors of the letters described above.

V. USTR HAS NOT SATISFIED ITS BURDEN OF PROVING DAMAGE TO NATIONAL SECURITY FROM RELEASE OF DOCUMENTS 209 AND 211-214

Plaintiffs have demonstrated above and in their summary judgment memorandum (pp. 26-29) that USTR waived the application of any exemption to Documents 211-214 by disclosing identical information outside the government. In their summary judgment memorandum (pp. 32-36), Plaintiffs also demonstrated that USTR's assertion that Documents 209 and 214 were shared by the Government of Chile under an understanding of confidentiality cannot by itself support the application of Exemption 1. *See* Pl. Summ. J. Memo. at 33-36. USTR has made no attempt to counter Plaintiffs' argument on this point.

USTR argues that releasing Documents 209 and 214 could harm U.S. interests by disclosing that the Trade Policy Review Group (TPRG) is discussing issues related to trade agreement provisions on exceptions and competition. *See* Def. Summ. J. Opp. at 14; Papovich Declaration, para. 10. According to USTR, "If high-level internal discussions on these topics were made public, it might be understood to signal a change in U.S. policy in these areas and raise questions about the U.S. government's willingness to apply current standards." Papovich

Declaration, para. 10. USTR's description of harm does not satisfy FOIA's requirement that releasing the documents be "reasonably expected to result in damage to the national security."²

That the documents "might" reveal the fact of U.S. deliberations concerning particular trade provisions cannot justify withholding them. Such a speculative concern cannot satisfy the requirement that harm be "reasonably expected" to occur. In fact, it would come as no surprise to anyone, including U.S. trading partners, that the United States regularly reviews and reassesses its position on trade provisions. Nor is it reasonable to believe that releasing such documents would cause harm because they "might signal a change in U.S. policy in these areas." Given that Mr. Papovich's declaration has already made public that the TPRG discussions contain information suggesting such a change, releasing the documents can cause no further harm. Moreover, even if releasing these documents did signal a change in U.S. policy, it is not reasonable to think that such a signal would "raise questions about the U.S. government's willingness to apply current standards." The United States remains obligated to comply with standards imposed by existing trade agreements whether or not it changes its policy, so the release of these documents could not reasonably raise questions about the U.S. government's willingness to apply current standards. For these reasons, USTR has not satisfied its burden of proving that releasing these documents could be "reasonably expected to" harm U.S. national security and USTR must disclose the documents.

² Exemption 1 allows USTR to withhold documents only if they 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." Exec. Order No. 12,958, 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).

CONCLUSION

For the forgoing reasons and those included in Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, and in Support of Plaintiffs' Motion for Summary Judgment, this Court should immediately

- 1) enjoin USTR from withholding, and order USTR to release:
 - a) all documents containing information produced by or shared with the Government of Chile, including the Documents listed in Appendix 1 to this memorandum; and
 - b) all reasonably segregable portions of documents containing information provided by or shared with the Government of Chile, including reasonably segregable portions of Documents 6, 16, 22, 36 and 152; and
 - c) all documents containing information similar to information disclosed to the public, including Documents 209, 210, 211, 212, 213, and 214; and

- 2) order USTR to identify and release:
 - a) all documents containing information prepared by the United States and communicated to or otherwise shared with the Government of Chile, including draft text for provisions of the U.S.-Chile Free Trade Agreement; and
 - b) all documents containing factual information concerning communications to or from the Government of Chile; and
 - c) all documents with respect to which information similar to that contained in the document has been released outside the government.

A Revised Proposed Order is attached.

Respectfully,

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