

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' 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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INTRODUCTION

The Center for International Environmental Law, Friends of the Earth and Public Citizen (Plaintiffs) oppose the motion filed by the Office of the United States Trade Representative and Robert B. Zoellick (USTR) seeking summary judgment on USTR's withholding of documents under the Freedom of Information Act (FOIA) pursuant to 5 U.S.C. § 552(b)(1), (5) (Exemptions 1 and 5) and moves for summary judgment to enjoin the continued withholding of these documents. The Court should deny USTR's motion and grant summary judgment for Plaintiffs because USTR has failed to carry its burden of proving that documents containing information provided by or disclosed to the Government of Chile, or disclosed to others outside the U.S. government, are exempted from FOIA's presumption of disclosure. Because USTR is unlawfully withholding these documents in violation of FOIA, the Court must enjoin such withholding and order USTR to produce the documents to Plaintiffs.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

This case concerns USTR's refusal to release to Plaintiff documents reflecting communications between the United States and Chile during the course of negotiations between the two countries to enter into a U.S.-Chile Free Trade Agreement (FTA). On June 29, 2001, Plaintiffs filed a Freedom of Information Act (FOIA) request with the USTR, seeking

copies of the following information relating to the negotiation of the US-Chile Free Trade Agreement:

- All records containing either US positions shared with Chile, or Chilean positions shared with the United States, at any in-person meeting or in any other manner, including both proposed text and any commentary, since January 1, 2000; and,
- All records prepared since January 1, 2000, during the inter-agency and/or intra-agency processes of the US government coming to positions reflected in the records referred to above.

Declaration of J. Martin Wagner, March 4, 2002 (Wagner Decl.), Exhibit 1. In a letter dated July 11, 2001, USTR informed Plaintiffs that it had received the FOIA Request on July 5, 2001, and had initiated the search process. Wagner Decl., Ex. 2. The letter stated that USTR would inform Plaintiffs “should it appear that we are unable to fully process your request within the initial [20 day] time frames contemplated by FOIA.”¹ *Id.*

By November 9, 2001, nearly four months after their initial request, Plaintiffs had still received no written determination from USTR concerning their request. Wagner Decl., ¶ 5. Plaintiffs had also received no indication that USTR would not be able to comply with the request by August 2, 2001, the statutorily mandated deadline, *see* 5 U.S.C. §552(a)(6)(A)(i), or any indication of an alternative date by which they could expect a determination. *See id.* §552(a)(6)(B)(i). Having thus exhausted their administrative remedies, *see id.* §552(a)(6)(C)(i), Plaintiffs filed this suit on November 9, 2001. *See* Wagner Decl., Ex. 3.

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.” *Id.* at 1101-02 (quotation

¹ Contrary to USTR’s assertion, *Defendant’s Statement of Undisputed Material Facts* ¶ 2, USTR’s letter in no way indicated “that the magnitude of the search would prevent USTR from responding within 20 days.” *See* Wagner Decl., Ex. 2.

omitted). Most FOIA actions are resolved by summary judgment. *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998).

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

The basic purpose of the Freedom of Information Act, 5 U.S.C. §552, is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire Co.*, 437 U.S. 214, 242 (1978). FOIA thus mandates disclosure of government documents “unless the documents fall within enumerated exemptions.” *Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7 (2001).

These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act; [c]onsistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a narrow compass.

Id. at 7-8 (quotations and citations omitted). “This [D.C.] Circuit and the Supreme Court require strict construction of the FOIA exemptions.” *Center for Auto Safety v. Dep’t of Justice*, 576 F. Supp. 739, 748 (D.D.C. 1983), vacated in part on other grounds, 1983 US Dist. LEXIS 15611, 1984-1 Trade Cas. (CCH) p. 65,862 (July 7, 1983).

In its Index of Documents, USTR identifies 14 documents that appear to have been prepared by the Government of Chile and produced to USTR during the course of negotiations of the US-Chile FTA.² *See* Declaration of Sybia Harrison, Attachment A, Index of Documents.

² These include documents 9, 27, 52, 89, 90, 91, 92, 93, 94, 97, 99 and 124. In addition, materials provided by Chile are included in apparently segregable portions of documents 6 (“describes . . . a Chilean proposal on trade remedies”) and 152 (“with attached Chilean text proposals on general provisions, transparency, final provisions, and exceptions”). As described

Thirteen documents are consolidations of text proposed by either country and shared with the other.³ *Id.* Ten documents are meeting minutes described as “agreed” or otherwise indicating that they were either prepared by or shared with the Government of Chile.⁴ *Id.*

There are thus 37 (and likely more⁵) documents responsive to Plaintiffs’ FOIA request that contain information, or factual descriptions of information or communications, received from or shared with the Government of Chile. USTR argues that these documents are exempted from disclosure under FOIA’s Exemption 5, 5 U.S.C. §552(b)(5), which protects “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.” *See* Memorandum in Support of Defendants’ Motion for Summary Judgment (Defendants’ Memo.) at 19. To qualify for the exemption, “the government must demonstrate that the document is either inter-agency or intra-agency in nature, and also that it is both predecisional and part of the agency’s deliberative process.” *Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 574 (D.C. Cir. 1990) (citations omitted).

Because the Government of Chile is not an agency of the United States and is not formally or informally serving as a consultant to the United States in the FTA negotiations, those 37 documents – as well as any others containing or describing information or communications between the United States and Chile – cannot be exempt as “inter-agency or intra-agency” communications.

below in Section II, USTR has an obligation to release any reasonably segregable portions of documents otherwise withheld.

³ These include documents 27, 28, 29, 111, 130, 134, 141, 142, 145, 146, 147, 148 and 149.

⁴ These include documents 23, 186, 187, 188, 189, 190 and 191. In addition, documents 15, 19 and 57 are in both English and Spanish, suggesting they were prepared by or provided to the Government of Chile.

⁵ As described in Section IV below, a number of other documents appear to contain information that is not exempt from disclosure, but USTR’s descriptions of the documents are inadequate to permit an accurate assessment of their contents.

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

The requirement that a document be produced by an agency of the United States to be protected under Exemption 5 is unambiguous:

[T]he communication must be “inter-agency or intra-agency.” 5 U.S.C. §552(b)(5). Statutory definitions underscore the apparent plainness of this text. With exceptions not relevant here, “agency” means “each authority of the Government of the United States,” §551(1), and “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency.” §552(f).

Klamath Water Users, 532 U.S. at 9. A foreign government does not satisfy this definition. *Cf. General Electric Co. v. EPA*, 18 F. Supp. 2d 138, 141 (D. Mass. 1998) (the agency of a state does not satisfy FOIA’s definition and communications with such an agency “may not be characterized as ‘inter-agency’ in nature.”); *Dow Jones*, 917 F.2d at 574 (“ . . . Congress is simply not an agency.”).

USTR argues that documents produced by Chile can be treated as inter- or intra-agency documents because, under certain circumstances, documents produced by outside advisors may fall within exemption 5. *See* Defendants’ Memo. at 19-25. The Supreme Court has recognized that some courts have read the intra-agency requirement “expansively,”

“regard[ing] as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency – *e.g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.”

* * *

[T]he fact about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its 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.

Klamath Water Users, 532 U.S. at 9-10, 10-11 (quoting *Department of Justice v. Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)). However, the Court’s decision in *Klamath Water Users* makes clear that communications to or from the Government of Chile during the course of FTA negotiations do not fall under this expansive definition.⁶

The plaintiffs in *Klamath Water Users* sought documents created by several Indian tribes and provided to the Department of Interior. *Id.* at 6. Some of the documents were produced as the result of an agreement that the tribes consult with the Department on an irrigation project. *Id.* at 5. Others were produced as part of claims filed by the Department on behalf of one of the tribes in a state water rights adjudication. *Id.* Some of the documents were prepared by the tribes and submitted to the Department at the request of the government; one was produced by Department officials and provided to lawyers for the tribes. *Id.* at 6. The Court of Appeals held that the documents were not covered by FOIA’s Exemption 5 because the tribes’ interest in the outcome of the proceedings meant they could not be considered “consultants” to the Department. *Id.* at 7. One judge dissented, arguing that “the proper enquiry [went] not to a document’s

⁶ USTR does not clearly address whether documents containing U.S. information that has been shared with Chile must be disclosed, presumably because it does not identify which U.S. information has been shared. Nevertheless, the documents surely contain such information, as described below in Section IV. Courts, including the Supreme Court, have applied the same “consultant” test to agency documents shared outside the agency as to outside documents provided to the agency. Thus, in *Klamath Water Users*, the Supreme Court did not distinguish between documents prepared by the Indian tribes and those prepared by the agency and provided to the tribe’s lawyers, but instead held none of them protected under Exemption 5 because the tribe’s interests were independent from the government’s. *See id.* at 5-6, 12. Likewise, in *Center for Auto Safety*, this Court concluded that documents disclosed outside the government during the course of negotiations “lost their internal status, and their qualification for Exemption 5.” 576 F. Supp. at 747. The Court noted two additional factors that supported this conclusion: First, the legislative history of FOIA suggest that Congress intended [that] internal memoranda, disclosed to outsiders, fall outside the scope of Exemption 5. Second, this Circuit and the Supreme Court require strict construction of the FOIA exemptions. *Id.* at 747-48. The conclusions of this section therefore apply to any shared documents, whether they were prepared by the United States or Chile.

source, but to the role it plays in the agency decisionmaking.” *Id.* (quoting 189 F.3d 1034 (9th Cir. 1999) (Hawkins, J., dissenting)). A unanimous Supreme Court rejected the analysis based on the document’s role and affirmed the order requiring release of the documents.

In seeking to bring its documents within the scope of Exemption 5, the agency argued that releasing the documents would erode “the candor of tribal communications,” which was necessary to the discharge of its trust obligation to the tribe, and that this interest in frank communications was sufficient justification for applying Exemption 5 to the documents, “in the same fashion that Courts of Appeals have found sufficient reason to favor a consultant’s advice that way.” *See id.* at 11-12. Although the Court recognized that disclosure would likely interfere with the frank communication necessary to the agency’s mission, *id.* at 11, it noted that

the Department’s argument skips a necessary step, for it ignores the first condition of Exemption 5, that the communication be “intra-agency or inter-agency.” The Department seems to be saying that “intra-agency” is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential.

There is, however, no textual justification for draining the first condition of independent vitality, and once the intra-agency condition is applied, it rules out any application of Exemption 5 to tribal communications on analogy to consultants’ reports (assuming, which we do not decide, that these reports may qualify as intra-agency under Exemption 5). As mentioned already, consultants whose communications have typically been held exempt have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant. In that regard, consultants may be enough like the agency’s own personnel to justify calling their communications “intra-agency.” The Tribes, on the contrary, necessarily communicate with the [agency] with their own, albeit entirely legitimate, interests in mind.

Id. at 12.

The Supreme Court’s reasoning makes clear that documents produced by or shared with the Government of Chile are not protected under Exemption 5. Like the tribes in *Klamath Water Users*, the Government of Chile is clearly representing its own interests in the negotiations. *See*

Defendants' Memo. at 22 ("Chile seeks to achieve its own objectives through the negotiations. . . ."). USTR's argument that the information provided by Chile may also be "essential to the development of the USTR's position on the free trade agreement" and is therefore "inter-agency" because it is part of the agency's deliberative process, *id.*, fails for the same reason the agency's argument failed in *Klamath Water Users*: it makes "inter-agency" "a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." *See* 532 U.S. at 12.

USTR argues that *Klamath Water Users* precludes the application of Exemption 5 only when "the positions expressed by the outside party are of an adversarial nature." *See* Defendants' Memo. at 23. This misinterpretation ignores the Court's statement that the fact that the tribes "communicate with the [agency] with their own . . . interests in mind . . . *alone* distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals." *Id.* at 12 (emphasis added). Moreover, the Court affirmed the disclosure of the documents prepared in the water rights adjudication, in which the agency argued that it "merely represent[ed] the interests of the Tribe." *Id.* at 13. Despite this lack of adversity, and "even if there were no rival interests at stake," the Court noted that the independent interest of the Tribe was sufficient to preclude the application of Exemption 5. *Id.* at 14.

No matter what shared interests Chile and the United States may have with respect to the free trade agreement, the interests of the Government of Chile are independent of those of the United States. In fact, the countries' interests are much more independent than the interests of the agency and the tribes in *Klamath Water Users*. In that case, the agency had an obligation to protect the tribes' interests. *Id.* at 5, 14. The Court nevertheless recognized that such an obligation must be assessed in light of the coexistent "duty to protect other federal interests." *Id.*

at 14 (quotation and citation omitted). Here, the United States has no obligation to Chile, or vice-versa. To the contrary, should the interests of either nation diverge, each would have an obligation to pursue its interests to the exclusion of the interests of the other. Given the independent interests of each nation, Chile cannot reasonably be considered “enough like [USTR’s] own personnel to justify calling their communications ‘intra-agency.’” *Id.* at 12.

USTR’s dependence on the idea of adversity undermines its use of other cases to support its withholding of documents produced by or shared with Chile. For example, USTR attempts to distinguish *Mead Data Central, Inc. v. Dep’t of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977), on the basis of the adversity of negotiations in that case. *See* Defendants’ Memo. at 23. In that case, the Air Force had negotiated with West Publishing Company for a licensing agreement to use the West key number system. 566 F.2d at 248. The plaintiffs sought disclosure of a document detailing offers and counter-offers made during the course of the negotiations. *Id.* at 257. The Court of Appeals for the D.C. Circuit held that the document was not protected by Exemption 5:

The documents in this case which would reveal the Air Force’s internal self-evaluation of its contract negotiations, including discussion of the merits of past efforts, alternatives currently available, and recommendations as to future strategy, fall clearly within [Exemption 5]. Information about the “deliberative” or negotiating process outside an agency, between itself and an outside party, does not. Moreover, neither of the policy objectives which exemption five is designed – to serve avoiding premature disclosure of agency decisions and encouraging the free exchange of ideas among administrative personnel – is relevant to a claim of secrecy for a proceeding between an agency and an outside party. All of the information as to what the Air Force offered West Publishing, initially and in response to West’s counter-offers, has already been fully disclosed to at least one party outside the Department – West itself and the Department has no control over further disclosure.

Id. at 257-58.

USTR attempts to distinguish *Mead Data* by asserting that the negotiations in that case were somehow more adversarial than the free trade negotiations in this case, but its analysis

ignores the reality of the negotiations in this case or in *Mead Data*. USTR states that the United States and Chile are negotiating in “a collaborative effort to reach a common objective – producing a set of regulations together.” Defendants’ Memo. at 24. The negotiations in *Mead Data* were a similarly collaborative effort to reach a common objective – producing a licensing agreement that would benefit both parties. Likewise, just as each side in *Mead Data* was undertaking that collaborative effort as part of an attempt to “maximize its own advantage,” *id.* at 23, the United States and Chile is each obviously seeking to maximize its advantage in the free trade agreement.

Other cases cited by USTR also support disclosure of the documents at issue here.

In *Dow Jones*, the Court of Appeals for the D.C. Circuit refused to apply Exemption 5 to agency communications with Congress because the communications were made for the benefit of Congress, not the agency, and therefore did not give Congress any attributes of a consultant to the agency. 917 F.2d at 575. Communications between the United States and Chile are clearly intended for the benefit of the nation making the communication, not to permit Chile to play the role of a consultant to USTR.

The three cases cited by USTR in which the courts held documents exempt under the consultant analogy are readily distinguishable because in each case, the documents were created at the request of the agency for the purpose of providing assistance to the agency. As the Supreme Court has explained, in these cases and others like them, communications are protected only when they are between the agency and “a person acting in a governmentally conferred capacity other than on behalf of another agency – *e.g.*, in a capacity as employee or consultant to the agency.” *Klamath Water Users*, 532 U.S. at 10 (quotation omitted). Chile is not such an entity.

In *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the documents at issue were generated by US Senators “by an initiative from the Department of Justice,” which had sent the Senators questionnaires seeking information necessary to carry out an agency study. *Id.* at 790. The specific request for assistance with an agency task made the Senators sufficiently similar to agency personnel to justify invoking the exemption. *See id.* As this Court has noted, “[c]entral” to the decision in *Ryan* “was the fact that the advice was obtained on the Department’s initiative.” *Center for Auto Safety*, 576 F. Supp. at 745. It was also relevant that the Senators are part of the federal government. *Id.*

The court in *Public Citizen v. Dep't of Justice*, 111 F.3d 168 (D.C. Cir. 1997), protected communications from a former President to the agency because the communications were made pursuant to an “explicit” consultative relationship between the President and the agency. *Id.* at 170 (before making the decision at issue, the law required the agency to “consult the former President.”). The court noted that the documents qualified as “intra-agency” because they were “‘created for the purpose of aiding the *agency’s* deliberative process.’” *Public Citizen*, 111 F.3d at 170 (underscoring added) (quoting *Dow Jones*, 917 F.2d at 575).

In *Formaldehyde Institute v. Dep't of Health & Hum. Servs.*, 889 F.2d 1118 (D.C. Cir. 1989), the agency submitted an article to a scientific journal for publication. 889 F.2d at 1120. As part of the journal’s normal publishing process, it sent the article to outside referees for review. *Id.* The journal sent the agency a letter detailing the reviews, which was subsequently requested under FOIA. *Id.* The agency refused on the ground that the letter fell under Exemption 5. The Court held the letter exempt under the consultant analogy, noting that “receipt of comments [from outside reviewers] is an expected result in the submission of an article for publication.” *Id.* at 1124 (quotation omitted). In other words, by submitting the article, the

agency implicitly solicited the assistance of independent outside reviewers to perform a task whose service to the agency was very like that of an agency employee.

USTR attempts to bring its communications with Chile within the scope of these cases' Exemption 5 analysis by asserting that those communications are "an important determinant in USTR's development of its own position." Defendants' Memo. at 21. USTR claims that simply because it uses the information, the documents are "intra-agency" documents. The Supreme Court directly rejected the analysis that the agency's use of the document can alone bring it within the ambit of Exemption 5. Both the dissenting Ninth Circuit judge and the agency in *Klamath Water Users* advocated this analysis, see 532 U.S. at 7, 11, which the Court rejected. See *id.*⁷

The common denominator of all these cases is that communications outside the agency are protected under Exemption 5 only if they were with parties who functioned "enough like the agency's own personnel to justify calling their communications 'intra-agency.'" *Klamath Water Users*, 532 U.S. at 12. That is clearly not true with respect to documents produced by or shared with the Government of Chile. Chile is not "acting in a governmentally conferred capacity." *Id.* at 9 (quotation omitted). Although Chile's documents may assist USTR in determining its own negotiating position, the documents were not created or solicited for that purpose. Nor are U.S.

⁷ For this same reason, the authority of the *Formaldehyde Institute* decision is uncertain in light of the Supreme Court's decision in *Klamath Water Users*. The *Formaldehyde Institute* court based its decision, at least in part, on the use to which the document was put:

"[I]nter-agency" and "intra-agency" are not rigidly exclusive terms, but rather embrace any agency document that is part of the deliberative process. . . . If [a document] is deliberative in character, then it may come within the confines of Exemption 5 notwithstanding its creation by an outsider.

889 F.2d at 1123 (quotations omitted). However, the facts in *Formaldehyde Institute* probably support the D.C. Circuit's decision, even under *Klamath Water Users*, because the outside reviewers were not "communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the [reviewers]." 532 U.S. at 7, 11.

documents shared with Chile to obtain Chile's assistance as a formal or informal consultant to the United States. The nations share documents to promote their own interests, not to jointly achieve the objectives of the United States.

This Court has consistently applied the same analysis to hold that communications relating to negotiations between agencies and outside entities are not protected by Exemption 5. In *Center for Auto Safety*, the plaintiffs sought documents related to a consent decree in a previous lawsuit. Some of the documents were prepared by the agency "in connection with the modification to the Consent Decree but . . . were shown or transmitted to the defendants." 576 F. Supp. at 743. Others were "prepared by the defendants in the Consent Decree case and submitted to the [agency] in connection with its decision to propose a modification to the Consent Decree." *Id.* The agency argued that the documents were protected under Exemption 5. *Id.* at 744. This Court rejected that argument and required the documents to be disclosed, noting the distinction between communications in the course of negotiations and cases in which the consultant analogy supported withholding the documents: A negotiation is "not a purely internal governmental matter in which the [agency] is simply seeking the advice of disinterested consultants." *Id.* at 745. Likewise, in *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3, 17 (D.D.C. 1998), this Court held that "factual information about negotiations between an agency and an outside party does not" fall within Exemption 5. *See also Brownstein Zeidman and Schomer v. Dep't of the Air Force*, 781 F. Supp. 31, 35 (D.D.C. 1991) ("While FOIA exemption 5 does protect intragovernmental deliberations, it does not cover negotiations between the government and outside parties.").

Other courts have reached the same conclusion. For example, in *Madison County, NY v. Dep't of Justice*, 641 F.2d 1036, 1040-41 (1st Cir. 1981), the First Circuit held that settlement documents created by an Indian tribe in an Indian claims case were not subject to Exemption 5:

We recognize that the government also stood to benefit from a successful settlement, but we believe that expanding exemption five to include self-seeking petitioners “within” agencies would do more violence to statutory language than Congress’ direction permits.

The decisions of the Supreme Court, the Court of Appeals for the D.C. Circuit and this Court make patently clear that information produced by or shared with the Government of Chile during FTA negotiations is not protected under Exemption 5. Chile is not “like [USTR’s] own personnel,” and its communications with the United States are made to promote its independent interests. Nor can U.S. communications with Chile be reasonably considered to be intended to obtain Chile’s advice in promoting U.S. interests. These documents simply cannot satisfy the requisite “strict construction of the FOIA exemptions.” *Center for Auto Safety*, 576 F. Supp. at 748.

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

Even if documents prepared by Chile were “intra-agency” documents, they would not be entitled to protection under Exemption 5 unless they were also predecisional. *See Dow Jones*, 917 F.2d at 574. USTR argues that all documents for which it claims Exemption 5 protection are predecisional “because they precede the final text of the United-States Chile Free Trade Agreement.” Defendants’ Memo. at 12. The fact that negotiations have not yet resulted in a final document, however, does not make all communications with outsiders predecisional. In fact, the contents and language of the documents that the United States provides to Chile in the FTA negotiations is clearly an agency decision itself, as evidenced by the degree and level of consultation that goes into approving such documents. *See, e.g.*, Index of Documents, Docs.

209, 212 and 214, which USTR describes as memoranda to facilitate discussion of “potential U.S. government positions” concerning by the Trade Policy Review Group, “an interagency group of senior-level officials who meet on an *ad hoc* basis” to resolve “the approach the U.S. government should take in a particular trade matter.” Papovich Decl., ¶ 4. This is true even if USTR anticipates that the final text of the agreement will be different from what it proposes during any particular stage of the negotiations. The denomination of text proposed to Chile as “draft text” cannot change the fact that such text is itself the result of a decision of the USTR.

Courts have frequently required the release of documents communicated to and from agencies concerning matters whose final outcome remains unresolved. In *Klamath Water Users*, the Supreme Court required the release of documents communicated to and from the agency before the agency had reached a final decision concerning the water allocation plan or the scope of claims in the state-court adjudication. *See* 532 U.S. at 6. In *Mead Data*, the court ordered the release of a document setting forth “negotiating positions of the parties which predate the final agreement on the contract terms.” 566 F.2d at 257. The court explicitly rejected a claim that the information was exempt “because it reflect[ed] negotiating positions of the parties which predate the final agreement on the contract terms.” *Id.* Although the court recognized that documents that would “reveal the [agency’s] internal self-evaluation of its contract negotiations” are clearly predecisional and deliberative, “[i]nformation about the ‘deliberative’ or negotiating process outside an agency, between itself and an outside party, does not” satisfy those requirements. *Id.*

In *Center for Auto Safety*, this Court ordered the release of documents submitted to the agency for its consideration during the course of the decisionmaking process in question, as well as documents produced by the agency and shared with the defendants in the Consent Decree case during that process. *See* 576 F. Supp. at 743. As the Court noted, “even if [a] document is

predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.” *Id.* at 747 (quotation and emphasis omitted).

USTR’s citation to *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975), does not help its case. The documents at issue in *Grumman* were never shared with anyone outside the agency and were therefore paradigmatic “inter-agency” deliberative documents. Once USTR decides to propose certain language to the Chilean negotiators, however, documents conveying that language are necessarily post-decisional, and thus not protected by Exemption 5. This is the case with all information produced by or shared with the Government of Chile during the course of the FTA negotiations.

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

USTR attempts to support its withholding of documents prepared by or shared with the Government of Chile by reference to an “understanding of confidentiality” with Chile. Defendants’ Memo. at 22 n.6. The Supreme Court has explicitly rejected just such an argument. In *Klamath Water Users*, the agency argued that “compelled release of the documents would itself impair the Department’s performance of a *specific fiduciary obligation to protect the confidentiality of communications with tribes.*” 532 U.S. at 15 (emphasis added). The Court rejected this argument, however, noting that “[t]here is simply no support for [an ‘Indian trust’ exemption] in the statutory text, which we have elsewhere insisted be read strictly in order to serve FOIA’s mandate of broad disclosure.” *Id.* at 16. *See also id.* at 15, n.5 (“[W]e think that even communications made in support of the trust relationship fail to fit comfortably within the statutory text.”).

The Supreme Court’s decision that a confidentiality agreement does not bring otherwise non-exempt documents within the ambit of Exemption 5 confirms this Court’s long-standing rule that “absent an express statutory exemption, disclosure of confidences to adversaries in . . . negotiations is mandatory.” *Center for Auto Safety*, 576 F. Supp. at 748. In *Greenberg*, 10 F. Supp. 2d at 17, this Court ordered the disclosure of settlement documents over an agency claim assertion of Exemption 5 protection. The Court rejected the agency’s argument that the confidentiality of the discussions described in the documents brought them within the exemption: “A claim of secrecy for a proceeding between an agency and an outside party does not implicate the policy objectives which Exemption 5 is designed to serve: avoiding premature disclosure of agency decisions and encouraging the free exchange of ideas among administrative personnel.” *Id.* (citations omitted).

Similarly, in *Center for Auto Safety*, this Court recognized that the documents in question were “confidential exchanges,” *id.* at 746, and that their disclosure could “stifle” future consent decree negotiations. *Id.* at 748. The Court concluded, however, that such concerns

are for legislative, not judicial concern, and so the Court must hold that those documents prepared by and disclosed or transmitted to the Consent Decree defendants are no longer “inter-agency or intra-agency” documents and are beyond the scope of protection of Exemption 5.

Id. See also *Mead Data*, 566 F.2d at 257-58 (secrecy is not relevant to an Exemption 5 claim; “Arguments that the disclosure mandated by the FOIA would seriously hamper the performance of an agency’s other duties have not fared well in the courts.”); *Madison County*, 641 F.2d at 1042 (“We confess to feeling a sense of indecent exposure in countenancing a third party

adversary obtaining confidential exchanges between the Indians' attorneys and the government. But we cannot agree that this means that Indians are 'within' the [agency]."⁸

It is important to note that USTR has provided no evidence that the confidentiality "understanding" with the Chilean government creates any binding obligation on the United States that would be breached by disclosure of the document. Even if the understanding were binding on USTR in the context of the US-Chile FTA negotiations, such an understanding cannot negate contrary obligations arising out of federal law.⁹ 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 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 confidentiality understanding is none of these and it cannot therefore prevail over USTR's obligations under FOIA to release the 37 documents prepared by Chile and any other information reflecting communications from Chile.

The understanding is neither a treaty nor a Congressional-executive agreement because USTR entered into it in the absence of any Congressional approval or any prior Congressional

⁸ USTR cites *Formaldehyde Institute*, 889 F.2d 1118, in support of its conclusion that the "understanding of confidentiality" with Chile supports treating the documents as "inter-agency." Defendants' Memo. at 22 n.6. However, as the language quoted by USTR demonstrates, the understanding of confidentiality in that case did not support the application of Exemption 5, but only the finding that the document was "part of the deliberative process of the agency." *See* 889 F.2d at 1124. The Supreme Court has made clear that unless the document is an "inter-agency or intra-agency" document, its role in the deliberative process does not bring Exemption 5 into play. *See Klamath Water Users*, 532 U.S. 1.

⁹ 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; this condition of confidentiality prohibits such disclosure regardless of any showing of harm. *See Papovich Decl.*, ¶ 9. There is therefore an inconsistency between the confidentiality agreement and FOIA.

grant of authority. *Id.* § 303(1)-(2), cmts. d and e. It is not a sole Executive agreement because it was not entered into pursuant to an independent Constitutional authority of the President. *Id.* § 303(4). Instead, the confidentiality understanding is part of the negotiation of a trade agreement, placing it within the constitutional authority of Congress to regulate commerce with foreign nations. U.S. Const., art. 1, sec. 8, cl. 3.

Even if USTR could demonstrate that the confidentiality understanding 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.” REST. 3RD § 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.

Justice Jackson echoed this holding in his earlier concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (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 confidentiality understanding 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. 1, sec. 8, cl. 3, and is inconsistent with the terms of FOIA, a prior Congressional act. Therefore, the understanding 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 keeping the desire for confidentiality consistent with the requirements of FOIA in other international contexts. For example, in the arbitration of *Methanex v. United States*, an international dispute under NAFTA, the United States explicitly recognized that FOIA requires it to release certain documents despite a confidentiality agreement. In *Methanex*, the United States entered into an agreement to hold documents confidential. Wagner Decl., Exhibit 5 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 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.

D. Chile’s Status as a Nation Does Not Bring Documents Shared with or by Chile Within the Scope of Exemption 5

Contrary to USTR’s assertion, Chile’s status as a nation does not change the Exemption 5 analysis. *See* Defendants’ Memo. at 25. Indeed, the case cited by USTR in support of this proposition compels the opposite conclusion. In *General Electric Co. v. EPA*, 18 F. Supp. 2d 138 (D. Mass. 1998), the court considered a claim that Exemption 5 protects certain documents solicited from a state agency by a federal agency under a legal obligation to consult with the state agency. *See id.* at 142, 143. The court recognized that “the state agency is not an agency within the meaning of [FOIA]. . . . Applying [FOIA’s] definition, it is also clear that the communications at issue under this heading may not be characterized as ‘inter-agency’ in nature.” *Id.* at 141. The court held Exemption 5 to apply, however, because the facts of the case made the state agency a “consultant” for the purposes of Exemption 5 analysis. *Id.* at 142. Thus, the court held that “when the federal agency asks the state agency for data,” that data will be exempt. *Id.* As noted above, the consultant analogy does not apply to Chile’s role in the FTA negotiations.

E. Facilitating Informed Public Participation Is Not a Harm that Justifies Withholding Under Exemption 5

USTR argues that releasing proposals tabled in the negotiations would harm its negotiating efforts by “fooling” public constituencies about USTR’s negotiating objectives and creating public pressure on USTR not to deviate from initial proposals. *See* Defendants’ Memo. at 17. Such putative harm is irrelevant to the documents at issue in this case.

Harm from disclosure cannot shoehorn documents that are not inter-agency or intra-agency into Exemption 5. As described above, the Supreme Court has held that before it can consider a claim that disclosure could harm agency interests – in that case by eroding “the candor

of tribal communications” necessary to the discharge of the agency’s mission – it must find the documents to satisfy “the first condition of Exemption 5, that the communication be ‘intra-agency or inter-agency.’” *See Klamath Water Users*, 532 U.S. at 12. Because negotiations between the United States and Chile do not satisfy this condition, assertions of harm from disclosure are irrelevant.¹⁰

Furthermore, many courts have recognized that FOIA’s “goal of broad disclosure,” *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989), will necessarily create inconveniences and difficulties for government agencies. In light of the clarity of Congress’s intent, however, courts have held that considerations of the harm resulting from disclosure are “factors . . . for legislative not judicial concern.” *Center for Auto Safety*, 576 F. Supp. at 748.

For example, in *Klamath Water Users*, the Supreme Court ordered disclosure that would harm the confidentiality necessary to the agency’s statutory mission. 532 U.S. at 15-16. This Court has ordered disclosure of documents relating to the negotiation of a consent decree even when doing so could “stifle consent decree negotiations.” *Center for Auto Safety*, 576 F. Supp. at 748.

Similarly, in *Dow Jones*, 917 F.2d at 574, the court rejected an argument that

because Congress exempted itself from FOIA, thereby protecting all of its internal deliberations[,] it could not have intended that Executive Branch communications to Congress for the purpose of Congress’ own internal deliberations be disclosable under FOIA.

Although the court agreed that the argument was “appealing,” it concluded:

It may well be true that if Congress had thought about this question, the Exemption would have been drafted more broadly to include Executive Branch communications to Congress, such as the letter sought here. But Congress did not, and the words [of

¹⁰ For this reason alone, the case cited by USTR in support of its assertion of harm – *Quarles v. Dep’t of the Navy*, 893 F.2d 390 (D.C. Cir. 1990) – is inapposite.

Exemption 5] simply will not stretch to cover this situation, because Congress is simply not an agency.

917 F.2d at 574.

In *County of Madison*, the court ordered the disclosure of settlement communications even though it recognized that

[t]he government engages in a prodigious amount of litigation, both as plaintiff and defendant. Negotiated settlement is the most efficient means to terminate such disputes. Knowledge that written settlement communications will be available to anyone, irrespective of his or her need to know . . . inevitably will to some extent impede this means.

641 F.2d at 1040.

USTR's argument boils down to a complaint that releasing these documents would provide citizens information that would permit them to participate knowingly in a process leading to the production of "a set of regulations." *See* Defendants' Memo. at 24. However, this "harm" is precisely the result Congress intended FOIA to have. As President Lyndon Johnson stated when he signed the Freedom of Information Act, "a democracy works best when the people have all the information that the security of the Nation permits." Statement by the President upon signing S.1160, July 4, 1966. FOIA is thus intended to "ensure an informed citizenry," *Robbins Tire Co.*, 437 U.S. at 242, and cannot countenance an agency's depictions of such a result as "harm." Moreover, public constituencies regularly pressure USTR to promote their interests whether they see proposals or not. Even in the case of the U.S.-Chile FTA negotiations, constituencies including Plaintiffs and business interests have made explicit their desires concerning the agreement. *See* Wagner Decl., Exhibits 4, 6. There is little difference between the pressure to adopt a position from the outset and the pressure not to deviate from a position already taken.

In addition, USTR has already released into the public sector some information concerning U.S. negotiating positions. As described in Section III below, the president of a U.S. business association was informed of U.S. agency proposals concerning certain provisions of the FTA. Such disclosure belies any concern USTR expresses regarding the release of U.S. proposals to the public.

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

Under FOIA, “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. §552(b). “[I]t has long been a rule in [the D.C.] Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.” *Mead Data Central, Inc.*, 566 F.2d at 260. Segregability “applies to all documents and all exemptions in the FOIA.” *Center for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984). “[T]he focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D. C. Cir. 1992) (citing *Mead Data Central, Inc.*, 566 F.2d at 260). In fact, “it is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof.” *Powell v. United States Bureau of Prisons*, 927 F.2d 1239, 1242 n.4 (D.C. Cir. 1991).

Even when a document contains material that qualifies for exemption, “purely factual, non-exempt information . . . must be disclosed if it is ‘reasonably segregable’ from exempt portions of the record.” *The Army Times Publishing Company v. Dep’t of the Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (citations omitted). In particular, factual information about the

negotiating process between an agency and an outside party is non-exempt and disclosable.

Mead Data Central, Inc., 566 F.2d at 257; *Greenberg*, 10 F. Supp. 2d at 17; *Brownstein Zeidman and Schomer*, 781 F. Supp. at 35-36 (portion of document containing information about negotiations that was “factual only” must be disclosed).

Although USTR has produced portions of some documents, it clearly has not produced *all* non-exempt portions of the documents responsive to Plaintiffs’ FOIA request. As explained above, information produced by or shared with the Government of Chile, or descriptions of negotiating meetings between the two nations, are not exempt. Where such information is reasonably segregable from otherwise exempt documents, those portions must be released. This Court should order USTR to clearly identify where such information is included in its documents and order USTR to release such information where it is reasonably segregable.¹¹

III. USTR HAS WAIVED ANY PROTECTION FOR CERTAIN DOCUMENTS, INCLUDING DOCUMENTS CONCERNING PROPOSED INVESTMENT PROVISIONS OF THE U.S.-CHILE FREE TRADE AGREEMENT

In support of its attempt to justify withholding documents responsive to Plaintiffs’ FOIA request, USTR argues that “[n]othing suggests that the [documents] were ever shared outside the executive branch.” Defendants’ Memo. at 5-7. Although this statement is supported by the declarations of Susan P. Cronin, ¶¶ 21-26, and Joseph Papovich, ¶ 13, it appears to be inaccurate. On November 19, 2001, Tom Niles, President of the U.S. Council for International Business, a non-governmental organization that “promotes American business views and solutions on a wide range of issues . . . directly to U.S. and international policy makers,”

¹¹ As noted previously, Documents 6 (“describes . . . a Chilean proposal on trade remedies”) and 152 (“with attached Chilean text proposals on general provisions, transparency, final provisions, and exceptions”), appear to include information concerning communications to or from Chile. However, because USTR has taken the position that such information is exempt from disclosure, it is not clear that USTR’s index identifies all instances in which documents include such information.

<<http://www.uscib.org/index.asp?documentID=697>>, wrote a letter to the Deputy U.S. Trade Representative expressing his concerns over

a proposal that I understand will be considered by senior Administration officials this week as they finalize the United States negotiating position for the Chile FTA. [¶]As I understand it, some agencies have suggested that if a claim of a treaty breach by an investor goes to a judicial action of the home country, the investor must first exhaust domestic remedies before that claim may be heard by an arbitral panel. This proposal is apparently seen by some as necessary to protect the United States from future cases that are similar to the Lowen case.

See Wagner Decl., Exhibit 6. As this letter indicates, U.S. proposals and certain inter-agency communications concerning the investment provisions of the FTA have already been made public.

The disclosure of information outside the federal government constitutes a waiver of any Exemption 5 protection.

The policy objectives of [Exemption 5] are not relevant when the government has voluntarily chosen to disclose otherwise exempted material on a selective basis. . . . When documents are voluntarily released to third parties, “the government’s assertion that these communications [are] confidential [is] rendered substantially less credible.” [North Dakota v. Andrus, 581 F.2d 177, 181 (8th Cir. 1978).] Cf. United States v. Nobles, 422 U.S. 225, 239 (1975) (holding that the common-law attorney work-product privilege is not absolute and may be waived).

United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992). See also Chivilis v. Securities and Exchange Comm’n, 673 F.2d 1205, 1212 (11th Cir. 1982)

(“Waiver [of Exemption 5 claims] can occur when communications are disclosed to private individuals or non-federal agencies.”). Furthermore, “[d]isclosure to others in violation of an agency’s regulations may also result in waiver.” *Id.* This is particularly true when disclosure has only been to selected outside parties, a practice several courts have called “offensive” to FOIA. See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (“selective disclosure” of record to one party in litigation deemed “offensive” to FOIA and held to prevent

agency's subsequent invocation of Exemption 5 against other party to litigation); *Committee to Bridge the Gap*, No. 90-3568, transcript at 3-5 (C.D. Cal. Oct. 11, 1991) (bench order) (deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested party; selective disclosure is "offensive" to FOIA) (cited in Dep't of Justice Freedom of Information Act Guide, <<http://www.usdoj.gov/oip/discretionary.htm#walver>> (May 2000)); *Northwest Envtl. Defense Ctr. v. United States Forest Serv.*, No. 91-125, slip op. at 12 (D. Or., Aug. 23, 1991) (magistrate's recommendation) (deliberative process privilege waived as to portion of agency report discussed with "interested" third party), adopted (D. Or. Feb. 12, 1992) (cited in Dep't of Justice Freedom of Information Act Guide, <<http://www.usdoj.gov/oip/discretionary.htm#walver>> (May 2000)).

USTR has classified some of the documents likely to include the information Mr. Niles was provided. In fact, Mr. Niles sent his letter shortly after the preparation of four documents that USTR has described as including "differing agency viewpoints on key investment rules and procedures." Declaration of Joseph Papovich, ¶ 7 (discussing Documents 211 (Oct. 25, 2001), 212 (Oct. 31, 2001), 213 (Nov. 2, 2001) and 214 ("prepared for November 20, 2001 meeting"). One such document, concerning "investment agreements [and] judicial finality," was prepared for a meeting that took place the day following Mr. Niles letter concerning the exhaustion of judicial remedies, and was most likely being prepared during the time immediately preceding the drafting of the letter. *See* Index of Documents, Doc. 214.

With regard to the disclosure outside the government of information contained in classified documents, this Court has stated:

Our 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.]

Washington Post v. US Dept of Defense, 766 F. Supp. 1, 10 (D.D.C. 1991). The evidence that information concerning U.S. agency investment proposals is already within the public domain

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. 42, 50 (D.D.C. 1996).

USTR's disclosure to Mr. Niles of information concerning agency proposals regarding investment provisions thus waives any claim USTR can make concerning Exemption 5 with respect to documents containing information related to such proposals. The disclosure also calls into question the appropriateness of USTR's classification of documents containing such proposals, for it makes untenable a claim that public disclosure will damage national security. USTR must therefore release all documents containing information relating to agency proposals concerning the investment provisions of the FTA if similar information has been released to the public.¹²

¹² Documents concerning investment provisions include Documents 8, 12, 30, 62, 81, 82, 83, 99, 141, 152, 210, 212, 213 and 214.

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

“An agency’s *Vaughn* index should ‘describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that the material withheld is logically within the domain of the exemption claimed.’” *Greenberg*, 10 F. Supp. 2d at 20 (quoting *King v. Dep’t of Justice*, 830 F.2d 210 218 (D.C. Cir. 1987)). *See also Animal Legal Defense Fund v. Dep’t of the Air Force*, 44 F. Supp. 2d 295, 300 (D.D.C. 1999) (A *Vaughn* index must provide “a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlat[es] those claims with the particular part of a withheld document to which they apply.” (Quotation omitted.)). USTR’s index lacks much detail necessary to demonstrate that the documents are logically within the domain of Exemption 5.

USTR’s Index of Documents appears not to identify all documents containing communications from the United States to the Government of Chile, including U.S. proposals for FTA language. For example, several documents include “consolidated Chilean and U.S. text” for certain chapters of the agreement. *See, e.g.*, Declaration of Sybia Harrison, Attachment A, Index of Documents, Doc. 145. Such consolidations strongly suggest that the United States provided to Chile documents setting forth U.S. proposals, which then became incorporated in the consolidations, but USTR does not indicate in its index which documents prepared by the United States were shared with Chile. In addition, several documents prepared by the United States and

denominated “drafts” are likely to have been shared with Chile,¹³ but because the United States does not distinguish between drafts for internal discussion and draft text proposed to Chile in the negotiations, it is impossible to know which documents were shared with the Chileans.

It is also likely that there exist documents containing factual information concerning communications to or from Chile that USTR must release. Presumably because it has taken the position that such communications fall within Exemption 5, USTR appears not to have identified such factual portions of the documents.

As described in Section I above, information concerning communications to and from the Government of Chile does not fall within the scope of Exemption 5 and must be released. USTR’s description of the documents does not describe the documents sufficiently to identify which ones contain information concerning such communications, and does not, therefore, satisfy the requirements for a *Vaughn* index.

USTR also has not identified documents with respect to which information similar to that contained in the document has been released outside the government. As noted in Section III above, USTR has released outside the government some information concerning agency proposals for investment provisions of the FTA. It is highly unlikely that Mr. Niles is the only person to whom such information was disclosed, or that only information concerning investment provisions was disclosed to Mr. Niles. USTR must therefore identify any documents, or

¹³ See, e.g., documents 44 (“proposed drafting language for Chile FTA negotiations”), 46 (“draft text of the negotiating group on market access”), 55 (“Chile FTA – Draft Text”), 58 (“Attachment is U.S. draft text proposal on Dispute Settlement”), 60 (same attachment), 64 (“draft labor cooperation proposal for May round”), 67 (attachment is “the U.S. proposal . . . for Trade Remedies”), 69 (“U.S. proposed market access text”), 74 (“U.S. temporary entry draft text”), 84 (attachment is “draft text on services, temporary entry, and financial services”), 108 (“Draft proposal on environmental cooperation for July 01 round”), 129 (“draft U.S. services text”), 172 (“Draft Text and a Non-paper”).

segregable portions of documents, containing information similar to information that has been disclosed outside the government.

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

USTR has withheld Documents 209, 211-214 on the ground that they are protected by Exemption 1, which allows withholding of documents that 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 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).

The Court of Appeals for 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)). 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.

USTR claims that the release of Documents 211-213 will harm national security because they would “reveal high-level internal government deliberations on foreign investment issues” and would permit other governments to “exploit interagency differences.” *Papovich Decl.*, ¶ 7. However, as described above in Section III, USTR has waived exemption on this basis, because it has already disclosed to the public the fact and nature of the interagency differences concerning the subject of these documents.

With respect to Documents 209 and 214, USTR argues that the documents reflect governmental deliberations related to the FTA’s “trade and investment rules,” and that revealing these deliberations could “undermine U.S. negotiating positions and make it more difficult to conclude the [FTA].” *Id.* ¶ 8. Again, USTR has waived Exemption 1 protection for these documents because it has already released the information contained in them. *See* Section III above.

USTR also asserts that Documents 209 and 214 contain both foreign government information and information on the foreign relations and foreign activities of the United States, *Declaration of Joseph Papovich* (“*Papovich Decl.*”), ¶¶ 9-10, and that in the case of foreign government information, “[t]hese communications were shared with [USTR] by the Chilean government under the condition that they would be held in confidence.” *Papovich Decl.*, ¶ 9. Such an assertion is not by itself sufficient to support application of Exemption 1. Documents classified as “foreign government information” under Section 1.5(d) or as “confidential sources” under Section 1.5(b) of Executive Order 12,958 no longer receive the protection of a non-disclosure presumption that a previous executive order on national security information had

provided. *Compare* Executive Order 12,356 provided , 47 Fed. Reg. 12,356 (April 2, 1982), § 1.3(c) (“Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources and methods is presumed to cause damage to national security.”) *with* Executive Order 12,958.

By relying on a conclusory statement that the documents were shared under the condition that they be held in confidence, USTR is asserting that it can withhold *any* portion of any document – even a portion whose release would otherwise cause absolutely no harm – simply by accepting a confidentiality request. 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.¹⁴

¹⁴ 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 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

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 these portions of the documents in the absence of any agreement regarding confidentiality or (2) a reasonable expectation of harm from the agency's refusal to operate under such an agreement. However, if the government cannot describe a harm reasonably expected to result in either situation, simply accepting such an agreement 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 this confidentiality

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 (D.C. Cir. 1978) (Wright, C.J., concurring).

agreement with Chile as it pertains to those documents. Nor has USTR made any attempt to explain the harm that would occur if it refused to operate under such an agreement. Furthermore, as noted above (Section I.C.), the confidentiality understanding cannot override the requirements of FOIA. Consequently, this Court should not hesitate to rule that USTR has failed to meet its burden of proof under FOIA—as the Plaintiffs have demonstrated throughout this reply—and enjoin the unlawful withholding even if such a ruling will cause USTR to change its policy regarding the confidentiality agreement with the Chilean government.

CONCLUSION

For the forgoing reasons, this Court should immediately¹⁵

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 Documents 9, 15, 19, 23, 27, 28, 29, 52, 57, 89, 90, 91, 92, 93, 94, 97, 99, 111, 124, 130, 134, 141, 142, 145, 146, 147, 148, 149186, 187, 188, 189, 190 and 191; 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

¹⁵ Plaintiffs respectfully remind this Court that their complaint included a request for expedited consideration of their claims pursuant to the Federal Civil Priorities Act, 28 U.S.C. § 1657(a)(2). *See* Wagner Decl., Exhibit 3. Plaintiffs requested expedited treatment because the requested records relate to new trade rules that will become binding on the United States upon adoption of the US-Chile FTA and that will affect the ability of the United States to protect human health and the environment. Disclosure of all or part of these records *before* the US and Chile conclude the US-Chile FTA would permit the Plaintiffs and other members of the public to provide useful and informed input to the US government concerning appropriate parameters of those rules. As negotiations move closer to completion, the ability of the US government to modify its position decreases, reducing the value of public input. *See Plaintiffs' Opposition to Defendants' Motion for Extension of Time to Answer or Otherwise Respond to the Complaint, and Supporting Points and Authorities*, filed in this case December 26, 2001. Therefore, this Court should require USTR to release documents obviously not subject to Exemption 1 or 5 (the documents listed in paragraph 1)) immediately, and not to withhold such documents until they have completed any necessary reassessment of the documents to determine whether additional documents comply with the Court's decision.

- c) all documents containing information similar to information disclosed to the public, including Documents 209, 211, 212, 213, and 214; and
- 2) 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.

Respectfully,

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