IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INSTITUTE OF MILITARY JUSTICE, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	Civil Action No. 04-0312 (RBW)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, plaintiff moves this Court for summary judgment that the records identified as Documents 1, 2, 3, 4 and 5 in defendant's *Vaughn* index are not exempt from disclosure. Plaintiff further seeks an order directing defendant to release those records in their entirety.

Respectfully submitted,

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff National Institute of Military Justice ("NIMJ") submits this memorandum in opposition to Motion of the United States Department of Defense ("DOD") for Summary Judgment, and in support of plaintiff's Cross Motion for Summary Judgment.

INTRODUCTION AND SUMMARY

In this FOIA action, plaintiff seeks records of communications between DOD personnel and members of the public concerning the procedures for implementing the President's November 13, 2001 Military Order, which authorizes the establishment of military commissions to try suspected terrorists. Although defendant acknowledges that DOD had such communications with at least eleven private lawyers, it has identified records of only three written exchanges to or from these individuals, and it is apparent from the record that DOD has not conducted an adequate search for responsive documents. DOD asserts FOIA exemption 5 for the two of the three communications it has identified, and also for the record of a meeting attended by DOD officials and private lawyers. Also at issue are

two pieces of correspondence between DOD personnel and officials of the British government that are being withheld under exemptions 2, 5 and 7. Plaintiff does not seek disclosure of any of the material that has been withheld on privacy grounds.

As we demonstrate below, DOD's search for responsive documents has been inadequate. Accordingly, the Court should order a proper search. Second, defendant's claims of exemption are without merit. Accordingly, the Court should deny defendant's motion, grant plaintiff's motion, and order the release of the documents that have been identified thus far.

BACKGROUND

On November 13, 2001, the President issued a Military Order authorizing the establishment of military commissions to try suspected terrorists. Tab A to Declaration of Stewart F. Aly, filed Sept. 30, 2004 ("Aly Decl."). Section 4 of the Order directs the Secretary of Defense to issue regulations to implement the Order. DOD attorneys have drafted such regulations. (Aly Decl. ¶ 16.) "In doing this, they were essentially designing a system to administer a criminal code for individuals subject to the Military Order, detainees held at the U.S. Navy Base Guantanomo in Cuba as a result of military operations in Afghanistan conducted by the United States and our allies." (*Id.*) The final rules establishing the procedures for the military commissions were published in the Federal Register on July 1, 2003. *See* 68 Fed. Reg. 39,374 (July 1, 2003).

Plaintiff's FOIA request is aimed at obtaining the records of comments provided by members of the public on the development of this body of law. The National Institute of Military Justice is a non-profit organization that collects and makes available to the public and practitioners materials relating to military law. *See* www.nimj.org. It's

publications include *Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (LexisNexis 2003) and *Military Commission Instructions Sourcebook* (2003). NIMJ seeks to compile whatever "legislative history" exists for what DOD describes as the "criminal code for individuals subject to the Military Order." (Aly Decl. ¶ 16.) On October 3, 2003, plaintiff made a FOIA request for all written or electronic communications between the Department and anyone outside the government concerning the Military Order.

After receiving an inadequate initial response and exhausting its administrative remedies, plaintiff filed suit on February 26, 2004. Plaintiff knew from the statements of the Secretary of Defense at a press conference on March 21, 2002, that DOD had received comments from a number of distinguished lawyers whom the Secretary identified by name. (Exhibit A.)[1] On June 4, 2004, DOD released a few more responsive documents. No record of communications with the lawyers identified by the Secretary were included. On June 16, 2004, plaintiff's counsel sent a letter to defendant's counsel pointing out the Secretary's statements at the press conference and noting that no records of communications with the identified outside lawyers had been released. (Exhibit B.) In a response dated August 24, 2004, the Assistant United States Attorney then assigned to this case revealed that DOD initially took the position that the records reflecting communications with these lawyers were not responsive to plaintiff's request. (Exhibit C.) However, the AUSA wrote that DOD would "not contest this point, and will deem those materials to be responsive." (*Id.*) Counsel also stated that DOD was now taking the

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[1] The lawyers identified by the Secretary at the press conference are Griffin Bell, Lloyd Cutler, William Coleman, Martin Hoffmann, Bernard Meltzer, Newton Minow, Terrence O'Donnell, William Webster, and Ruth Wedgwood. *Id.*

position that "all of those communications are protected from release, in their entirety, by FOIA Exemption 5," relying on "both the attorney-client privilege and the deliberative process privilege." (*Id.*)

In its *Vaughn* submission, DOD identified only three written communications with any outside lawyers: a fax from Terrence O'Donnell that has been withheld in its entirety (*Vaughn* Index, Doc. 3); a redacted e-mail exchange between Ruth Wedgwood and a special assistant to DOD's General Counsel (*Vaughn* Index Doc. 4 and Tab E); and an e-mail exchange with Lee Casey, an outside attorney who commented on a proposed instruction, which has been released in full. (Tab D to Aly Decl.) Defendant also revealed the existence of a memorandum summarizing a meeting on July 30, 2003, attended by the Deputy Secretary of Defense, the DOD General Counsel, the DOD Deputy General Counsel and eight of the identified lawyers. (*Vaughn* Index Doc. 5.) Except for the cover page identifying the attendees, all of this document has been withheld. (Tab F.)

Also at issue are two documents exchanged between DOD and officials of the British government. The first is described as a three-page e-mail from a British official to a DOD attorney concerning "the specific paragraphs of a proposed instruction on elements of offenses." (*Vaughn* Index Doc. 1.) The second is a three-page letter from the DOD General Counsel to the Attorney General of the United Kingdom. (*Vaughn* Index Doc. 2.) This letter is said to "respond to specific issues regarding the conduct of military commission proceedings which had been raised by the Attorney General," and "concerns both the conduct of Military Commissions in general and specific matters related to British citizens." *(Id.)*

ARGUMENT

"In FOIA . . . a new conception of Government conduct was enacted into law, a general philosophy of full agency disclosure." *Dep't of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 16 (2001) (internal quotations and citations omitted). The statute is unique in administrative law in that it places the burden of justifying withholding on the defendant agency and mandates *de novo* judicial review rather than the usual deferential standard of review. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 755 (1989) ("Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to determine the matter de novo.") (quoting 5 U.S.C. § 552(a)(4)(B)). Consistent with the Act's dominant policy of disclosure rather than secrecy, the exemptions to FOIA are to be narrowly construed. *See Klamath Water Users,* 532 U.S. at 8.

One additional word of introduction is appropriate to this case. Although this FOIA action seeks records relating to trials of suspected terrorists and communications with a foreign government, DOD has not asserted exemption 1, which is applicable to classified national security information. Accordingly, national security concerns are not present in this case, and the Court need not accord the deference to the government's claims of exemption that is required in national security cases.

I. DOD's SEARCH FOR DOCUMENTS IN RESPONSE TO NIMJ'S FOIA REQUEST WAS INADEQUATE.

DOD has not conducted an adequate search for responsive documents. "In order to obtain summary judgment, the agency must show that it has made a good faith effort to conduct a search for the requested records, using methods which can be reasonably

expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (internal citation omitted). DOD has not met this test.

A. The Determination That Responsive Documents Were Non-Responsive Is Evidence of Either Bad Faith or Gross Incompetence.

DOD admits that it initially considered the documents released with its *Vaughn* submission (Tab D to the First Aly Decl.) and the five withheld documents to be non-responsive to NIMJ's request. (Aly Decl. ¶ 21.) A cursory review of the initially non-responsive documents shows that no reasonable person could conclude that those documents were not within the scope of plaintiff's request. *See* Tabs D, E and F to the Aly Decl.

These documents include letters and e-mails to several outside lawyers requesting comments on draft instructions for the military commissions. For example, defendant released in its entirety an e-mail string between Jennifer Koester, Special Assistant to the DOD General Counsel and Lee Casey. (Tab D to Aly Decl.)[2] At the beginning of this e-mail string, Ms. Koester encloses "the draft instruction on the review panel" and solicits Mr. Casey's comments. A few days later, Mr. Casey replies with six paragraphs of comments on the draft. These are precisely the type of documents plaintiff's FOIA request seeks. By no stretch of the imagination could they be thought to be non-responsive. In a feeble attempt at explanation, Mr. Aly avers that "I determined some of [the documents he had collected] were not responsive because I believed that the plaintiff was not seeking them." (Second Aly Decl. ¶ 3.)[3] Mr. Aly provides no elaboration for this conclusory statement, which raises more questions than it answers. The determination that

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[2] According to his e-mail address, Mr. Casey is at the law firm of Baker & Hostetler, and according to that firm's website, Mr. Casey is a partner there. *See* www.bakerlaw.com.

[3] The Second Aly Declaration was submitted on October 28, 2004, in support of Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Protective Order.

these documents were non-responsive was an act of either bad faith or gross incompetence. Either way, it taints DOD's entire response to plaintiff's request.

This is not the first case where DOD has attempted to evade the requirements of FOIA with respect to requests for information concerning detained terrorist suspects. In *American Civil Liberties Union v. DOD,* Civ. No. 04-4151 (AKH), 2004 WL 2050921 (S.D.N.Y. Sept. 15, 2004), plaintiffs requested records concerning the treatment of detainees. In that case eleven months passed after plaintiffs had made their FOIA request, and "with small exceptions, no documents [had] been produced by defendants; no documents [had] been identified; no exemptions [had] been claimed; and no objections [had] been stated," *Id*. at *1. Moreover, DOD proposed a schedule that would have extended its obligations for another year. *Id.* at *2. Judge Hellerstein observed that the requested materials "are matters of significant public interest. Yet the glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires." *Id.* at *3.

DOD's attempt in this case to render plainly responsive documents non-responsive demonstrates more than "indifference to the commands of FOIA." It was an attempt to frustrate the Act. If agencies cannot be trusted to identify responsive documents, then the entire system mandated by the Act and implemented by the D.C. Circuit's seminal decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), and its many progeny will collapse. The record strongly suggests that DOD would have continued with its non-responsive ploy had it not been confronted by plaintiff with evidence that responsive documents existed (Exhibit B) and had the United States

Attorney's Office not intervened to end DOD's hide-the-ball strategy. (Exhibit C.) Mr. Aly offers no other explanation for his about-face on this issue. Nor does DOD's belated disclosure of the existence of responsive documents make this a case of "no harm, no foul." The position that responsive documents were not responsive denied plaintiff access to documents to which it was statutorily entitled for nearly a full year – from the date of its original FOIA request on October 3, 2003, to the release of those documents on September 30, 2004.

The Court of Appeals has held that agency affidavits attesting to the adequacy of its search for responsive documents will "suffice only if they [are] relatively detailed, nonclusory and not impugned by evidence in the record of bad faith on the part of the agency." *McGehee v. CIA,* 697 F.2d 1095, 1102 (D.C. Cir. 1983). Where the "[c]ircumstances surrounding the processing of [plaintiff's] request do indeed suggest that the agency has not acted in good faith," a court can "conclude that the agency has not established that its search procedure was reasonable solely on the ground that the credibility of the affidavit it submitted in support of that proposition . . . is undermined by evidence of bad faith." *Id.* at 1102 n.26. This is such a case. The Court, therefore, should approach DOD's representations in this case with skepticism.

B. The Non-Existence of Records Reflecting Comments From At Least Eleven Lawyers Is Implausible.

In a news briefing on March 21, 2002, Secretary Rumsfeld told reporters that DOD solicited comments from private individuals on the Department's planned procedures for use with military commissions. (*See* DOD News Briefing on Military Commissions, March 21, 2002, attached as Exhibit A at 4.) In particular, Secretary Rumsfeld identified Griffin Bell, William Coleman, Lloyd Cutler, Mark Hoffman, Bernard Meltzer, Newton

Minow, Terry O'Donnell, William Webster, and Ruth Wedgwood, all private attorneys not employed by DOD. *Id.* at 4-5. The Secretary said that these individuals "have given a great deal of time to provide advice as we worked through these many important issues," and that they "have been enormously helpful." (*Id.* at 4-5.) In its *Vaughn* submission, defendant reveals that six of these lawyers plus two additional outside lawyers (William Barr and John Marsh) attended a meeting at the Pentagon on July 30, 2003 – 16 months after the Secretary's press conference – to discuss "the applicable legal regime" for the Military Commissions. (*Vaughn* Index at 6.) Mr. Aly vaguely states that "[t]he list of individual lawyers consulted has changed over time, both gaining and losing." (Aly Decl. ¶ 22.) Consequently, plaintiff and the Court now know that at least eleven lawyers have communicated with the Department about the rules and procedures for the military tribunals, but we have no idea what the total number is.

Despite acknowledging comments by these lawyers, the only records DOD has produced or identified documenting such comments are a fax sent by Mr. O'Donnell (*Vaughn* Index Doc. 3), an e-mail exchange with Professor Wedgwood (*Vaughn* Index Doc. 4 (produced with redactions)), and a memorandum summarizing the meeting attended by outside lawyers on July 30, 2003. (*Vaughn* Index Doc. 5.) DOD has identified no records of comments from Messrs. Bell, Coleman, Cutler, Hoffman, Meltzer, Minow, Webster, Marsh or Barr. Furthermore, although Secretary Rumsfeld said on March 21, 2002 that these lawyers had given a "great deal of time," the identified documents – both those released and those withheld – bear dates of July 30, 2003 (Tab F), and October and November 2003 (Tabs D and E). Thus, no documents at all have been identified from the period prior to the Secretary's press conference – a period that by the Secretary's own

description involved a "great deal of time" on the part of the outside lawyers. In light of (1) Secretary Rumsfeld's statement that these lawyers had "given a great deal of their time" by March 21, 2002, (2) his statement that the outside lawyers were "enormously helpful" (Exhibit A at 4-5), and (3) the fact that outside lawyers continued to provide comments for at least 20 more months,[4] it is implausible that DOD has no written record of their comments. It strains credulity that at least eleven distinguished lawyers providing enormously helpful comments on an important and novel issue over a period of at least 20 months would generate only the paltry number of pages that DOD has identified.

It is of course possible – though highly improbable – that DOD never received anything in writing from the outside lawyers other than Ms. Wedgwood, Mr. O'Donnell, and Mr. Casey, and that no one at DOD ever made notes of their conversations with the outside lawyers. But to establish that unlikely contingency, DOD must present more persuasive evidence than Mr. Aly's vague, second-hand assurances. Under the circumstances, the Court should require declarations from each DOD employee who was in contact with the private attorneys on the subject of the military commissions attesting that (1) they received no written communications from the private attorneys, (2) they sent no written communications to the private attorneys concerning the military commissions, and (3) they made no notes of telephonic or in-person conversations with the outside attorneys. The number of DOD employees who were in contact with the private attorneys is not so large as to make this requirement unduly onerous.

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[4] Tab E, the e-mail exchange with Ms. Wedgwood, is dated November 25, 2003.

C. The Aly Declaration And The Released Documents Demonstrate That The Search Has Been Inadequate.

Mr. Aly's declaration demonstrates that he conducted an inadequate search even after his change of heart about his initial determination that plainly responsive documents were non-responsive. He has never searched three of the most likely sources for responsive documents – the files of the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and – most surprising of all – the immediate files of the General Counsel, who was specifically identified in NIMJ's request.

The Court of Appeals "has required agencies to make more than perfunctory searches, and, indeed, to follow through on obvious leads to discover requested documents." *Valencia-Lucene v. U.S. Coast Guard,* 180 F.3d 321, 326 (D.C. Cir. 1999). Thus, "[t]he agency cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested." *Id.* (internal quotations and citation omitted). DOD has failed to follow these requirements in this case.

As noted above, eight of the outside lawyers met with the Deputy Secretary of Defense on July 30, 2003. Furthermore, in his press conference in March 21, 2002, Secretary Rumsfeld said that the Under Secretary of Defense for Policy, along with the General Counsel, "had been deeply involved in this process" of developing the rules for the military commissions. (Exhibit A at 7.) Yet defendant conducted no search of the files of either of these officials. Clearly, the evidence that the Deputy Secretary and the Under Secretary for Policy were involved is a lead that should have been followed up, but wasn't.

The failure to search the files of the immediate Office of the General Counsel is especially egregious. Mr. Aly admits that the identified lawyers had been asked by the General Counsel to "give their opinions and recommendations," and further that the General

Counsel "maintain[s] a relationship with these lawyers to benefit from their extensive experience and wisdom," including on topics such as the military commissions. (Aly Decl. ¶ 22.) And it is clear from the Secretary's press conference that the General Counsel personally played a very substantial role in the project. Yet DOD's search was limited to the files of only certain components of the Office of the General Counsel. Specifically, searches were conducted in the Office of the Deputy General Counsel (Legal Counsel) and the Office of Military Commissions, which is part of the Office of the Deputy General Counsel (Legal Counsel). (Aly Decl. ¶ 8(a) & (b).)

No searches were made of the immediate Office of General Counsel, despite the fact that the General Counsel himself was clearly involved in the contacts with the private attorneys. Instead, with respect to that office, Mr. Aly merely "conducted a survey by personally inquiring of the attorneys and managers in those offices whether they had any files related to the Military Commission Orders or Instructions." Aly Decl. ¶ 8(c). In response to this "survey," Mr. Aly was told that there were no such files and that any responsive correspondence had been referred to the Deputy General Counsel (Legal Counsel) or the Office of Military Commissions. *Id*. But this statement is contradicted by Ms. Koester's e-mails to Ms. Wedgwood and Mr. Casey that identify her as "Special Assistant to the General Counsel." (*See* Tabs D and E.)

Judge Urbina's decision in *Defenders of Wildlife v. USDA*, 311 F. Supp. 2d 44 (D.D.C. 2004), shows that DOD is not entitled to summary judgment on the adequacy of its search in this case. That case holds that "the bare assertion" by an agency official that he "had no responsive documents is inadequate because it does not indicate that he performed any search at all." *Id*. at 55. It is plain from Mr. Aly's Declaration that his "survey" of

attorneys in the Office of General Counsel yielded only bare assertions that their files did not contain responsive documents. There is no evidence that any files were searched. Accordingly, as in *Defenders of Wildlife*, this Court should order a new search of the files of the Office of General Counsel. *Id*.

The released documents also refer to other documents that have been neither released nor accounted for in defendant's *Vaughn* index. As noted above, documents in Tab D to the Aly Declaration indicate that copies of "a draft military commission instruction entitled, 'Review of Trials by Military Commission'" were sent to Ruth Wedgwood, Judge Edward E. Biester, Jr., Martin Hoffman and Terrance O'Donnell for comment. Mr. Koester's e-mail to Mr. Casey also encloses a draft instruction. Yet the drafts themselves – clearly within the scope of plaintiff's request – are not accounted for in defendants' *Vaughn* index.

Ms. Koester's e-mail to Ms. Wedgwood also states: "I found our discussion on Friday very helpful." (Tab E to Aly Decl.) This statement strongly suggests that Ms. Koester – doubtlessly a diligent young lawyer – took notes of her conversation with Ms. Wedgwood, a well-respected academic. Yet defendant has not released nor identified in the *Vaughn* index any notes of Ms. Koester's conversations with Ms. Wedgwood or any of the other outside lawyers with whom Ms. Koester spoke. Nor has defendant released or accounted for notes of conversations between any other DOD lawyers and the private attorneys they consulted (other than the formal record of the meeting attended by the Deputy Secretary of Defense and some of the outside lawyers). Again, it is possible that no such notes were ever taken, but the current record is insufficient to negate the extremely high probability that notes were taken.

Finally, Ms. Wedgwood's e-mail to Ms. Koester refers to "our meeting with Wolfowitz at 5 pm." (Tab E.) Mr. Wolfowitz is the Deputy Secretary of Defense. That e-mail is dated November 25, 2003. The meeting attended by Mr. Wolfowitz and the outside lawyers that is recorded in one of the withheld documents took place on July 30, 2003. (Tab F.) Ms. Wedgwood's e-mail strongly suggests that there was a second meeting between the outside lawyers and Mr. Wolfowitz on November 25, 2003, yet no record of that meeting has been released or identified. Since the July 30 meeting generated a 24-page memorandum, it is highly unlikely that a second meeting (and there may have been more) generated no written record. This is yet another deficiency in defendant's search for and accounting of responsive documents.

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DOD is not entitled to summary judgment on the adequacy of its search. *See Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979) (where the production of countervailing evidence, places "the sufficiency of the agency's identification or retrieval procedure . . . genuinely in issue, summary judgment is not in order."); *Defenders of Wildlife,* 311 F. Supp. 2d at 54 ("If the record raises substantial doubts regarding the agency's efforts, 'particularly in view of well defined requests and positive indications of overlooked materials,' summary judgment is not appropriate.") (quoting *Valencia-Lucena,* 180 F.3d at 326). To summarize: (1) DOD's response to this request was tainted from the outset by either bad faith or gross incompetence; (2) the absence of any additional written record of communications with the outside attorneys is implausible; (3) DOD has failed to search the immediate files of the General Counsel, the Deputy Secretary of Defense, or the Undersecretary for Policy – all of

whom were involved in the process; and (4) the documents that have been produced either refer to or strongly suggest the existence of additional documents that have neither been produced or accounted for in the *Vaughn* index. The Court should order defendant to address each of these deficiencies.

II. EXEMPTION 5's DELIBERATIVE PROCESS PRIVILEGE DOES NOT PROTECT COMMUNICATIONS WITH PRIVATE CITIZENS FROM DISCLOSURE.

DOD seeks to withhold pursuant to exemption 5 three documents relating to communications with private attorneys that it did find. As Judge Friedman has recognized, "[i]n keeping with the FOIA's goal of broad disclosure, the Section 552(b)(5) exemption is construed narrowly." *Ctr. for Int'l Entl. Law v. Office of the U.S. Trade Representative*, 237 F. Supp. 2d 17, 23 (D.D.C. 2002). DOD, however, presses an interpretation of exemption 5 that goes far beyond its accepted scope. In essence, defendant seeks to establish an exemption for "secret notice and comment" on proposed rules.

Exemption 5 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." 5 U.S.C. § 552(b)(5). If DOD sought to protect advice from attorneys, one would expect DOD to assert the attorney-client privilege. Indeed, defendant at one point expressed its intention to invoke the attorney-client privilege (*see* Exhibit C), but did not do so in its motion. Instead DOD falls back on the deliberative process privilege.

DOD's reliance on the deliberative process privilege in this case, however, is misplaced. The privilege was designed to protect agency decision-making processes. Thus, "[i]n order to qualify for protection . . . a document must satisfy two conditions: (1) it must be either interagency or intra-agency in nature, and (2) it must be both pre-decisional and part of the agency's deliberative or decision making process." *Ctr. for Int'l Envtl. Law*, 237

F. Supp. 2d at 24 (internal citation omitted) (emphasis in original); *see also Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The withheld documents satisfy neither of these conditions: they do not contain communications between or within government agencies; and though pre-decisional, they were not part of any deliberative process but rather merely record comments by private citizens on a proposed rule.

"For purposes of the inter-agency requirement, the Supreme Court has noted that the term '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)." *Ctr. for Int'l Envtl. Law*, 237 F. Supp. 2d at 25 (quoting *Klamath Water Users*, 552 U.S. at 9). "In general, this definition establishes that <u>communications between agencies and outside parties are not protected</u> under Exemption 5." *Id.* (internal citation omitted) (emphasis added) *See Klamath Water Users*, 532 U.S. at 12 ("There is . . . no textual justification for draining the [inter-agency] condition of independent vitality."). Communications between private citizens and public officials, therefore, are not ordinarily be protected by exemption 5.[5]

There is one exception to the literal terms of the inter-agency requirement, which DOD relies on here. The so-called "consultant corollary to Exemption 5," *Klamath Water Users*, 532 U.S. at 11, acknowledges that agencies sometimes need "to rely on the

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[5] *See also Brownstein Zeidman & Schomer v. Dep't of the Air Force*, 781 F. Supp. 31, 35 (D.D.C. 1991) ("While FOIA exemption 5 does protect intra-governmental deliberations, it does not cover negotiations between the government and outside parties."); *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 257-58 (D.C. Cir. 1977) (same).

opinions and recommendations of temporary consultants" and that "[s]uch consultants are an integral part of [the agency's] deliberative process." *Dow Jones & Co. v. D.O.J.*, 917 F.2d 571, 574-75 (D.C. Cir. 1990). Under this exception, "[c]ommunications with outside consultants have been deemed part of an agency's deliberative process only where the documents prepared by or communications to or from the outside consultants 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done,' or where 'the consultant functions just as an [agency] employee would be expected to do." *Center for Int'l Envtl. Law*, 237 F. Supp. 2d at 25 (quoting *Klamath Water Users*, 552 U.S. at 10-11).

In this case, the private citizens who provided comments to DOD on proposed procedures for military commissions cannot be compared to agency personnel or consultants engaged in a deliberative process. They were not retained or otherwise engaged in to assist in any deliberative process but rather were merely asked to comment on a proposed rule. As the Secretary of Defense described their role, "they just volunteered to help out." (Exhibit A at 5.)

DOD cites four cases for the proposition that outside consultants can be considered part of an agency's deliberative process. *Public Citizen, Inc. v. D.O.J.,* 111 F.3d 168 (D.C. Cir. 1997); *Formaldehyde Inst. v. HHS,* 889 F.2d 1118 (D.C. Cir. 1986); *Ryan v. D.O.J.,* 617 F.2d 781 (D.C. Cir. 1980); and *Wu v. Nat'l Endowment for Humanities,* 460 F.2d 1030 (5th Cir. 1972). These cases, however, rest on dramatically different circumstances from those presented in this case. Therefore, they do no support DOD's assertion that comments by private lawyers on proposed rules are equivalent to comments on agency actions by an agency's employees or consultants. In *Ryan* responses from Senators

to Justice Department questionnaires on potential judicial nominees were held to fall within exemption 5. That case clearly is not applicable here, because the Senators, while not part of the Justice Department, were part of the government. *Public Citizen, Inc. v. Dep't of Justice* concerned communications between the National Archives and two former Presidents concerning the disposition of their presidential records. In that situation, the Court found, a former President "can hardly be viewed as an ordinary private citizen." 111 F.3d at 170. Further, the "consultative relationship" between the former Presidents and the National Archives, was "not only explicit, . . . but . . . mandated by statute" and thus communications between them concerning the maintenance of records were deemed part of the agency's deliberative process. *Id.* Neither *Citizen* nor *Ryan* governs this case because unlike Senators and former Presidents, the respondents to DOD's requests for comments are purely private citizens.

Wu and *Formaldehyde Inst.* do involve assistance to an agency by private citizens, but again the facts are very different from this case. At issue in *Wu* were the comments of outside experts in Chinese studies who were asked by the National Endowment for the Humanities to review an application for a grant to conduct a study on Chinese history. The Fifth Circuit held that these comments were part of the deliberative process on whether to approve the application. Similarly, in *Formaldehyde Inst*., the document in question was a "review letter" from referees for a scientific journal explaining why a report prepared by an HHS staff employee in the course of his official duties was not accepted for publication in the journal. The agency relied on the special expertise of the referees to decide "whether and in what form to publish the Report in the name of the agency." 889 F.2d at 1124.

In *Public Citizen, Wu* and *Formaldehyde Inst.* the outsiders brought expertise that the agency lacked. In *Public Citizen*, the former Presidents (who were not entirely outsiders) brought a perspective to the disposition of their records that was otherwise unavailable. In *Wu*, the expertise of Chinese scholars was otherwise unavailable to evaluate a proposal for a study of Chinese history. In *Formaldehyde Inst.*, the referees contributed their scientific expertise to assist HHS in deciding what should be published in the agency's name. In this case, by contrast, the comments of the outside lawyers doubtlessly were helpful to DOD, but the outside lawyers did not have special legal expertise unavailable in DOD, the Department of State and the Department of Justice. Indeed, at the Secretary's press conference, the General Counsel said: "we reached out not just to those people identified, but also to the experts within the building – the Judge Advocates General and the general counsels of the military departments were very important in the development of these procedures. . . . And we also, of course, consulted with other agencies." (Exhibit A at 8.) At a minimum, the Aly Declaration does not carry DOD's burden of establishing that the outside lawyers filled a special need that could not be filled by government lawyers.[6]

This case is distinguishable from the cases on which DOD relies in another critical respect. In each of those cases, the outside consultants were utilized to assist the agency in making an internal decision in which the public played no role. Here DOD concedes that it was making rules for the conduct of the military commissions. *See* Aly

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[6] DOD's reliance on *Formaldehyde Inst.* is misplaced for an additional reason. As Judge Friedman has recognized, "[t]he court in *Formaldehyde v. HHS* did not address the inter-agency requirement of Exemption 5 at all and made no finding that the outside reviews were inter-agency in nature." *Ctr. for Int'l Envtl. Law,* 237 F. Supp. 2d at 29. Accordingly, "[t]he continued vitality of *Formaldehyde v. HHS* is questionable in light of the Supreme Court's recent emphasis on the importance of the inter-agency requirement under Exemption 5." *Id.*

Decl ¶ 16 (DOD attorneys "were essentially designing a system to administer a criminal code for individuals subject to the Military Order"). Although these rules fall within the "military functions" exemption to the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. § 553(a)(1), the fact remains that the outside attorneys were asked to do something that is traditionally a public and open process – commenting on proposed rules. It would be a novel application of exemption 5 to shield such comments by some members of the public from the rest of the public.

Although this case does not involve APA rule-making, the implications of DOD's assertion of exemption 5 for the APA's regime of notice and comment are staggering. Notice of proposed rule-making and the opportunity for public comment is one of the great achievements of American administrative law. *See, e.g., Small Refiner Lead Phase-Down Task Force v. E.P.A.,* 705 F.2d 506, 547 (D.C. Cir. 1983) (identifying the "values" of public notice and comment). Proposed rules are subject to public comment, and the comments are available for inspection by the public. The expansion of exemption 5 that DOD urges here would create a system for secret comments on proposed rules. DOD's interpretation of exemption 5 would allow agencies to solicit the views of a small and select group of private citizens, who have no formal relationship with the government, and then by calling them consultants shield their comments from public disclosure. This expansion would erode the traditional and salutary openness of public comments on proposed rules and create a haven for special interests and secret pleading. "Secret law is an abomination," Kenneth Culp Davis*, Administrative Law Treatise* 137 (Supp. 1970), and secret comments on proposed rules are even worse.

When the role played by the outside attorneys is viewed from the proper perspective, it is clear that their comments do not fall within exemption 5. "Communications with outside consultants have been deemed part of an agency's deliberative process only when the documents prepared by or communications to or from the outside consultants 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done' or where 'the consultant functions just an [agency] employee would be expected to do." *Ctr. for Int'l Envtl. Law*, 237 F. Supp. 2d at 25 (quoting *Klamath Water Users,* 532 U.S. at 10-11). It is clear that Griffin Bell, Lloyd Cutter, William Webster and the other distinguished outside attorneys did not function just as a DOD staff attorney would be expected to. In addition to their seniority, they "just volunteered to help out," as the Secretary said. (Exhibit A at 5.) DOD concedes that in applying exemption 5, "courts ask whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." (Def. Mem. at 13.) DOD has not come close to making that showing in this case. But even more importantly, the comments of the outside attorneys were more like traditional public comments on proposed rule-making than the work of staff attorneys drafting a proposed rule. When properly viewed as public commenters rather than staff attorneys, it is clear that the comments of the outside attorneys do not fall within exemption 5.

DOD cannot cite to any cases where the comments by purely private citizens to a government agency were protected by exemption 5. *See American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp.*, No. 82-2806, 1983 U.S. Dist. LEXIS 20337, at *3 (D.D.C. July 22, 1983) (holding that advice of professional advisory committees does not

merit protection as disclosure would not chill outsiders' candor). Accordingly, the Court should order DOD to disclose the documents reflecting the comments of the outside attorneys.

III. DOD HAS FAILED TO DEMONSTRATE THAT THE WITHHELD COMMENTS FROM OUTSIDE ATTORNEYS FALL WITHIN EXEMPTION FIVE.

Even if exemption 5 can be extended, as a general matter, to cover comments from outside attorneys on proposed rules – and it cannot for the reasons set forth above – DOD has failed to establish the applicability of exemption 5 in other respects as well.

A. DOD Has Not Explained How The Withheld Documents Are Any Different From The Comments Of An Outside Attorney That Have Been Released.

Because DOD has released a document that is substantially similar to the withheld communications, defendant has failed to establish that those documents are exempt. Defendant has released an e-mail from Lee Casey, another outside attorney, commenting on a draft instruction for the military commission. (Tab D.) This action does not waive DOD's ability to withhold documents similar to those it has released, but it does impose on the agency an obligation to explain why it can release Mr. Casey's comments, but not the comments of the other outside attorneys.

In *Army Times Publishing Co. v. Dep't of the Air Force,* 998 F.2d 1067 (D.C. Cir. 1993), the defendant released certain survey information, but withheld other similar survey information under exemption 5. The Court of Appeals held that while the release was not a waiver of exemption 5 with respect to the withheld information, the defendant's *Vaughn* submission must explain why "the withheld information is different in any relevant respect from that which has been released voluntarily." *Id.* at 1071. *See also id.* ("the failure of the Air Force to offer some distinguishing feature of the withheld information

strongly suggests that at least some of the information contained in the withheld surveys is similar to that already released, and also non-exempt.") Accordingly, the Court directed that on remand "the Air Force must demonstrate that, unlike the released poll results, the withheld poll results would actually inhibit candor in the decision-making process if made available to the public." *Id.* at 1072.

Similarly, in this case, DOD bears the burden of demonstrating how disclosure of comments of other outside attorneys, unlike the Casey's comments, would actually inhibit candor of outside attorneys who comment on proposed rules. The Aly Declaration does not even begin to address this issue, and therefore DOD has failed to carry its burden of establishing the applicability of exemption 5. As the Court noted in *Army Times*, "FOIA was designed to preclude a government agency from cherry-picking the materials to be made public." *Id.* at 1072. Yet this is precisely what DOD has done here by disclosing the comments of one outside attorney but withholding the comments of others.

B. DOD Has Not Demonstrated That The Meeting on July 30, 2003 Is Pre-Decisional Or That The Record Of This Meeting Is Exempt In Its Entirety.

Document 5 (Tab F) is a 24-page summary of a meeting held on July 30, 2003, and attended by the Deputy Secretary of Defense, the General Counsel, the Deputy General Counsel (Legal Counsel) and eight outside lawyers. The government says that "[t]his document contains summaries of deliberations about procedures for the conduct of Military Commissions prior to the finalization of the Military Instructions at issue in this case." Def's Mem. at 16. That statement cannot be true. The final military instructions were published in the Federal Register on July 1, 2003. *See* 68 Fed. Reg. 39,374 (July 1, 2003). Thus, a meeting on July 30, 2003 could not have been a deliberation prior to the finalization of the instructions. Defendant concedes that a "fundamental requirement for

invoking the deliberative process privilege is that the document "must be predecisional." (Def. Mem. at 12.) As the Court of Appeals has held, in order for a document to be "predecisional," it must be "actually *antecedent to the adoption of an agency policy.*" *Jordan v. D.O.J.,* 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc) (emphasis in original). Document 5 clearly fails this test. Because the final instructions for the military commissions had been published four weeks prior to the meeting, DOD has failed to carry its burden of establishing that this document is predecisional.

Furthermore, even if this document were predecisional – and it clearly is not – the description in defendant's *Vaughn* Index shows that the meeting involved much discussion that cannot be characterized as deliberative. The document includes sections described as "Welcoming remarks," a "Briefing on Office of Military Commissions," and a "Briefing titled Prosecution Update including presentation summarizing prosecution effort and strategy." (*Vaughn* Index at 6-7.) These topics are clearly factual and retrospective status reports by DOD officials to the private attorneys. Even if a document is predecisional, factual statements must be segregated from opinions and disclosed. It is well-established that "[e]xemption 5 applies only to the deliberative portion of a document and not to any purely factual, non-exempt information the document contains." *Army Times,* 998 F.2d at 1071. "Non-exempt information must be disclosed if it is reasonably segregable from exempt portions of the record, *see* 5 U.S.C. § 552(b) [final sentence], and the agency bears the burden of showing that no such segregable information exists. *Id. See also Mead Data Central v. Dep't of the Air Force,* 566 F.2d 242, 259-62 (D.C. Cir. 1977). Once again, DOD has failed to carry its burden – this time failing to demonstrate why the portions of the

meeting memorandum that contain retrospective factual reports cannot be segregated from the positions of the document that are allegedly deliberative.

IV. DOD IMPROPERLY WITHHELD CORRESPONDENCE BETWEEN DOD AND BRITISH OFFICIALS.

DOD also withheld correspondence between agency officials and representatives of the government of the United Kingdom (*Vaughn* Index Docs. 1 & 2), citing exemption 5 as well as exemptions 2, 7(A) and 7(E). None of these Exemptions protects this correspondence from disclosure.

A. Exemption Five Does not Apply To The British Correspondence.

DOD again asserts exemption 5's inter-agency deliberative process privilege to protect the U.K. correspondence. That privilege does not extend, however, to communications between an agency and a foreign government with its own, distinct interests. Judge Friedman has held that that correspondence with "an independent sovereign state" does not meet the requirements for the Exemption 5 privilege. *Ctr. for Int'l Envtl. Law*, 237 F. Supp. 2d at 26. DOD cannot establish that the United Kingdom was participating in a collaborative process with DOD to develop procedures for the military commissions, as opposed to pursuing its own interests. Indeed, the British Government has vociferously objected to its citizens (who were among the detainees at Guantanomo Bay) being subjected to the truncated procedures of the military commissions. For example, the Prime Minister's official website carries the following statements:

> In answer to questions, the PMOS [Prime Minister's Official Spokesman] said that we had been in regular discussion with the US about the detainees from the time the first UK nationals had arrived there in January 2002. Since then, we had pressed the US consistently to resolve the situation. At no time had we endorsed the idea of military commissions. Although it was important for us to keep in touch with US thinking, we had not given tacit approval, played any part or assisted the US in any way with procedures for

> the commissions. Our discussions with the US authorities had focused on making it clear to them that the detainees should receive a fair trial.[7]

The British Foreign Secretary stated:

> The Attorney General has held a number of discussions with the US authorities about the future of the detainees. These have been paralleled by discussions between myself and US Secretary Powell and between British and US officials. There have been many complex issues of law and security which both Governments have had to consider. Although significant progress has been made, in the Attorney General's view the Military Commissions, as presently constituted, would not provide the type of process which we would afford British nationals. Our discussions are continuing.[8]

And the Attorney General of the United Kingdom – the British official to whom Document 2 is addressed – said in a speech:

> While we must be flexible and be prepared to countenance some limitation of fundamental rights if properly justified and proportionate, there are certain principles on which there can be no compromise. Fair trial is one of those – which is the reason we in the UK have been unable to accept that the US military tribunals proposed for those detained at Guantanamo offer sufficient guarantees of a fair trial in accordance with international standards.[9]

It is clear from these statements that the United States and the United Kingdom are not in accord on the military commissions and that the U.K. has been pressing its own concerns and interests on the United States. The *Vaughn* index acknowledges as much when it describes Document 2 as concerning "specific matters related to British citizens." As Judge Friedman has held, "[w]here an outside party's self-interest predominates over its interest in informing or assisting the agency, that party's communications cannot be considered inter-agency for purposes of Exemption 5." *Ctr. for Int'l Envtl.*

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[7] Press Briefing, July 10, 2003, also available at (http://www.number-10.gov.uk/output/page4129.asp).

[8] Foreign Secretary Statement on Return of British Detainees, February 19, 2004, also available at (http://www.number-10.gov.uk/output/page5381.asp).

[9] The full text of the Attorney General's speech is found at http://news.bbc.co.uk/1/hi/uk_/politics/3839153.stm (last visited 11/1/04).

Law, 237 F. Supp. 2d at 27. This principle applies to countries as well as individuals. *Id*. at 26. Thus, "[n]o matter what shared interests [the U.K.] and the United States may have," with respect to military commissions, "the interests of [the U.K.] are manifestly independent of those of the United States." *Id* at 27. Accordingly, exemption 5 does not apply to Documents 1 and 2.

B. Exemptions Two And Seven Do Not Apply To The British Correspondence.

DOD also asserts that exemptions 2, 7(A) and 7(E) protect this correspondence from disclosure. DOD does not appear to be serious about these exemptions, as its memorandum devotes only one sentence to them and cites no cases. Def. Mem. at 18. In any event, the assertion of these exemptions is without merit.

Exemption 2 protects from disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Although DOD asserts that release of the U.K. correspondence would "frustrate . . . the President's Order," it does not indicate how. (Aly. Decl. ¶ 20.) Further, and without support, DOD asserts that the private intent of these communications must be respected. (*Id.*) The test for whether exemption 2 applies requires both that the requested document be "predominantly internal," and that its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc) (courts must "construe Exemption 2 narrowly in order to be consistent with congressional intent," and it is "the Government's burden to prove the 'significant risk'"). DOD has met neither part of this test. First, correspondence with a foreign government is not "predominantly internal." Indeed, the Military Order applies only to alien detainees, so correspondence with a foreign government about that subject cannot possibly involve "predominantly internal" matters.

Further, DOD makes no specific showing that disclosure of the British correspondence will circumvent agency regulations or statutes. *See Feshbach v. SEC*, 5 F. Supp. 2d 774, 787-88 (N.D. Cal. 1997). ("In order to justify non-disclosure the [agency] must provide non-conclusory reasons why disclosure would risk circumvention of the law.")

Exemption 7 is likewise inapplicable. Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Exemption 7(E) protects from disclosure all law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). DOD has not demonstrated that disclosure of the U.K. correspondence would either "interfere with enforcement proceedings" or "risk circumvention of the law." *See Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (holding that government must make specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *North v. Walsh,* 881 F.2d 1088, 1097 (D.C. Cir. 1989) (agency's obligation to show that disclosure of the particular kinds of records a requester seeks "could reasonably be expected perceptibly to interfere with an enforcement proceeding"); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (finding that agency's "summary" attestations failed to demonstrate that disclosure would interfere with enforcement proceedings).

DOD offers only vague speculation that disclosure of the U.K. correspondence might discourage foreign governments from communicating with the United States. (Aly Decl. ¶ 20.) But the United Kingdom has made its negative view of the military commissions known to the world. Further, DOD asserts that disclosure "could unduly prejudice individual Military Commission proceedings" (*id.*), but it offers no explanation how, nor has it addressed whether discrete redactions could protect any specific law enforcement interest. Such conclusory statements about how future proceedings might be effected by disclosures of documents are insufficient to establish the privilege. *See Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding."); *Feshbach*, 5 F. Supp. 2d at 786 (agency "cannot discharge its burden with unsupported assertions in its moving papers or the conclusory statements of a single declarant regarding only one of many categories of documents withheld pursuant to Exemption 7(E)."); *Cowsen-El v. D.O.J.*, 826 F. Supp. 532, 533-34 (D.D.C. 1992) (finding Bureau of Prisons program statement to be internal policy document wholly unrelated to investigations or prosecutions).

CONCLUSION

For the reasons addressed above, DOD's summary judgment motion should be denied, and plaintiff cross-motion for summary judgment should be granted.

Respectfully submitted,

/s/ Mark H. Lynch

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November 1, 2004

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INSTITUTE OF MILITARY JUSTICE, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	Civil Action No. 04-0312 (RBW)

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND PLAINTIFF'S STATEMENT OF GENUINE MATERIAL ISSUES

Plaintiff responds as follows to each numbered paragraph of defendant's Statement of Material Facts Not In Dispute:

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied. Paragraph 8(c) of the Declaration of Steward Aly specifically states that no search was made of the files of the immediate Office of General Counsel.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted, except that plaintiff denies that the withheld documents are properly exempt from disclosure.

9. Admitted, except that plaintiff denies that the withheld documents are properly exempt from disclosure.

10. Admitted, except that plaintiff denies that the withheld material is properly exempt from disclosure.

This record presents the following genuine issues of material fact:

1. Whether plaintiff has conducted an adequate search for records responsive to plaintiff's FOIA request.

2. Whether plaintiff has carried its evidentiary burden of establishing that the withheld documents are properly exempt from disclosure.

Respectfully submitted,

/s/ Mark H. Lynch

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INSTITUTE OF MILITARY JUSTICE, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	Civil Action No. 04-0312 (RBW)

PLAINTIFF'S STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE

In support of its Cross-Motion for Summary Judgment, plaintiff states the following material facts not in dispute:

1. Defendant has not carried its evidentiary burden of establishing that the withheld records are properly exempt from disclosure.

Respectfully submitted,

/s/ Mark H. Lynch

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