

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
PHYSICIANS FOR HUMAN RIGHTS,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 08-273
)	The Honorable Colleen Kollar-Kotelly
U.S. DEPARTMENT OF DEFENSE, <i>et al.</i> ,)	REQUEST FOR ORAL
)	ARGUMENT
Defendants.)	
_____)	

**MOTION AND INCORPORATED MEMORANDUM IN SUPPORT OF PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Peter M. Brody (DC #398717)
Ryan M. Malone (DC #483172)
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW, Suite 900
Washington, DC 20005-3945
(202) 508-4600
Fax: (202) 508-4650
Email: peter.brody@ropesgray.com

*Counsel for Plaintiff Physicians for Human
Right*

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. BACKGROUND.....	3
A. PHR and Investigations of Mass Graves in Afghanistan.....	3
B. PHR’s FOIA Request	5
C. Defendants’ Response To PHR’s FOIA Request	7
III. STANDARD OF REVIEW	7
A. Summary Judgment Standard	7
IV. ARGUMENT	9
A. Defendants’ Motion For Summary Judgment Should Be Denied Because Defendants’ Declarations Are Insufficient	11
B. Defendants Failed To Conduct An Adequate Search For Responsive Documents	14
1. Defendants Did Not Search Certain Locations In Afghanistan Where Documents Were Likely To Be Found.....	16
2. Defendants Did Not Contact DoD Officials Who Would Likely Have Known Where Responsive Documents Were Located.....	17
3. Defendants Used Search Terms That Were Not Reasonably Calculated To Locate Responsive Documents When Conducting Electronic Searches	19
C. Defendants Have Not Adequately Supported Their Claimed Exemptions For The Withheld And Redacted Documents	21
1. The Vaughn Indexes And Declarations Are Not Detailed Enough To Sustain Defendants’ Burden	22
(a) The Vaughn Index Entries Are Not Sufficiently Detailed To Support Defendants’ Claimed Exemptions	23
(b) Defendants Gave No Explanation When Severing Non-Responsive Material From Responsive Material	26
2. The Court Should Require <i>In Camera</i> Review Of The Withheld Documents And The Redacted Documents	27
V. CONCLUSION	28

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Allen v. CIA</i> , 636 F.2d 1287 (D.C. Cir. 1980).....	22, 27
<i>Amnesty Int’l v. CIA</i> , No. 07 Civ. 5435, 2008 U.S. Dist. LEXIS 47882 (S.D.N.Y. June 19, 2008).....	20
* <i>Campbell v. United States Dep’t of Justice</i> , 164 F.3d 20 (D.C. Cir. 1998).....	15, 16
<i>Carter v. Dep’t of Commerce</i> , 830 F.2d 388 (D.C. Cir. 1987).....	27, 28
* <i>Coastal States Gas Corp. v. Dep’t of Energy</i> , 617 F.2d 854 (D.C. Cir. 1980).....	22, 23, 26
<i>Dep’t of the Air Force v. Rose</i> , 425 U.S. 352 (1976).....	7
<i>Founding Church of Scientology, Inc. v. NSA</i> , 610 F.2d 824 (D.C. Cir. 1979).....	9
<i>Friends of Blackwater v. DOI</i> , 391 F. Supp. 2d 115 (D.D.C. 2005).....	9
<i>Greenberg v. Dep’t of Treasury</i> , 10 F. Supp. 2d 3 (D.D.C. 1998).....	8
* <i>Hayden v. NSA/Central Security Service</i> , 608 F.2d 1381 (D.C. Cir. 1979).....	27, 28
<i>Hemenway v. Hughes</i> , 601 F. Supp. 1002 (D.D.C. 1985).....	8
* <i>Jackson v. United States Atty’s Office</i> , 293 F. Supp. 2d 34 (D.D.C. 2003).....	10, 17, 18
* <i>Jackson v. United States Atty’s Office</i> , 362 F. Supp. 2d 39 (D.D.C. 2005).....	<i>passim</i>
* <i>Judicial Watch, Inc. v. FDA</i> , 449 F.3d 141 (D.C. Cir.2006).....	21, 22, 24

Kowalczyk v. United States Dep’t of Justice,
73 F.3d 386 (D.C. Cir. 1996)8

LaCedra v. Executive Office for United States Attys,
317 F.3d 345 (D.C. Cir. 2003)21

Maydak v. United States Dep’t of Justice,
362 F. Supp. 2d 316 (D.D.C. 2005)13

Mays v. DEA,
234 F.3d 1324 (D.C. Cir. 2000)27

Nat’l Ass’n of Home Builders v. Norton,
309 F.3d 26 (D.C. Cir. 2002)8

Nat’l Labor Relation Bd. v. Robbins Tire & Rubber Co.,
437 U.S. 214 (1978)8

**Nation Magazine, Washington Bureau v. United States Customs Serv.*,
71 F.3d 885 (D.C. Cir. 1995)10, 11, 15, 21

**Oglesby v. United States Dep’t of Army*,
79 F.3d 1172 (D.C. Cir. 1996) *passim*

**Oglesby v. United States Dep’t of Army*,
920 F.2d 57 (D.C. Cir. 1990)9, 11, 12, 16

People for the Am. Way Found. v. Nat’l Park Serv.,
503 F. Supp. 2d 284 (D.D.C. 2007)9, 13, 14

Quinon v. FBI,
86 F.3d 1222 (D.C. Cir. 1996)11

Rosenfeld v. United States Dep’t of Justice,
No. C 07-03240, 2008 U.S. Dist. LEXIS 64620 (N.D. Cal. Aug. 22, 2008)10, 14, 19

Sample v. Bureau of Prisons,
466 F.3d 1086 (D.C. Cir. 2006)8

Schrecker v. United States Dep’t of Justice,
349 F.3d 657 (D.C. Cir. 2003)15

Spannaus v. CIA,
841 F. Supp. 14 (D.D.C. 1993)11

**Steinberg v. United States Dep’t of Justice*,
23 F.3d 548 (D.C. Cir. 1994)8, 11, 12

Truitt v. Department of State,
897 F.2d 540 (D.C. Cir. 1990).....15

**Valencia-Lucena v. United States Coast Guard*,
180 F.3d 321 (D.C. Cir. 1999).....8, 16, 17, 19

**Vaughn v. Rosen*,
484 F.2d 820 (D.C. Cir. 1973)..... *passim*

Weisberg v. United States Dep't of Justice,
627 F.2d 365 (D.C. Cir. 1980).....13

STATUTES

5 U.S.C. § 552..... *passim*

OTHER AUTHORITIES

Exec. Order 12958 § 1.4, 3 C.F.R. 333 (1995), *reprinted as amended in* 50 U.S.C. § 435
note at 91 (Supp. 2004).....24, 25

S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974).....27

Following its own investigation of the mass graves in Dasht-e-Leili in early 2002, Plaintiff Physicians for Human Rights (“PHR”) sought information related to these events pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). Specifically, PHR requested all records relating to the mass graves in Dasht-e-Leili, the deaths of surrendered Taliban soldiers, and the presence of U.S. military near the mass grave sites. PHR also seeks any documents relating to U.S. investigations of the events that led to the Taliban soldiers’ deaths. In response to PHR’s request, the Department of Defense (“DoD”) and its components (collectively “Defendants”) have thwarted PHR’s efforts to obtain relevant documents. Defendants first told PHR that they could not find any responsive records and then only released documents authored by PHR. Defendants then failed to submit sufficiently detailed declarations or conduct a search that was reasonably calculated to locate documents responsive to PHR’s request. Finally, the declarations and *Vaughn* indexes submitted by the government do not contain adequate detail to show the logical connection between the withholding of responsive material and the claimed exemption. In sum, Defendants have attempted to avoid disclosing records that would shed light on an incident that could be a serious violation by an American ally of the Geneva Convention and international law.

Defendants are not entitled to summary judgment because they have failed to submit affidavits that adequately describe how they searched for responsive documents. Additionally, Defendants have not established that they conducted an adequate search or sufficiently supported their claimed exemptions for withholding responsive material. For these reasons, PHR respectfully requests the Court deny Defendants motion for summary judgment.

In addition, PHR respectfully asks the Court to grant its cross-motion for summary judgment because the facts, even as minimally disclosed by Defendants, show that Defendants

failed to conduct an adequate search and did not provide enough information to allow PHR to challenge the claimed exemptions for withheld material. Therefore summary judgment in favor of PHR is appropriate, and the Court should order Defendants to search for responsive documents in Afghanistan, contact DoD personnel who have knowledge of the U.S. investigation into the mass graves, conduct an electronic search on its databases using proper search terms, and require an *in camera* review of the documents withheld or redacted based on claims of exemption.

II. BACKGROUND

A. PHR and Investigations of Mass Graves in Afghanistan

PHR is a not-for-profit organization with a mission to promote health by protecting human rights. PHR uses scientific methods and clinical medical skills to investigate allegations of human rights violations. PHR has conducted investigations of health and human rights in Afghanistan and has worked around the world to expose war crimes. The goals of PHR's investigations include revealing the truth about human rights abuses, holding perpetrators accountable, demonstrating the scope of rights violations, and advocating an end to abuses. PHR publishes newsletters, reports, and informational materials for the public.

As part of its continuing investigations of rights abuses in Afghanistan, PHR sent a three person fact-finding team to Northern Afghanistan in January 2002. *See Preliminary Assessment of Alleged Mass Gravesites in the Area of Mazar-I-Sharif, Afghanistan*, a Report by Physicians for Human Rights (attached as Exhibit ("Ex.") 1). While in Afghanistan, the PHR investigation team learned of the mass graves and collected information on several grave sites. *Id.* Another PHR team of two forensic anthropologists followed in February 2002 with its own investigation of the mass graves. *Id.* The PHR investigation teams compiled pictures, detailed descriptions of the mass graves, and witness interviews and published their findings on the PHR website. *Id.*

PHR shared the results of its on-the-ground investigations with the U.S. State Department. *See* Letter from Leonard S. Rubenstein, Executive Director Physicians for Human Rights, to FOIA Officer (June 21, 2006) (attached as Ex. 2). In addition, two United Nations (“U.N.”) entities – the U.N. Assistance Mission to Afghanistan and the U.N. High Commissioner for Human Rights – investigated the grave sites and compiled a report. *See* John Barry, Babak Dehghanpisheh and Roy Gutman, *The Death Convoy of Afghanistan*, NEWSWEEK, Aug. 26, 2002 (attached as Ex. 3). Throughout 2002, American and international news sources reported on the deaths in Dasht-e-Leili, the mass graves, and investigations of the events by the U.S. government and military. *See id.*; *see also* Marianne Bray, *U.S. probe mass Taliban ‘suffocations,’* CNN.com, Aug. 21, 2002; *U.S. general backs probe of reported Afghan mass graves,* CNN.com, Aug. 25, 2002; John F. Burns, *Political Realities Impeding Full Inquiry Into Afghan Atrocity,* The New York Times, Aug. 29, 2002 (attached as Exs. 4-6).

The investigations by PHR, the U.N., and the media revealed horrific accounts of hundreds of surrendered Taliban fighters being squeezed into sealed cargo containers where they died from asphyxiation on their journey to the Sheberghan prison. *See, e.g.,* Ex. 3. The investigations also revealed that, while not directly involved in the alleged mass killings, U.S. military forces were in the area and close to General Dostum at the time. *Id.* On more than one occasion, U.S. officials indicated that Defendants had conducted investigations related to the mass graves. *See* Exs. 3-6.

In July 2002, Newsweek reported that DoD spokesman Lt. Col. Dave Lapan said that United States Central Command (“CENTCOM”) had questioned U.S. troops in Afghanistan “several months ago” about the incident. Ex. 3. Lapan also said that “Central Command looked into [allegations regarding the mass killings] and found no evidence of participation or

knowledge or presence” by American forces. *Id.* The DoD later confirmed this position and stated “[n]o US troops were present anywhere near that site in November [2001].” *Id.* The *Newsweek* article also stated that a senior Defense Department official “said the Pentagon asked the commander [Col. John Mulholland] of the Fifth Special Forces Group to look into the reports of container deaths,” and that Col. Mulholland “reported back that the A-team knew that numbers, perhaps even large numbers, of Taliban prisoners had died on the journey to Sheberghan.” *Id.* Following publication of the *Newsweek* article, State Department spokesman Philip Reeker said that the U.S. would investigate the circumstances surrounding the mass graves. Ex. 4. In August 2002, a CNN.com article quoted General Tommy Franks as calling for an investigation into the mass graves. Ex. 5. A New York Times article from the same month also reported that Marine General Peter Pace told reporters at a Pentagon briefing that the U.S. military had conducted an internal review into what happened at Sheberghan prison. Ex. 6.

B. PHR’s FOIA Request

On June 21, 2006, PHR submitted a FOIA request to the U.S. Department of State, the DoD, the Air Force, the Army, CENTCOM, and the Central Intelligence Agency (“CIA”). Ex. 2. PHR’s request sought information relating to a mass grave at Dasht-e-Leili and included detailed requests for information related to nine specific categories of records. *Id.* PHR is seeking the records about the mass graves as part of its mission to reveal human rights abuses and inform the public about possible war crimes in Afghanistan, and PHR plans to publish the information for public scrutiny upon receipt.

On March 15, 2007, PHR received a letter from United States Special Operations Command (“USSOC”) stating that “no responsive documents were found.” Letter from Thomas D. Waldhauser, U.S. Marine Corps Chief of Staff, to Leonard S. Rubenstein (Mar. 15, 2007) (attached as Ex. 7). After the FOIA deadline passed without PHR’s receiving any documents

responsive to its request, PHR submitted an administrative appeal on April 26, 2007 to the Defense Intelligence Agency (“DIA”), USSOC,² and CENTCOM. Letter from Leonard S. Rubenstein to Karen M. Finnegan, DoD Office of Freedom of Information (Apr. 26, 2007) (attached as Ex. 8). PHR never received any documents from DIA, USSOC, or CENTCOM in response to its initial June 21, 2006 FOIA request or its subsequent administrative appeal.

By letter dated August 6, 2007, DoD released six documents it deemed responsive to PHR’s FOIA request, including a draft of a letter from the Office of the Deputy Secretary of Defense to PHR, articles and letters from PHR’s own website, a Washington Post editorial written by the executive director of PHR, and various constituent letters to Members of Congress regarding the Afghanistan mass graves. Letter from Will Kammer, DoD Office of Freedom of Information, to Leonard S. Rubenstein (Aug. 6, 2007) and Documents released with the letter (attached as Ex. 9). None of these documents relates to a U.S. investigation into the reports of a mass gravesite in Afghanistan.

On February 19, 2008, PHR filed a complaint in this Court against DoD and three of its components – DIA, USSOC, and CENTCOM – alleging violation of obligations under the FOIA. Defendants answered the Complaint on April 28, 2008. Since that time, PHR agreed to allow Defendants additional time to complete their searches for documents and review documents for exempt material. Defendants have now provided approximately 60 documents to PHR,³ many of which are publicly available.⁴ Defendants have also relied on one or more FOIA

² DIA and USSOC were not recipients of PHR’s initial FOIA request, but received the FOIA request on referral from DoD and the Department of Army, respectively.

³ The State Department and CIA also released documents to PHR. The documents released by the State Department and CIA originated with DoD and its components, but DoD referred out the documents for review by the State Department and CIA.

exemptions to withhold both entire documents and portions of documents. *See, e.g.*, Documents released by the Joint Staff and DIA (attached, respectively, as Exs. 10, 11).

C. Defendants' Response To PHR's FOIA Request

In response to PHR's complaint, Defendants filed a motion for summary judgment and submitted a series of conclusory declarations in support of its motion that shed little light on how defendants searched for responsive documents. The declarations do, however, identify certain deficiencies with Defendants' searches. For example, the declarations make clear that Defendants did not adequately attempt to locate relevant documents in Afghanistan. Additionally, Defendants did not contact DoD officials – who made public comments about the government's investigation of the Taliban deaths, the mass grave, and the issue of U.S. involvement – to determine if those individuals knew where responsive documents were located. The declarations that describe the search terms used show terms that were unlikely to locate responsive documents. For example, one search was structured to *only* find documents containing the *exact* phrase “November and December 2001.”

The parties now agree that that the only issues in dispute are whether Defendants conducted an adequate search for documents responsive to PHR's FOIA request and whether Defendants properly withheld material exempt from disclosure under the FOIA exemptions.

III. STANDARD OF REVIEW

A. Summary Judgment Standard

The Supreme Court has explained that the purpose of FOIA is “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep't of the*

⁴ The CIA released five Foreign Broadcast Information Service documents, the DIA released twenty articles from Reuters news agency, and the DoD released print-outs from PHR's own website.

Air Force v. Rose, 425 U.S. 352, 361 (1976) (internal quotations omitted). Congress created FOIA to “ensure an informed citizenry,” which is “vital to the functioning of a democratic society [and] needed to check against corruption.” *Nat’l Labor Relation Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The D.C. Circuit has “embrace[d] the congressional purpose of open government,” *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999), and instructed that “[a]t all times courts must bear in mind that FOIA mandates a strong presumption in favor of disclosure, and the statutory exemptions, which are exclusive, are to be narrowly construed.” *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (internal quotations and citations omitted). Thus, unless “the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester,” summary judgment in the agency’s favor is not appropriate. *Greenberg v. Dep’t of Treasury*, 10 F. Supp. 2d 3, 11 (D.D.C. 1998).⁵ Conversely, a plaintiff is entitled to summary judgment when, viewing the facts in a light most favorable to the defendant, the agency has not

⁵ In its brief, Defendants cites *Hemenway v. Hughes*, 601 F. Supp. 1002, 1004 (D.D.C. 1985), for the proposition that “summary judgment hinges not on the existence of a genuine issue of material fact but rather on the sufficiency of agency affidavits.” See Defs.’ Mot. for Summ. J. at 5. This incorrectly states the applicable summary judgment standard. See, e.g., *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1087 (D.C. Cir. 2006) (when analyzing the government’s motion for summary judgment in the FOIA context, a court “must determine whether the facts, viewed in the light most favorable to the requester, present any genuine issue of material fact.”); *Kowalczyk v. United States Dep’t of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (“We can affirm the summary judgment for the FBI only if the agency has shown that the evidence, when viewed in the light most favorable to [requester], raises no genuine issue of material fact.”); *Steinberg v. United States Dep’t of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (To prevail at the summary judgment stage, “the agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact.”). The sufficiency of the agency affidavits affects whether there is a genuine issue of material fact but is not alone determinative for the summary judgment decision.

complied with its FOIA obligations. *See Jackson v. United States Atty's Office*, 362 F. Supp. 2d 39, 42-43 (D.D.C. 2005).

To comply with FOIA, the agency must perform an adequate search for responsive documents and support all claimed exemptions with information sufficient for the requester to challenge the exemptions. In response to a FOIA request, the relevant government agency is required to conduct a “search reasonably calculated to uncover all relevant documents.” *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 292 (D.D.C. 2007). The government may rely on detailed affidavits or declarations to establish that it conducted an adequate search, so long as they are not merely conclusory statements. *Friends of Blackwater v. DOI*, 391 F. Supp. 2d 115, 119 (D.D.C. 2005). Once the agency has located documents responsive to the FOIA request, the government may not use “conclusory and generalized allegations of exemptions” to withhold documents in whole or in part. *Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824, 830 (D.C. Cir. 1979). Further, all exemptions from disclosure must be narrowly construed. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973).

IV. ARGUMENT

Defendants' motion for summary judgment should be denied. The affidavits submitted by the Defendants are too vague to establish that the Defendants conducted adequate searches. Without sufficient affidavits, Defendants cannot prevail at summary judgment. *See Oglesby v. United States Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Additionally, Defendants failed to establish that they undertook an adequate search or that they appropriately described the documents withheld or redacted with claimed exemptions.

Further, PHR's motion for summary judgment should be granted. Although Defendants' affidavits leave many questions about what Defendants did in conducting searches for responsive documents, the affidavits do make clear that Defendants *did not* search locations in Afghanistan

where documents were likely to found, *did not* contact DoD personnel who likely knew where responsive documents were located, and *did not* use proper search terms when conducting electronic searches. Therefore Defendants did not conduct an adequate search. *See Nation Magazine, Washington Bureau v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby*, 920 F.2d at 68). In addition, Defendants relied on *Vaughn* indexes comprised of boilerplate language that mimics the words of each exemption rather than the “detailed analysis” required when claiming FOIA exemptions. *See Vaughn*, 484 F.2d at 826 (D.D.C. 1973). Consequently, summary judgment should be entered in PHR’s favor and the Court should order Defendants to search in Afghanistan for responsive documents, contact DoD officials who have knowledge of Defendants’ investigation, and conduct an electronic search on their databases using proper search terms. *See Jackson v. United States Atty’s Office*, 362 F. Supp. 2d 39, 42-43 (D.D.C. 2005) (denying government’s motion for summary judgment, granting plaintiff’s motion for summary judgment, and ordering agency to “contact and discuss [relevant document]” with individuals with nexus to documents).⁶ In addition, because the Defendants’ declarations do not adequately describe the basis for withholding all or part of the responsive documents, the court should conduct an *in camera* review to determine whether the

⁶ The record clearly indicates that defendants have not fulfilled their statutory obligations under FOIA. If, however, the Court is not convinced that plaintiff is entitled to summary judgment, then at a minimum the Court should order the defendants to submit sufficiently detailed declarations describing its search. *Jackson v. United States Atty’s Office*, 293 F. Supp. 2d 34, 41 (D.D.C. 2003) (denying government’s motion for summary judgment and ordering “defendants to submit . . . additional and/or more detailed affidavits”); *Rosenfeld v. United States Dep’t of Justice*, No. C 07-03240, 2008 U.S. Dist. LEXIS 64620, at *50 (N.D. Cal. Aug. 22, 2008) (ordering “defendants to provide supplemental declarations in accordance with” the court’s decision). The value of ordering more specific declarations is minimal though, because the submitted declarations show that Defendants have not conducted an adequate search. Additional specificity in the Defendants’ declarations cannot overcome these deficiencies.

withheld records are subject to a FOIA disclosure exemption.⁷ *See Quinon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996) (“[W]here an agency’s affidavits merely state in conclusory terms that documents are exempt from disclosure, an *in camera* review is necessary.”).

A. Defendants’ Motion For Summary Judgment Should Be Denied Because Defendants’ Declarations Are Insufficient

In order “to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate,” the government agency must submit “[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched” in order to prevail at summary judgment. *Oglesby v. United States Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). “[T]he affidavits should identify the searched files and describe the structure of the agency’s file system which makes further searches difficult.” *Spannaus v. CIA*, 841 F. Supp. 14, 16 (D.D.C. 1993) (citing *Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986)). “[A]gency affidavits that ‘do not denote which files were searched . . . do not reflect any systematic approach to document location, and do not provide information specific enough to enable the requestor to challenge the procedures utilized’ are insufficient to support summary judgment.” *Steinberg v. United States Dep’t of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1984) (quoting *Weisberg v. United States Dep’t of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980)).

In the absence of sufficiently detailed affidavits, it is not possible for the government agency to satisfy its burden of proof to show that it has conducted an adequate search. *See Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). Thus, if the agency

⁷ PHR notes that, if the Court orders Defendants to search for more responsive documents, *in camera* review might be appropriate once Defendants release all responsive documents to PHR, as the *Vaughn* indexes might include additional documents at that time.

does not submit sufficiently detailed affidavits, the government's motion for summary judgment must be denied. *Oglesby*, 920 F.2d at 68.

In *Oglesby*, the D.C. Circuit denied the government's motion for summary judgment in part because the affidavit it relied on did not "identify the terms searched or explain how the search was conducted." *Id.* at 68. Similarly, in *Steinberg*, the D.C. Circuit rejected a declaration that "describe[d] in general how the [relevant government agency] processed appellant's FOIA request, [but] fail[ed] to describe in any detail what records were searched, by whom, and through what process" as insufficient and denied the government's motion for summary judgment. 23 F.3d at 552.

In this case, Defendants submitted eight conclusory declarations that are insufficient to establish that adequate searches were conducted. Exs. 12-19. The declaration supporting the Office of the Deputy Assistant Secretary of Defense for Central Asia's search tersely states "action officers in the Afghanistan directorate searched hard copy files available in the Central Asia Office that we determined to be reasonably likely to have records responsive to the request." Scott Schless Decl. ¶ 3 (Def. Ex. C). From this vague and conclusory language, it is not possible to determine which files were searched, how the search was conducted, or who looked for the relevant documents. The declaration describing the DIA Directorate for Analysis's ("DI") electronic search is similarly flawed, simply stating that DI "searched the classified web on the classified network to ensure that it did not miss any responsive documents." Alesia Y. Williams Decl. ¶ 10 (Def. Ex. E). The declaration does not discuss what the "classified web" is or what search terms were used to locate responsive documents. The declaration supporting USSOC suffers from the same shortcoming. Steven A. Hummer Decl. ¶ 5 (Def. Ex. G) ("Each search consisted of a physical search of paper files and an electronic search

of multiple unclassified and classified files.”); ¶ 7 (“The history office performed a key word search of their archives.”). The D.C. Circuit has found similar language to be inadequate. *Weisberg v. United States Dep’t of Justice*, 627 F.2d 365, 370 (D.C. Cir. 1980) (holding affidavit that stated agency official “ha[d] conducted a review of [agency] files which would contain [relevant] information” was insufficient to support government’s motion for summary judgment).

The declaration submitted on behalf of the U.S. Army Special Operations Command (“USASOC”) offers only vague descriptions of the search conducted, claiming that “USASOC performed a complete physical search/review of retained computer files, hard copy files, and library holdings within their directorates. Also 5th Special Forces Group performed a computer search on October 10 and 11, 2006 of the tactical local area network, which would reasonably and/or likely contain information relating to the plaintiff’s request.” Hummer Decl. ¶ 4 (Def. Ex. G). The declaration submitted by the Directorate for Human Intelligence’s (“DH”) is also lacking key details, merely stating “[h]ardcopy files likely to contain responsive documents were also searched.” Williams Decl. ¶ 11 (Def. Ex. E). When confronted with vague descriptions like these, courts have found the affidavits to be inadequate and denied the government’s motion for summary judgment. *People for the Am. Way Found.*, 503 F. Supp. 2d at 294 (denying summary judgment because affidavit did not “identif[y] what search terms were used, [or] identif[y] why the scope of defendant’s search was limited to the files or personnel listed”); *Maydak v. United States Dep’t of Justice*, 362 F. Supp. 2d 316 (D.D.C. 2005) (concluding government affidavits were insufficient because they lacked “the *search terms* and the *specific files* searched for each request”). Defendants cannot support their claim of an adequate search with affidavits merely parroting the legal standard; they must also explain which files were searched, and why the

search included only those files and not others, so that PHR (and the Court) can evaluate whether the search was adequate.

The DIA's search was also flawed. When DI attempted to locate documents, it conducted a manual search on an electronic database containing "numerous folders of all intelligence products, including drafts, produced by four offices within DI" for documents. Williams Decl. ¶ 10 (Def. Ex. E). Without more information about how the manual search was conducted, it is not possible to analyze whether the DI's search was reasonably calculated to locate documents responsive to PHR's FOIA request. A similar situation occurred in *Rosenfeld*, 2008 U.S. Dist. LEXIS 64620, at *44. In *Rosenfeld*, the relevant government agency argued it complied with its FOIA obligations because it responded to plaintiff's FOIA request by conducting manual searches for responsive documents. *Id.* at *44. Specifically, the government relied on a declaration that stated the agency "conducted manual searches on [specific] subject matters or individuals in specific field offices." *Id.* at *44 n.13. The court held this declaration was inadequate because "defendants fail[ed] to discuss how these [manual searches] were conducted and what databases were searched." *Id.* at *44. Consequently, the court ordered defendants to "explain what databases . . . are located in that office," describe "the mechanics of how [the databases] were searched" and "to the extent that any of these databases were not searched, provide a detailed rationale for this decision." *Id.* Because the declaration submitted on behalf of DI does not describe the databases located in the DI offices or explain which databases were and were not searched, the declaration is insufficient.

B. Defendants Failed To Conduct An Adequate Search For Responsive Documents

After receiving a FOIA request the relevant government agency must "conduct[] a search reasonably calculated to uncover all relevant documents." *People for the Am. Way Found.*, 503

F. Supp. 2d at 292 (quoting *Weisberg v. United States Dep't of Justice*, 705 F.2d at 1351). More specifically, the agency must make “a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Nation Magazine*, 71 F.3d at 890 (quoting *Oglesby*, 920 F.2d at 68).

Because of the fact-specific nature of FOIA requests, whether an agency conducted an adequate search is “dependent upon the circumstances of the case.” *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). As a general matter, however, “the proper inquiry is whether the Government has made reasonable use of the information readily available to it, and whether there exist reasonable alternative methods that the Government failed to employ” to locate responsive documents. *Schrecker v. United States Dep't of Justice*, 349 F.3d 657, 662 (D.C. Cir. 2003).

When determining if the government complied with its FOIA obligations, “the court evaluates the reasonableness of an agency’s search based on what the agency knew at [the search’s] conclusion rather than what the agency speculated at its inception.” *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). Additionally, if an agency discovers information relevant to the FOIA request during its search it “must revise its assessment of what is ‘reasonable’” for a search. *Id.*

Because the affidavits clearly show that Defendants did not search in Afghanistan for relevant records, did not contact DoD officials who knew where responsive documents were likely located, and did not use proper search terms when conducting electronic searches, Defendants have not conducted an adequate search. Consequently, Defendants’ motion for summary judgment should be denied and PHR’s motion for summary judgment should be granted.

1. Defendants Did Not Search Certain Locations In Afghanistan Where Documents Were Likely To Be Found

“It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search barring an undue burden.” *Valencia-Lucena*, 180 F.3d at 327. Similarly, an agency “cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Oglesby*, 920 F.2d at 68. PHR’s FOIA request sought records related to events *that took place in Afghanistan*. Ex. 2. Because the relevant events occurred in Afghanistan, it seems only reasonable that responsive documents might be located in field offices in Afghanistan or other overseas offices in the region.

But, surprisingly, Defendants did not search for responsive hard copies of documents in Afghanistan, and only CENTCOM conducted an electronic search of files located in Afghanistan. Defendants also did not look in other nearby overseas locations, such as Pakistan, that might contain responsive documents.

The D.C. Circuit has consistently held that when government agencies fail to look in locations where responsive documents might be located, their search is inadequate. *Valencia-Lucena*, 180 F.3d at 327 (holding that agency’s failure to search records stored at federal record center made search inadequate); *Campbell*, 164 F.3d at 27 (concluding agency’s search was inadequate because it failed to look for documents in an alternate index); *Oglesby*, 920 F.2d at 68 (denying agency’s motion for summary judgment because the agency did not establish the system searched was the only possible place that responsive records could be located). Because Defendants did not adequately search in Afghanistan or other overseas locations, their searches were not reasonably calculated to uncover all relevant documents.

2. Defendants Did Not Contact DoD Officials Who Would Likely Have Known Where Responsive Documents Were Located

“An agency’s search is unreasonable if it fails to follow through on obvious leads to discover requested documents.” *Jackson*, 362 F. Supp. 2d at 41-42. Indeed, the D.C. Circuit has explained that “[w]hen all other sources fail to provide leads . . . , agency personnel should be contacted if there is a close nexus . . . between the person and the particular record[s]” sought. *Valencia-Lucena*, 180 F.3d at 328.

The D.C. Circuit most thoroughly addressed the duty of government agencies to contact knowledgeable individuals when conducting a search in *Valencia-Lucena*, 180 F.3d at 327. In that case, plaintiff sought copies of various documents that were created on a specific Coast Guard ship. *Id.* at 325. The Coast Guard produced non-responsive documents and informed plaintiff “that a reasonable search for responsive records ha[d] been made and [that] no other places within the Coast Guard exist where the records are likely to be found.” *Id.* The D.C. Circuit held the search to be inadequate in part because the Coast Guard did not contact the captain of the ship when attempting to locate responsive documents. *Id.* at 327. The D.C. Circuit found this failure to inquire important because the captain “would be a likely source for information about what happened to [one of the specific documents requested].” *Id.* at 327-28.

This Court reached a similar conclusion in *Jackson v. United States Atty’s Office*, 362 F. Supp. 2d 39 (D.D.C. 2005). In *Jackson*, the plaintiff submitted a FOIA request to the U.S. Attorney’s Office seeking “copies of all non-privileged documents relating to [the] decision” not to prosecute certain individuals who testified in a civil case against the plaintiff. *Jackson v. U.S. Attorney’s Office*, 293 F. Supp. 2d 34, 37 (D.D.C. 2003). In response, the government released 141 pages of responsive material. *Id.* The plaintiff challenged the adequacy of the search and specifically challenged the government’s failure to disclose a specific

memorandum. *Id.* The district court held that the search was inadequate. *Id.* at 39. The government subsequently submitted an additional declaration stating that the author of the memorandum no longer worked at the U.S. Attorney's Office. *Jackson*, 362 F. Supp. 2d 39. The plaintiff again challenged the adequacy of the search. *Id.* at 41. The court held the government's search "was *per se* unreasonable because the agency failed to contact either [the author] or [recipient] regarding the whereabouts of the [memorandum]" and denied the government's motion for summary judgment. *Id.* at 42.

Defendants should have spoken to the DoD officials who conducted an investigation into the mass grave in Dasht-e-Leili. The DoD has publicly stated on more than one occasion that it conducted an investigation into the deaths of Taliban soldiers during transport from Konduz to Sheberghan prison, including an investigation into the possibility of American involvement in the incident. *Newsweek* reported that DoD spokesman Lt. Col. Lapan said that the CENTCOM had questioned the U.S. forces in Afghanistan concerning the mass grave sites and the transfer of Taliban prisoners to Sheberghan prison. Ex. 3. Col. Mulholland, the commander of the Fifth Special Forces Group, also indicated that Defendants had investigated the deaths of Taliban soldiers. *Id.* From these public statements, it is clear that Defendants conducted an investigation regarding the possibility of U.S. involvement in the mass grave. It is only reasonable to believe that the individuals who conducted the investigation might have information or documents relevant to PHR's request.

But there is no evidence that Defendants ever contacted individuals who conducted the investigation to determine whether responsive materials existed. Since the Defendants failed to locate any documents relating to the investigation when they conducted their search, they had an obligation to contact individuals with a nexus to the investigation to attempt to locate responsive

records. *Valencia-Lucena*, 180 F.3d at 328. Publicly disclosed information indicates that Lt. Col. Lapan and Col. Mulholland had personal knowledge of the DoD investigation.

Nevertheless, none of the declarations indicate that Defendants contacted these individuals or other people with a nexus to the investigations to determine where responsive documents might be located.

This case is analogous to both *Valencia-Lucena* and *Jackson*. Just as in those cases, there is evidence that Defendants are in possession of responsive documents. Like the relevant government agencies in *Valencia-Lucena* and *Jackson*, Defendants have failed to locate the requested documents and did not contact individuals with a nexus to the investigation who might know where the relevant records are located. Consequently, the same conclusion is mandated here as in *Valencia-Lucena* and *Jackson*: Defendants did not conduct an adequate search.

3. Defendants Used Search Terms That Were Not Reasonably Calculated To Locate Responsive Documents When Conducting Electronic Searches

When conducting an electronic search, the government agency must use search terms “reasonably calculated to uncover all relevant documents requested.” *Rosenfeld*, 2008 U.S. Dist. LEXIS 64620, at *37-38 (quoting *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985)).

The Defendants’ used flawed search terms when conducting electronic searches. CENTCOM and CJTF-82 used the following search terms “*in combination* with the words ‘Afghanistan’ [and] ‘November and December 2001 timeframe’: mass grave, grave, mass, Dasht-e-Leili, Taliban, prisoners, Konduz, captured, prisoner transportation, prison, deaths, Sheberghan prison, burial, human bodies or bodies, death, General Tommy Franks, briefings, reports, investigations, President Hamid Karzai, meeting 20 Aug 2002, containers, 595 A-Team, mistreatment, detainee.” Jacqueline J. Scott Decl. ¶ 3-5 (Def. Ex. F) (emphasis added). The list of search terms includes many words and phrases that are relevant to PHR’s request. But by

structuring the search such that the terms “Afghanistan” and “November and December 2001 timeframe” were required, CENTCOM and CJTF-82 greatly limited the number of documents returned. Courts have been skeptical of these types of searches. *Amnesty Int’l v. CIA*, No. 07 Civ. 5435, 2008 U.S. Dist. LEXIS 47882, at *46 (S.D.N.Y. June 19, 2008) (“Simply stated, a search that is designed to return documents containing the phrase ‘CIA detainees’ *but not* ‘CIA detainee’ or ‘detainee of the CIA’ is not ‘reasonably calculated to uncover *all* relevant documents.’”) (quoting *Truitt*, 897 F.2d at 542). Because the search terms were unduly limited, the electronic search was not reasonably calculated to uncover responsive documents in CENTCOM’s possession.

Other searches carried out by Defendants utilized overly restrictive search terms as well. When the DI conducted its manual search, it sought to locate documents referring to Jowzjan, Faryab, or Saripol provinces as well as documents pertaining to Rashid Dostum. Williams Decl. ¶ 10. PHR’s FOIA request did not mention those provinces, but did contain a wide range of other usable search terms including “Dasht-e-Leili,” “grave,” “Taliban,” “Taliban prisoner,” “Konduz,” “Sheberghan,” “investigation,” and “595 A-Team.” Ex. 2. It is unclear why the DI searched for documents containing the names of those provinces instead of more accurate terms provided in PHR’s FOIA request. Similarly, the Office of the Deputy Assistant Secretary of Defense for Central Asia conducted an electronic search by using the following *combinations* of words: 1) “Dostum” and “graves”; 2) “Dostum;” 3) “Sheberghan,” and “graves”; 4) “mass graves” and “Dasht-e”; 5) “Dashte” and “Shiberghan” and “graves”; and 6) “mass graves” and “Afghanistan.” Schless Decl. ¶ 3 (Def. Ex. C). But the Office did not conduct broader searches using more specific terms (i.e., just searching for “Sheberghan” or “grave”). By using such restrictive terms, the DI and Office of the Deputy Assistant Secretary of Defense for Central Asia

impermissibly construed PHR's FOIA request in an overly restrictive manner. *See, e.g., LaCedra v. Executive Office for United States Attys*, 317 F.3d 345, 348 (D.C. Cir. 2003) (explaining that government agencies may not narrowly construe a FOIA request "reasonably susceptible to the broader reading"); *Nation Magazine*, 71 F.3d at 890 (stating "an agency . . . has a duty to construe a FOIA request liberally").

DH's electronic search was also unlikely to identify responsive records. In total, DH only searched 4.8 gigabytes of information electronically, an amount of information that is a fraction of the size of the hard drive on a standard desktop computer. Williams Decl. ¶ 11 (Def. Ex. E). The small amount of information searched suggests that either DH's search was too limited or it looked in the wrong place for documents. In either case, the search was inadequate. Because the Defendants' searches were flawed, an adequate search was not conducted, and summary judgment should be denied.

C. Defendants Have Not Adequately Supported Their Claimed Exemptions For The Withheld And Redacted Documents

In addition to failing to perform an adequate search for responsive documents, Defendants have not provided an adequate description of the documents or parts of documents that they claim are exempt from release under one of the nine statutory FOIA exemptions. *See* 5 U.S.C. § 552. So in addition to requiring Defendants to search for more responsive documents, the Court should order an *in camera* review of the documents Defendants released with redactions. For each exemption claimed, Defendants are required to describe each redaction or withholding in enough detail for PHR to challenge the withholdings. *See, e.g., Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) (The FOIA requester faces "an asymmetrical distribution of knowledge where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request," so the agency is required to give "the court and the challenging

party a measure of access.” (internal citations omitted)). Defendants provided both declarations and *Vaughn* indexes to support their claimed exemptions. Exs. 12-19. But neither source of explanation provides sufficient detail for PHR to challenge the withholdings. In this situation, the court has the authority to conduct an *in camera* review of government documents to determine the applicability of claimed exemptions. *See, e.g., Allen v. CIA*, 636 F.2d 1287, 1296 (D.C. Cir. 1980). Because PHR cannot adequately challenge Defendants’ claimed exemptions based on the declarations and *Vaughn* indexes, PHR respectfully asks the Court to order an *in camera* review of the documents withheld by claims of exemption if it denies Defendants’ motion for summary judgment and grants PHR’s motion for summary judgment.

1. The *Vaughn* Indexes And Declarations Are Not Detailed Enough To Sustain Defendants’ Burden

FOIA cases have a “unique evidentiary configuration” because the government alone controls, reviews, releases, and withholds the subject matter of the FOIA request. *Judicial Watch, Inc.*, 449 F.3d at 145 (quoting *Vaughn*, 484 F.2d at 824). Because the requesting party is at a disadvantage, the burden is on the government “to sustain its action.” 5 U.S.C. § 552(a)(4)(B); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (stating that the burden is on the agency to establish its right to withhold information from the public). The government can meet its burden by using affidavits and *Vaughn* indexes to describe the information it claims is exempt from disclosure. *Judicial Watch, Inc.*, 449 F.3d at 146. When the government withholds information from the requester based on one of the FOIA exemptions, it may use *Vaughn* indexes to provide the court and the requester some access to the withheld material without revealing the exempt information. *Id.*

Courts should not accept indexes that are “conclusory and generalized allegations of [FOIA] exemptions.” *Vaughn*, 484 F.2d at 826. A “relatively detailed analysis” of each

document found to be responsive to a FOIA request is required. *Id.* To draft an acceptable *Vaughn* index, each agency is required to “itemize *each* document and explain the connection between the information withheld and the exemption claimed.” *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172, 1180 (D.C. Cir. 1996) (citing *Vaughn*, 484 F.2d 820). In *Oglesby*, the court suggested that certain general information – including the “length, date, author and [a] brief description of each document” – would allow the requester a “realistic opportunity to challenge [the government’s] invocation of exemptions.” *Id.* at 1181 (remanding in part for further description of documents and segments withheld). The *Oglesby* court directed the government to “submit an index describing the withheld documents to the greatest extent possible without disclosing information that must be protected.” *Id.* at 1184.

Defendants provided PHR with four *Vaughn* indexes with the declarations attached to Defendants’ motion for summary judgment. *See* Kammer Decl. (Def. Ex. A), Patrick Decl. (Def. Ex. B), Williams Decl. (Def. Ex. E), & Hummer Decl. (Def. Ex. G). Defendants provided PHR with a total of eight declarations from employees responsible for FOIA searches and disclosures. Exs. 12-19. Together, the *Vaughn* indexes and the declarations contain the only information PHR has about the documents withheld or redacted by Defendants. Defendants are required to provide to PHR a “relatively detailed analysis” of each document withheld or redacted through its *Vaughn* indexes and declarations. *See Vaughn*, 484 F.2d at 826. For the reasons outlined below, Defendants have not met their burden to sustain the action. *See Coastal States Gas Corp.*, 617 F.2d at 861.

(a) The *Vaughn* Index Entries Are Not Sufficiently Detailed To Support Defendants’ Claimed Exemptions

Defendants rely on four FOIA exemptions to withhold information from PHR: Exemptions 1, 2, 3, and 6. *See* Defs.’ Mot. for Summ. J. While each exemption covers a

different type of protected information, *see* 5 U.S.C. § 552(b)(1) – (3) and (6), the requirements of a sufficient *Vaughn* index are the same for all of them. *See Vaughn*, 484 F.2d at 827. Careful review of the *Vaughn* indexes with the declarations and released documents show that Defendants have not provided a sufficient *Vaughn* index.

For example, Defendants redacted large portions from two pages of a responsive document authored by U.S. Space Command claiming FOIA Exemption 1. Ex. 10. The section immediately preceding the redacted language includes the statements:

. . . The claim asserts that captured Taliban fighters were loaded into shipping containers and transported to Sheberghan prison. Many of the prisoners were said to have suffocated in the sealed metal shipping containers during the two-day journey. Others state that NA troops fired upon three of the containers, killing many of the prisoners inside.

Id. In the *Vaughn* index provided by Mark S. Patrick of the Joint Staff, Defendants state that, if released, the information in the document would “reveal foreign government information as well as intelligence sources and methods and compromise the intelligence information collection mission effectiveness of the intelligence community.” Def. Ex. B. But this description does little more than repeat the language of the Executive Order that permits the exemption. *See* Exec. Order 12958 § 1.4, 3 C.F.R. 333 (1995), *reprinted as amended in* 50 U.S.C. § 435 note at 91 (Supp. 2004) (information may be classified if it concerns “foreign government information” and “intelligence sources or methods”). This limited explanation of the withheld information does not describe the document “to the greatest extent possible.” *See Ogelsby*, 79 F.3d at 1184. And there is no way for PHR to challenge this description because of the “unique evidentiary configuration” in which Defendants control all of the information. *Judicial Watch Inc.*, 449 F.3d at 145.

Tellingly, Defendants use the *exact* same language in a *Vaughn* index accompanying Alesia Y. Williams's declaration. Williams Decl. (Def. Ex. E). To support the claim of withholding under Exemption 1, the index states that the document contains information that would "reveal intelligence sources and methods and compromise the intelligence information collection mission effectiveness of the intelligence community." *Id.* In this four page document, DIA redacted large portions of two pages and the entirety of the two remaining pages. Ex. 11. The few visible statements on the pages include: "Northern Alliance forces entered Konduz, 25 Nov" and "Some shelling, more Taliban have surrendered." *Id.* Defendants' insertion into a *Vaughn* index of boilerplate language that mimics the words of the exemption is not sufficient to allow PHR a "realistic opportunity to challenge" Defendants' claims. *See Ogelsby*, 79 F.3d at 1181. Defendants have not met their obligation to explain to PHR "the connection between the information withheld and the exemption claimed." *Id.* at 1180.

In the *Vaughn* index submitted with Steven A. Hummer's declaration, six of seven documents have segments redacted under an Exemption 1 claim. Hummer Decl. (Def. Ex. G). All six explanations of the Exemption in the index use words copied directly from Executive Order 12958 to explain the exemption. *See Exec. Order 12958* § 1.4. In the *Vaughn* index, three of the documents have an identical description while the other three documents share a different identical description:

Documents 1, 2, and 7: The document contains information which, if publicly released would reveal intelligence activities, sources, or methods.

Documents 3, 4, and 5: The document contains information which, if publicly released would reveal foreign relations, foreign activities of the United States, to include confidential sources.

Id. Again, these descriptions are not sufficient to meet Defendants' obligation to describe "the withheld documents to the greatest extent possible." *See Ogelsby*, 79 F.3d at 1184. PHR has

little, if any, ability to challenge such “conclusory and generalized allegations of [FOIA] exemptions.” *See Vaughn*, 484 F.2d at 826. Defendants must do more to fulfill their burden under the FOIA. *See Coastal States Gas Corp.*, 617 F.2d at 861.

(b) Defendants Gave No Explanation When Severing Non-Responsive Material From Responsive Material

In addition to describing the basis for claims of exemption from release, Defendants must provide PHR with adequate explanations of the material they withheld based on a claim of non-responsiveness. In his declaration, William T. Kammer refers to “two pages of information” released to PHR – one in its entirety and one with the non-responsive information redacted. William T. Kammer Decl. ¶ 9 (Def. Ex. A). But he did not describe the type, author, or length of the document from which the production was excerpted. *Id.* While no exemptions were claimed in the pages, the description of two pages of information is far from the “detailed analysis” that would allow PHR to challenge the completeness of the documents. *See Vaughn*, 484 F.2d at 826. Two pages released without contextual information and explanation are not useful to PHR’s understanding of the investigation into the Afghanistan mass graves and do not meet the requirements of the FOIA. *See Documents released by DoD (attached as Ex. 12).*

Jacqueline J. Scott’s declaration on behalf of CENTCOM describes the release of one paragraph on “one slide” responsive to PHR’s FOIA request. Scott Decl. ¶ 6 (Def. Ex. F). While the declaration describes the date of the slide and states that it was part of a “daily brief,” there is no indication of the author of the slide or how many other slides comprised the entire daily brief. *Id.* Because CENTCOM withheld information on the slide and gave no explanation as to what other slides might have accompanied the released one in the daily brief, it has not met its burden to describe the documents to the “greatest extent possible.” *See Ogelsby*, 79 F.3d at 1184. Because of this inadequate description, coupled with the other deficiencies in the

declarations and *Vaughn* indexes, PHR is unable to effectively challenge Defendants' withholdings. *See* Documents released by CENTCOM (attached as Ex. 13).

2. The Court Should Require *In Camera* Review Of The Withheld Documents And The Redacted Documents

To guard against the disadvantage created because the requester has no access to the information withheld, the FOIA explicitly gives trial courts the authority to conduct *in camera* review of government documents to determine the applicability of claimed exemptions. 5 U.S.C. § 552(a)(4)(B). The Conference Report on the authorizing amendment to the FOIA states that “in many situations [*in camera* review] will plainly be necessary and appropriate.” S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974). The court has “broad discretion” to conduct an *in camera* review of documents. *Allen*, 636 F.2d at 1296. While there are costs associated with *in camera* review, courts have noted that *in camera* review is especially appropriate when the number of documents at issue is small. *See, e.g., Carter v. Dep’t of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987) (when the contested documents are “‘few in number and of short length,’ *in camera* review may save time and money”) (quoting *Allen*, 636 F.2d at 1298).

When the government’s affidavits are “conclusory, merely reciting statutory standards, or if they are too vague or sweeping,” *in camera* review is appropriate. *Hayden v. NSA/Central Security Service*, 608 F.2d 1381, 1387 (D.C. Cir. 1979). It follows that, when the record – including declarations and *Vaughn* indexes – does not provide enough information for the court to determine if an exemption is properly claimed, the court “may review the disputed documents *in camera* in order to make [its] determination.” *Mays v. DEA*, 234 F.3d 1324, 1328 (D.C. Cir. 2000).

Defendants released approximately sixty documents to PHR, many of which contained redactions, claiming exemptions from release under FOIA for the redacted portions. As outlined

above, the *Vaughn* indexes and declarations did not adequately describe the documents for which Defendants claimed exemptions and included the “vague” and “conclusory” language the courts find trigger the need for *in camera* review. *See Hayden*, 608 F.2d at 1387. Because PHR has no “realistic opportunity” to challenge Defendants claimed exemptions, *see Oglesby*, 79 F.3d at 1181, it is appropriate for the Court to perform an *in camera* review of the documents. *See, e.g., id.* at 1387. Further, the number of documents at issue in this case is small, making *in camera* review particularly appropriate. *See Carter*, 830 F.2d at 392. Because PHR does not have enough information on its own to determine the validity of the claimed exemptions, PHR respectfully requests that the Court inspect Defendants’ documents *in camera* to determine if the exemptions claimed in each document is applicable to the content.

V. CONCLUSION

For the foregoing reasons, PHR respectfully requests that the Court deny the motion by Defendants for summary judgment and grant the cross-motion by PHR for summary judgment. PHR respectfully requests that, with this decision, the Court order Defendants to do the following:

1. Search in Afghanistan for relevant records, contact DoD officials who likely know where responsive documents are located, and employ proper search terms when conducting electronic searches, and

2. Submit withheld or redacted documents to the Court for *in camera* review to determine if Defendants properly invoked claims of exemption.

Respectfully submitted,

Dated: November 17, 2008

/s/

Peter M. Brody (DC #398717)
Ryan M. Malone (DC #483172)
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW, Suite 900
Washington, DC 20005-3945
(202) 508-4600
Fax: (202) 508-4650
Email: peter.brody@ropesgray.com

Counsel for Plaintiff Physicians for Human Rights

