No. 17-55036
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORGE ALEJANDRO ROJAS,

Rojas-Appellant,

v.

FEDERAL AVIATION AMINISTRATION,

Defendant-Appellee.

DEFENDANT-APPELLEE'S ANSWERING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV15-05811 CBM (SSx)

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I. COUNTER-STATEMENT OF THE ISSUES FOR APPEAL

Whether Defendant-Appellee Federal Aviation Administration ("FAA"), established that it conducted a search reasonably calculated to uncover all responsive documents in response to the Freedom of Information Act, 5 U.S.C. §552 ("FOIA") request submitted by Plaintiff-Appellant Jorge Alejandro Rojas ("Rojas").

Whether the district court properly granted FAA's motion for summary judgment on the grounds that the FAA properly withheld information in response to Rojas' FOIA request pursuant to the exemption for documents subject to the deliberative process, work-product and attorney-client privileges.

II. STATEMENT OF JURISDICTION

Rojas brought this action in the district court under the FOIA. Subject matter jurisdiction was proper in the district court.

Rojas appealed from a Judgment entered November 10, 2016, in which the district court ruled on FAA's Motion for Summary Judgment. This was a final order that disposed of all of the claims of the parties. (CR 37, ER 2.)[1]

[1] "CR" refers to the District Court Clerk's Record and is followed by the document control number. "ER" refers to Rojas' Excerpts of Record, and is followed by the applicable page numbers. "SER" refers to Defendant-Appellee's Supplemental Excerpts of Record and is followed by the applicable Bates number. "AOB" refers to Rojas' Opening Brief and is followed by the number generated by ECF in the top right hand corner of each page.

The statutory basis for jurisdiction in this Court is 28 U.S.C. §1291. Rojas filed his notice of appeal on January 6, 2017. (CR 38.) The appeal is therefore timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B).

III. STATEMENT OF THE CASE

A. Nature of the Case

Rojas sued FAA under the FOIA, alleging that it had improperly withheld records from him in violation of FOIA's access provisions. (CR 1.)

B. Course of District Court Proceedings

Rojas filed a complaint in the district court for the Central District of California on July 31, 2015. (CR 1.) On October 2, 2015, FAA filed its answer to Rojas' complaint. (CR 10.)

On March 24, 2016, the parties filed a Joint Stipulation to vacate the settlement conference deadline and instead allow the parties to proceed to summary judgment. (CR 36, ER 5; CR 23, SER 110-111.) In the Stipulation, the parties agreed that the only issue in the case concerned the legal basis for the FAA's decision to withhold the responsive records. (CR 23, SER 111, 113 [¶9].) The district court approved the Stipulation. (CR 24, SER 1.)

On April 4, 2016, FAA filed a motion for summary judgment. (CR 25.) FAA submitted a Vaughn Index[2] identifying the three withheld documents and the bases for the withholding (CR 25-3, SER 105). Along with the motion, the FAA submitted a declaration from Yvette Armstead, Assistant Chief Counsel, Employment and Labor Law Division ("AGC-100"), of the Office of the Chief Counsel for the FAA, explaining FAA's compliance with Rojas' FOIA request. (CR 25-2, SER 95-98 [Declaration of Yvette A. Armstead ("Armstead Dec.")].) The FAA also submitted a declaration from John Scott, Chief Operating Officer of Applied Psychological Techniques, Inc. ("APTMetrics"), a human resources consulting firm that worked with the FAA, in regard to the documents at issue in this case. (CR 25-1, SER 93-94 [Declaration of John C. Scott ("Scott Dec.")].)

On April 25, 2016, Rojas filed his response to the FAA's motion for summary judgment. (CR 26, 27.) On May 4, 2016, the FAA filed its reply. (CR 30.)

On September 21, 2016, following a hearing on the Motion for Summary Judgment (CR 31), the district court issued an order requiring the FAA to provide

[2] A Vaughn Index is a document that is prepared in litigation to justify withholding of information under the FOIA. The term arose from the case of Vaughn v. Rosen, 484 F.2d 820, 823-25 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), in which such an index was required to determine the validity of the agency's withholdings. See also Yonemoto v. Department of Veterans Affairs, 686 F.3d 681, 688 (9th Cir. 2012) (describing requirements for Vaughn Index.)

it with a copy of the documents at issue for *in camera* review. (CR 34, ER 17.) The FAA subsequently submitted the documents, under seal, for *in camera* review by the Court. (CR 35.)

On November 10, 2016, the district court granted summary judgment in favor of the FAA on the grounds that the records withheld under 5 U.S.C. §552(b)(5) ("Exemption 5") were inter-agency memoranda protected by the attorney work-product privilege. (CR 36, ER 2.) Rojas now appeals. (CR 38, ER 25.)

IV. STATEMENT OF FACTS

A. The Relationship Between FAA and APTMetrics

Beginning in 2011 or 2012, the FAA undertook a comprehensive review of the Air Traffic Control Specialist ("ATCS") selection and hiring process. (CR 25-2, SER 95 [¶5].) This review indicated a number of concerns about the FAA ATCS hiring process, including the Air Traffic Selection and Training Test ("AT-SAT"). (SER 126.)

In or about November 2012, the FAA retained Applied Psychological Techniques, Inc. ("APTMetrics") to assist in a review and analysis of the ATCS hiring process, recommend improvements, and assist in implementing those recommendations. (CR 25-2, SER 96 [¶6]; CR 25-1, SER 93 [¶3].)

In 2013, APTMetrics modified the Biographical Assessment ("BA") that was previously part of the AT-SAT screen for developmental ATCS applicants and validated the modified BA test. (CR 27-1, SER 126-128; CR 25-1, SER 93 [¶4]; CR 25-2, SER 96 [¶7, fn. 1].) The BA is a computerized test that measures the following job-related characteristics: flexibility; risk tolerance; self-confidence; dependability; resilience; stress tolerance; cooperation; teamwork; and rules application. (CR 25-1, SER 93 [¶5].)

In 2014, as part of the annual workforce plan, the FAA identified the need to continue to hire ATC specialists to address estimated losses. (CR 27-1, SER 127-128.) This included refining the selection process to improve the evaluation of applications in a timely and efficient manner. (Id.) As a result, in February 2014, the FAA implemented the "2014 Interim Hiring Process" for one-time use, incorporating as many of APTMetrics' initial recommendations as practicable including the BA. (Id.) The FAA then issued a nationwide, general-public vacancy announcement for entry level ATCS positions. (CR 25-2, SER 96 [¶7, fn. 1].)

In March 2014, an unsuccessful applicant for an ATCS position filed a "Class EEO Complaint – 29 CFR 1614.204 Certification Request" letter with the FAA's Office of Civil Rights. (CR 25-2, SER 96 [¶8].) The putative class was represented by Rojas' current counsel, Mr. Pearson. (Id.)

In April 2014, the same applicant attempting to represent a group of 2014 unsuccessful ATCS applicants filed a "Formal Complaint" and a petition for class certification. (CR 25-2, SER 96 [¶9].) Mr. Pearson represented the putative class. (Id.)

In the summer and fall of 2014, the FAA revised the BA used in the 2014 interim hiring process ahead of the 2015 nationwide, general-public vacancy announcement and APTMetrics performed work related to that process. (CR 25-2, SER 96 [¶10].)

In late November 2014, the FAA Office of Chief Counsel requested John Scott, the Chief Operating Officer of APTMetrics, to summarize elements of its validation work related to the use of the BA as an instrument in the ATCS selection process. (CR 25-1, SER 94 [¶7].) It did so because of the administrative litigation pending in the EEOC. (CR 25-1; SER [¶8].)

In December 2014, APTMetrics provided FAA counsel with an initial summary of the validation work, and supplemented this information in January 2015. (CR 25-2, SER 96 [¶11]; CR 25-1, SER 94 [¶7].)

In early 2015, the FAA issued a new nationwide, general-public vacancy announcement for entry level ATCS positions. (CR 25-2, SER 96 [¶7, fn. 1].) Again, the FAA used the BA as one of several selection tools in the ATCS hiring process. (Id.) The 2015 entry-level ATCS hiring process was substantially similar

to the 2014 interim process, but with modifications including a newly refined BA, an alternate, but equal version of the AT-SAT, and the issuance of a separate vacancy announcement for experienced air traffic controllers. (CR 27-1, SER 128-129.)

In April 2015, another unsuccessful applicant for the 2015 entry-level ATCS positions contacted a counselor with the FAA's Office of Civil Rights. (CR 25-2, SER 96 [¶12].) He was also represented by Mr. Pearson. (Id.)

In August 2015, a group of unsuccessful applicants filed a "Formal Complaint" and a petition for class certification related to the 2015 ATCS hiring process. (CR 25-2, SER 97 [¶13].) Mr. Pearson represented the putative class. (Id.)

B. Rojas's FOIA Request

On or about May 24, 2015, via e-mail, Rojas submitted the following FOIA request to the FAA:

> "1) I am requesting all records concerning my application for the March 2015 Air Traffic Control Specialist hiring announcement. This includes information regarding the reason for failing the biographical assessment administered for FAA-ATO-15-ALLSRCE-40166.
>
> 2) I am requesting all emails and other written communications (Lync, documents, presentations, etc.) related to the scoring of the biographical

assessment between individuals in the Office of the Administrator ("AOA"), Air Traffic Organization ("ATO"), and Human Resources ("AHR") Line of Business. [3]

3) I am requesting information regarding the empirical validation of the biographical assessment noted in the rejection notification. This includes any report, created by, given to, or regarding APTMetrics' evaluation and creation and scoring of the assessment."

(CR 25-2, SER 95 [¶¶3-4]; CR 1, ER 332.) Only the third of Rojas' enumerated requests was at issue in the district court action, as well as this appeal. (AOB 9.)

On June 18, 2015, the Office of the Chief Counsel of the FAA initially responded to Rojas' FOIA request and assigned tracking number 2015-006130 to the request. (CR 25-2, SER 97 [¶14]; CR 25-3, SER 99.) The Agency informed Rojas that documents responsive to his request no. 3 for information regarding the empirical validation of the biographical assessment were located, but were being withheld pursuant to Exemption 5 because the documents were protected under the attorney-client and attorney-work product privileges and were pre-decisional and deliberative. (Id.)

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[3] Although the offices within the FAA (the AOA, ATO, and AHR) separately responded to Rojas' FOIA request, and provided records to Rojas, he does not take issue with their responses in this litigation. (CR 18, SER 26.) Thus, the documents at issue in this case are only a portion of the responsive documents provided to Rojas by the FAA.

On or about June 25, 2015, Rojas filed an administrative appeal based upon the FAA's initial response. (CR 25-2, SER 97 [¶15]; CR 25-3, SER 101.) The appeal was assigned FOIA Control No. 2015-006130A. (Id.)

On July 31, 2015, Rojas filed this FOIA action in the district court. (CR 1.)

On October 7, 2015, the FAA responded to Rojas' administrative appeal. The FAA determined that a portion of Rojas' request related to the request for empirical validation of the biographical assessment should be remanded back to the Office of Chief Counsel for additional action, since records regarding the 2014 hiring process had been searched, rather than the 2015 process referenced in Rojas' FOIA request. (CR 25-2, SER 97 [¶16]; CR 25-3, SER 102.)

After the matter was remanded, in late October 2015, AGC-100 conducted a second search for documents responsive to Rojas' FOIA request regarding the 2015 hiring process. (CR 25-2, SER 97 [¶17].) The attorneys who provided leagal advice related to the revisions to the ATCS hiring process were asked to search their records. (Id.) The FAA located three responsive documents dated December 2, 2014, January 29, 2014, and September 2, 2015, which were summaries discussing the validation of the 2015 BA test. (SER 97 [¶18].) Those documents are identified in the Vaughn Index attached the Declaration of Ms. Armstead. (SER 97 [¶¶18-19], 105.)

On December 10, 2015, the FAA provided Rojas with a determination letter regarding his appeal. (CR 25-2, SER 97 [¶20]; CR 25-3, SER 103.) AGC-100 determined that Rojas' request for information related to any empirical validation of the BA test was protected under Exemption 5 of the FOIA. (Id.) The district court agreed by order dated November 10, 2016. (CR 36; ER 2.)

V. STANDARD OF REVIEW

A district court's decision to grant summary judgment is reviewed *de novo*. Szajer v. City of L.A., 632 F.3d 607, 610 (9th Cir. 2011). The Court of Appeal's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). Suzuki Motor Corp. v. Consumers Union, Inc., 330 F.3d 1110, 1131 (9th Cir. 2003).

In the past, this Court employed a standard unique to FOIA cases for reviewing a district court's summary judgment. See Yonemoto, 686 F.3d at 688 (holding that in reviewing a grant of summary judgment in a FOIA case, we first review *de novo* whether there is an adequate factual basis to support the district court's decision, and if there is, we then review the district court's conclusions of fact for clear error). However, the Court has now overruled this FOIA-specific summary judgment standard, and instead applies the general summary judgment standard. See Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987, 990 (9th Cir. 2016) (en banc). Accordingly, the district court's grant or denial of

motions for summary judgment is reviewed *de novo*. Id. "[W]e view the evidence in the light most favorable to the nonmoving party, determine whether there are any genuine issues of material fact, and decide whether the district court correctly applied the relevant substantive law." Id. at 989.

VI. SUMMARY OF THE ARGUMENT

This Court should affirm the district court's entry of summary judgment in favor of Defendant-Appellee. Rojas failed to produce admissible evidence sufficient to demonstrate a genuine issue of material fact with respect to his claims.

The district court properly ruled that the FAA's search for records was reasonable notwithstanding Rojas' speculation that other documents might exist. The district court also properly found that the records at issue in this case were exempt from disclosure, in their entirety, pursuant to FOIA Exemption 5 based on the declarations, Vaughn Index, and an *in camera* inspection of the withheld documents.

VII. ARGUMENT

A. Overview of the Standard of Review in FOIA Cases

The United States can only be sued to the extent that it has waived its sovereign immunity. Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987). The waiver of sovereign immunity under the FOIA provides the court with jurisdiction "to enjoin the agency from withholding agency records and to order

the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Federal jurisdiction to order disclosure is dependent on a showing that an agency has (1) "improperly" (2) "withheld" (3) "agency records." Spurlock v. FBI, 69 F.3d 1010, 1015 (9th Cir. 1995) (quoting Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136, 150 (1980)). "Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements." Spurlock, 69 F.3d at 1015 (quoting Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989)).

Under FOIA, an agency's decision to withhold information from a FOIA requester is subject to *de novo* review by the courts. 5 U.S.C. § 552(a)(4)(B). The agency bears the burden of justifying the nondisclosure of documents and establishing that particular documents are exempt from disclosure. Lane v. Dept. of Interior, 523 F.3d 1128, 1135-36 (9th Cir. 2008); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995).

FOIA cases are typically decided on motions for summary judgment because facts are rarely in dispute. See Yonemoto, 686 F.3d at 688; Lane, 523 F.3d at 1134. A defendant is entitled to summary judgment in a FOIA case when it demonstrates that no material facts are in dispute, that it has conducted an adequate search for responsive records, and that each responsive record that it has located has either been produced or is exempt from disclosure. Weisberg v. U.S. Dep't of

Justice, 627 F.2d 365, 368 (D.C. Cir. 1980); see also Zemansky v. U.S. EPA, 767 F.2d 569, 571 (9th Cir. 1985); Kissinger, 445 U.S. at 150.

To meet its burden, the agency may rely on affidavits or declarations and other evidence which show that the documents are exempt from disclosure. Lane, 523 F.3d at 1135-36. Summary judgment may be granted solely on the basis of agency affidavits or declarations if they contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption. See Lane, 523 F.3d at 1136 (citing Lewis v. IRS, 823 F.2d 375, 378 (9th Cir. 1987) ("district court need look no further"). Courts "accord substantial weight to an agency's declarations regarding the application of a FOIA exemption" where the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of agency bad faith. Shannahan v. IRS, 672 F.3d 1142, 1148 (9th Cir. 2012).

Agency declarations or affidavits (singly or collectively) are often part of the agency's Vaughn Index. See Vaughn, 484 F.2d 820; Wiener v. FBI, 943 F.2d 972, 978 n.6 (9th Cir. 1991). "A Vaughn Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption." Spurlock, 69 F.3d at 1012 n.1; (citing Citizens Comm'n on Human Rights, 45 F.3d at 1326 n.1). "Of course the explanation of the exemption claim and the descriptions of withheld

material need not be so detailed as to reveal that which the agency wishes to conceal, but they must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979); Lewis, 823 F.2d at 378 (same).

B. The FAA Conducted an Adequate Search for Documents Responsive to Rojas' FOIA Request

Under FOIA, the agency's burden is to establish that it has conducted a search "reasonably calculated to uncover all responsive documents." ACLU of Southern Cal. v. Dep't of Homeland Security, 2012 WL 5342411, at *1 (C.D. Cal. Oct. 25, 2012) (quoting Lane, 523 F.3d 1139); see also Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (superseded on other grounds by Electronic FOIA Amendments, Pub.L. No. 104-231, §8(c), 110 Stat. 3048, 3052 (1996)); Zemansky, 767 F.2d at 571. This standard of reasonableness "depends, not surprisingly, on the facts of each case." Weisberg, 745 F.2d at 1485. The agency bears the burden of demonstrating the adequacy of the search by providing a declaration that contains "reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption." Lane, 523 F.3d at 1134.

Here, Rojas challenges the sufficiency of the search by alleging that both the FAA and the district court construed his FOIA request too narrowly, and that the FAA did not conduct a reasonable search for responsive documents. (AOB 8, 15.)

1. The FAA Properly Construed Rojas' FOIA Request

Rojas' FOIA request for documents specifically sought: "information regarding the empirical validation of the biographical assessment in the rejection notification. This includes any report created by, given to, or regarding APTMetrics' evaluation and creation and scoring of the assessment." (SER 95 [¶¶3-4], 97 [¶14], 99) As set forth above, although other offices within the FAA separately responded to Rojas' FOIA request and provided responsive records, those documents are not part of this litigation. (SER 115-116.)

The documents at issue here are those that came from the search within the Employment and Labor Law Division of the Office of Chief Counsel at the FAA ("AGC-100"). (SER 97 [¶¶17-20].) AGC-100 located three documents (totaling 9 pages), which discussed the validation of the 2015 Biographical Assessment. (Id.) Those documents were withheld pursuant to FOIA Exemption 5, and are identified in the FAA's Vaughn Index. (Id.; SER 105-108.) The response provided by AGC-100 is the response at issue in this case. (SER 97 [¶¶18-20], 103.)

On appeal, Rojas argues that the district court and the FAA failed to properly construe his FOIA request, and that the district court "erred in interpreting

the scope of the FOIA request to include only the summaries of the validation study rather than the summaries along with the validation study itself and the raw data collected during the study." (AOB 8-9.) However, there was no misinterpretation of the FOIA request. The Armstead Declaration confirms that all of the attorneys within the Office of the Chief Counsel who provided legal advice related to the revisions to the ATCS hiring process were asked to search their records, and that the search for records within the AGC-100 was reasonably calculated to obtain documents responsive to Rojas's FOIA request. (SER 97 [¶¶ 14-20].) Those documents are identified in the Vaughn Index. (SER 105-108.) Contrary to Rojas' speculation, there is no indication that the search was limited to summaries, excluded any validation study, or that any additional documents even exist.

Moreover, in the district court, the parties stipulated to vacate the settlement conference deadline and instead proceed to summary judgment since the parties agreed that the documents at issue (as identified in the Vaughn Index) had been properly identified and the only issue in the case concerned the legal basis for the FAA's decision to withhold the responsive records. (ER 5; SER 110-111, 113 [¶9].) The district court approved the Stipulation. (SER 2.) Thus, there was no challenge to the sufficiency of the search at that time.

In opposition to summary judgment, Rojas argued generally that it was "questionable" whether the FAA had uncovered all documents regarding the validation study because the FAA originally searched for records regarding the wrong year, and because former validation studies done the by the FAA were "well over 100 pages and consisted of multiple volumes" as opposed to the 9 pages of documents identified in this case. (ER 81.) However, the focus of the underlying action was whether Exemption 5 applied to the documents that were located. There was no further argument regarding an insufficient search. (ER 82-92.)

On appeal, Rojas continues to speculate that additional documents, specifically "validation studies," must exist and relies on excerpts from the transcript of the summary judgment hearing. (AOB 14.) Rojas argues that the "summaries" at issue are different than a "validation study." There is no dispute that the documents are different. The records identified in this case are described in the Armstead Declaration as follows:

> "Reasonably expecting litigation about the Agency's ATCS hiring process the Office of the Chief Counsel specifically and directly requested APTMetrics to conduct an analysis to determine the validity of the BA as an instrument in the hiring process. The office of the Chief Counsel requested that the outcome of this analysis be sent directly to AGC-100 in anticipation of litigation."

(SER 98 [¶23].) The records are described in the Scott Declaration as follows:

> "At the request and direction of the FAA's Office of Chief Counsel, APTMetrics created summaries and explanations of the validation analyses supporting the use of the updated BA in 2015."

(SER 94 [¶7].) The district court reviewed these documents *in camera*, and found the documents subject to Exemption 5 (CR 35, 36.)

2. The FAA Conducted an Appropriate Search for Any and All Responsive Records

In response to a FOIA request, a reasonable search is one that covers those locations where responsive records are likely to be located. Oglesby, 920 F.2d 68. To satisfy its obligation, "the agency must show that it 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." Id.; see also, ACLU of Southern Cal., 2012 WL 5342411 at *1. The issue is not whether there might exist any other records possibly responsive to the request, but rather whether the search for responsive records was reasonable. Citizens Comm'n, 45 F.3d at 1328; Vest v. Dep't of the Air Force, 793 F. Supp. 2d 103, 120 (D.D.C. 2011) (finding that "the FOIA does not mandate a 'perfect' search, only an 'adequate' one"); Zemansky, 767 F.2d at 571; Weisberg, 745 F.2d 1485; Hamdan v. United States DOJ, 797 F.3d 759, 766 (9th Cir. 2015).

Rojas argues that former validation studies by the FAA have been well over 100 pages and therefore concludes that because only three documents were identified by AGC-100 in this case, the search was somehow insufficient. However, as explained in the Armstead and Scott Declarations, although the FAA undertook a comprehensive review of the ATCS selection and hiring process in 2012, only interim validation work was conducted related to the 2014 and 2015 vacancy announcements and the BA selection tool used in both of those hiring processes. (SER 95-96 [¶¶5-7, 10-11], 93-94 [¶¶3-9].) Thus, there is no evidence that a full validations study was necessary.

The documents identified in the Vaughn Index are summaries and explanations of the validation analysis supporting the use of the updated BA in 2015, which were requested by the FAA's Office of Chief Counsel. (SER 97 [¶18], 93-94 [¶¶6-8], 105-108.) Those summaries or explanations are entirely different from the "validation studies" that Rojas argues were used to validate the selection process in previous hiring cycles. Rojas' own exhibit sheds light on the interim procedures used during the 2014-2015 time period. (SER 126-129.) The letter from FAA Administrator Michael Huerta to the Chair of the Subcommittee on Aviation Operations, Safety, and Security, dated December 8, 2015, confirms that the FAA undertook a comprehensive review of the ATCS selection and hiring

process in 2012 and subsequently retained nationally recognized human resources consultants, APTMetrics to assist with that process. (Id.)

However, while that work continued, FAA identified the need to hire and train ATC specialists as part of its 10 year workforce plan. "As a result, in February 2014, the FAA implemented the 2014 Interim Hiring Process for one-time use, incorporating as many of APTMetrics' initial recommendations as practicable…" (SER 127.) The 2015 entry-level ATCS hiring process was substantially similar to the 2014 interim process, but with modifications including a newly refined BA, an alternate, but equal version of the AT-SAT, and the issuance of a separate vacancy announcement for experienced air traffic controllers. (SER 128-129.) Thus, Rojas' presumption that "validation studies" like those that may have been done in past hiring cycles were done, or should have been done for the 2014 and 2015 interim hiring processes is speculative.

Thus, the Armstead Declaration establishes that the FAA's search was reasonably calculated to uncover records in the AGC-100's possession, responsive to Rojas' FOIA Request for information regarding the empirical validation of the BA, including any reports by APTMetrics.

C. The FAA Provided A Sufficiently Detailed Vaughn Index and Declarations

The purpose of a Vaughn index is to ameliorate the imbalance inherent to FOIA litigation: that the agency knows the contents of its records while the Rojas

and the Court do not. Ogelsby, 79 F.3d at 1178; see King v. Dep't of Justice, 830 F.2d 210, 218 (D.C. Cir. 1987); Campaign for Responsible Transplantation v. FDA, 180 F. Supp. 2d 29, 32 (D.D.C. 2001). A Vaughn index is intended, in part, to afford the requester a meaningful opportunity to challenge the agency's claims of exemption. Ogelsby, 79 F.3d at 1178. There is no set formula for a Vaughn index. Rather, "it is well established that the critical elements of the Vaughn index lie in its function, and not in its form." Kay v. FCC, 976 F. Supp. 23, 35 (D.D.C. 1997); see Hinton v. Dep't of Justice, 844 F.2d. 126, 129 (D.C. Cir. 1988) (holding that a Vaughn index is sufficient if "the requester and the trial judge [are] able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure"). In this Circuit, this means "identify[ing] each withheld document, describ[ing] its contents to the extent possible, and giv[ing] 'a particularized explanation of why each document falls within the claimed exemption.'" Yonemoto, 686 F.3d at 695. [4]

In this case, the FAA has filed a Vaughn Index that provides a detailed description of each record withheld from Rojas; the date of the record; the author

[4] Contrary to Rojas' contention that the Vaughn Declarations should have identified the staff members contacted about the FOIA request, and should have named the individual attorneys within the Office of Chief Counsel who searched for records (AOB 16-17), courts have generally held that agencies are not required to answer questions posed as FOIA requests. See, e.g., Zemansky, 767 F.2d at 574. Rojas cites no authority to support that argument that the names of individuals who conducted the search must be included in a Vaughn Index.

and intended recipient of the record; the number of pages of the entire record, including attachments; the number of pages withheld; the claim of relevant exemptions; and a description of the withheld or redacted document. As explained in the Vaughn index and below, the information that FAA withheld from the records produced to Rojas is exempt from disclosure under FOIA Exemption 5. See 5 U.S.C. §§ 552(b)(5).

Rojas further argues that because the district court undertook an *in camera* review of the documents at issue, that action implies that the affidavits were vague or did not include sufficient detail. (AOB 19.) However, there are many reasons that the court may undertake an *in camera* review, including in the interest of efficiency when a relatively few number of documents are at issue, as was the case here. See e.g., Elec. Privacy Info. Ctr., 384 F. Supp. 2d 100, 119 (D.D.C. 2005); Maynard v. CIA, 986 F.2d 547, 558 (1st Cir. 1993) ("*In camera* review is particularly appropriate when the documents withheld are brief and limited in number.") Here, the district court made no finding that the declarations were insufficient. (ER 4-5.) After reviewing the records, the district court found them to be “summaries of the ATCS hiring process, the 2015 biographical assessment, and the validation process and results” and found them to be properly withheld under Exemption 5. (Id.)

D. The FAA Properly Withheld the Documents at Issue Based on FOIA Exemption 5

The FOIA enumerates nine categories of records that Congress determined should be exempt from public disclosure. 5 U.S.C. § 552(b). As noted by the Supreme Court in CIA v. Sims, 471 U.S. 159, 166-67 (1985), "[t]he mandate of the FOIA calls for broad disclosure of Government records." Congress recognized, however, that public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U.S.C. § 552(b).

Here, the FAA properly relied upon Exemption 5 to justify the withholdings addressed herein. The Declarations of Ms. Armstead, an Assistant Chief Counsel for the FAA, and Mr. Scott, the Chief Operating Officer of APTMetrics, along with the Vaughn Index, demonstrate that the FAA properly determined that the documents at issue in this case fall within the FOIA Exemption 5 for attorney work-product communications. In addition, the district court's *in camera* review of the documents and subsequent ruling in favor of the FAA on the attorney work-product exemption supports the withholding of the documents.

On appeal, it appears that Rojas recognizes that "the summaries of the validation studies may be considered memoranda which would not be discoverable as attorney work-product," but continues to challenge the FAA's and the district court's interpretation of the request or the inclusion of any "validation studies" that

he believes exist. (AOB 25.) Those arguments are addressed above in regard to the sufficiency of the search. However, to the extent Rojas is arguing that the documents identified by AGC-100 in response to Rojas' FOIA request and the Vaughn Index should have been released, his arguments fail.

1. The Documents Are Inter-Agency Memorandums

FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5); see also 21 C.F.R. §20.62. Courts construe this language to exempt those documents that would not be available to an agency's opponent in a civil discovery context and to incorporate all evidentiary privileges that would be available in that context. Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 148-49 (1975) (holding that Exemption 5 exempts those documents that would be privileged as deliberative process, attorney-client communications, and attorney work-product); see also Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001); United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984); Nat'l Resources Defense Council v. Dep't of Defense, 388 F. Supp. 2d. 1086, 1097 (C.D. Cal. 2005) (holding that "Exemption 5 entitles an agency to withhold from the public inter-agency or intra-agency records that are otherwise protected by the attorney-client privilege, the attorney work-product privilege, or the 'deliberative process'

privilege) (quoting Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997)).

Thus, the threshold issue under Exemption 5 is whether the records in question qualify as "inter-agency or intra-agency memorandums." 5 U.S.C. § 552(b)(5). The information withheld pursuant to Exemption 5 here — records relating to FAA's hiring process for ATCS, among other issues — clearly satisfy this threshold. Although the documents originated with APTMetrics, an outside agency, federal courts have given the "inter-agency" portion of Exemption 5 an expansive reading, recognizing that federal agencies frequently have a need for the opinions and recommendations of temporary consultants and that such advice can play an integral function in an agency's decision-making. See Soucie v. David, 448 F.2d 1067, 1078 N. 44 (D.C. Cir. 1971); CNA Fin.Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987) ("[F]ederal agencies occasionally will encounter problems outside their [expertise], and it clearly is preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities."). Where agencies seek outside advice in such matters, the consultants effectively function as agency employees. See e.g., Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 184-85 (D.C. Cir. 1987) (upholding application of Exemption 5 to material supplied by outside contractors); Citizens for Responsibility & Ethics in Wash. v. DHS, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (protecting documents prepared by

contractors for FEMA); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1191 (N.D. Cal. 2006) (upholding agency's invocation of Exemption 5 to protect documents prepared by private contractor hired to perform audit for agency).

On appeal, Rojas argues that the district court erred in finding that the records at issue were inter-agency memoranda. (AOB 24.) However, the FOIA's definition of "record" expressly provides that the term includes information that qualifies as a record under the FOIA and is maintained for an agency by an entity under government contract. 5 U.S.C. § 552(f)(2)(B). The cases set forth above provide that Exemption 5 does apply to materials provided to government agencies by outside constractors. Rojas relies on Electronic Frontier Foundation v. Office of the Director of Nat'l Intelligence, 639 F.3d 876, 889-91 (9th Cir. 2010) to argue that the Court should take a narrow view of the definition of "agency" that would exclude contractors. (AOB 27.) However, in that case, the Court distinguished documents exchanged between the Executive branch, Congress, and telecommunications carriers (with no indication that the carriers had government contract). (Id. at 891.) Accordingly, Electronic Frontier is inapposite.

In this case, as set forth in the Armstead and Scott Declarations, the FAA retained APTMetrics, an outside contractor with applicable experience and specialty, to conduct a thorough review of the ATCS hiring process, to develop a Biographical Assessment test to be used in that process and to validate the test.

Although the FAA initially retained APTMetrics in 2012, APTMetrics' work has spanned several different, yet related, aspects of the ATCS selection process. In addition, its scope of work has specifically included assistance to the FAA in anticipation of litigation against the agency concerning the ATCS hiring process and specifically, the use of the BA in this case. (See SER 93-98.) Thus, FOIA Exemption 5 is properly applied to the documents provided by APTMetrics to the FAA in this case.

2. The Attorney Work-Product Privilege

a. The Documents Were Prepared In Anticipation of Litigation

Before the district court, Rojas argued that the FAA could not assert attorney-client /work-product privilege over the 2015 validation summaries because the FAA was required "by statute and regulation" to complete these studies in the ordinary course of business, citing 42 U.S.C. § 2000e-2(h), 41 C.F.R. § 60-3.5 and 41 C.F.R. § 60-3.7. However, these authorities do not support his argument. Thus, Rojas apparently abandoned this argument on appeal.

Instead, Rojas argues that there is insufficient evidence in the record to determine when litigation was reasonably anticipated. (AOB 31.) Again, Rojas ignores the "summaries" that have been identified in response to his FOIA request and are the subject of this litigation, and instead argues that the "validation studies" that he believes should exist must, but were not located or identified in this case,

were not prepared in anticipation of litigation. He argues that there is no evidence to suggest that the "validation studies" are anything other than a record maintained in the ordinary course of business. (AOB 31, 34.) In fact, there is no evidence in the record that "validation studies" even exist for the 2015 hiring process.

However, in regard to the records that have been identified here, the Armstead Declaration clearly sets forth the time frame in regard to the documents at issue. The summaries were requested by Office of Chief Counsel in November 2014, *after* an unsuccessful applicant for an ATCS position filed a "Class EEO Complaint" in March 2014 and a "Formal Complaint" in April 2014. (SER 96 [¶¶8-10].) The summaries were provided to FAA counsel in December 2014 and January 2015. (SER 96 [¶11].) Thus, all of the documents identified in The FAA's Vaughn Index are dated after the FAA learned of the litigation by unsuccessful applicants for ATCS positions. (SER 105-108.)

Rojas also relies on a transcript of a January 8, 2014 telephone conference to claim that there was no pending litigation at the time. (AOB 32.) However, the portions of the transcript included in the ER do not properly identify the person making that representation,[5] and thus provide no evidence to controvert the

[5] Despite including the entire transcript in the district court record, Rojas includes only portions in the ER which fail to identify the numerous individuals on the phone call. (ER 106, 113.) The individual who makes the statement that no litigation was pending is identified in another part of the transcript as Mike McCormick, the Vice President of Management Services for an "air traffic

Armstead declaration concerning the FAA Office of Chief Counsel's anticipation of litigation regarding the 2014 and 1015 hiring processes as set forth above.

b. The Documents Were Not Prepared In The Ordinary Course of Business

Rojas contends that even if the summaries were created in anticipation of litigation, the "validation studies proper" were created in the ordinary course of business. (AOB 34.) However, there is sufficient evidence that APTMetrics' created the summaries (the only documents at issue here) at the request of the FAA Chief Counsel's Office, and not in the ordinary course of business. (AOB 34.) The summaries were created solely at the request and direction of FAA Counsel and were not shared with other elements of the FAA outside the OGC. (SER 96 [¶¶10-11], 94 [¶¶7-8].) Moreover, courts have accorded work product protection to materials prepared by non-attorneys who are supervised by attorneys. See, e.g., Shacket v. United States, 339 F. Supp. 2d 1092, 1096 (S.D. Cal. 2004) (holding it "irrelevant" that report withheld pursuant to work-product privilege was prepared by IRS Special Agent, not attorney; observing that privilege extends to an attorney "or other representative of a party"); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 75-76 (D.C. Cir. 2003) (rejecting claim that privilege is limited to materials

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organization." (SER 136-137.) There is no evidence that Mr. McCormick is in any way associated with the Office of Chief Counsel, or has information regarding matters that might be in the administrative process or in litigation.

prepared by attorney, and citing Federal Rule of Civil Procedure 26(b)(3) for proposition that privilege extends to documents created at direction of attorney.) Thus, in this case, where APTMetrics was acting in a human resources capacity for the FAA and consulting with the Office of Chief Counsel, the work-product protection is appropriate.

Moreover, even in a situation where a document may have been created for more than one purpose, the work-product privilege has been found to apply if the agency can show that the document was created at least in part because of the prospect of litigation. See United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998) (determining, in non-FOIA case, that "a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of [Federal Rule 26(b)(3)]"); Hertzberg, 273 F. Supp. 2d at 80 (D.D.C. 2003) (rejecting "primary purpose" test); Maine v. Norton, 208 F. Supp. 2d 63, 67 (D. Me. 2002) (applying privilege in civil discovery context to documents created in ordinary course of agency business, so long as agency could show that they were prepared in light of possible litigation).

Moreover, this privilege is not limited to civil proceedings, but rather extends to administrative proceedings as well. See, e.g., Schoenman v. FBI, 573 F. Supp. 2d 119, 143 (D.D.C. 2008) (upholding use of privilege for documents “created by an attorney in the context of an ongoing administrative proceeding that

eventually resulted in litigation"); Nevada v. Doe, 517 F. Supp. 2d 1245, 1260 (D. Nev. 2007) (noting that privilege applies to administrative proceedings, as long as they are "adversarial").

Here, the Declarations of Ms. Armstead and Mr. Scott show that following the filing of an EEO Complaint regarding the ATCS hiring practices, the FAA requested that APTMetrics assist in summarizing elements of the validation work in regard to the BA test. (See SER 96 [¶¶7-10], 93-94 [¶¶6-8].) Those documents were clearly prepared in anticipation of litigation in both administrative proceedings and before the district court. (Id.) Thus, the FAA properly asserted the attorney work-product privilege under FOIA Exemption 5 in order to protect the documents at issue.

3. The Records at Issue Were Not "Reasonably Segregable"

FOIA requires that if a record contains information that is exempt from disclosure, an agency must disclose any "reasonably segregable" information after deletion of the exempt information, unless the non-exempt portions are "inextricably intertwined with exempt portions." 5 U.S.C. § 552(b); see Billington v. Dep't of Justice, 233 F.3d 581, 586 (D.C. Cir. 2000); Krikorian v. Dep't of State, 984 F.2d 461, 466 (D.C. Cir. 1993). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with reasonable specificity" that the information it has withheld cannot be further

segregated. Armstrong v. Exec. Office of the President, 97 F.3d 575, 578-79 (D.C. Cir. 1996); see Canning v. Dep't of Justice, 567 F. Supp. 2d 104, 110 (D.D.C. 2008).

Here, the FAA has satisfied its segregability obligation. First, the Armstead declaration demonstrates that the agency has reviewed all of the records responsive to Rojas's FOIA Request and determined that no portions of the documents were segregable. (SER 97 [¶19].) The FAA described each document withheld and has established, with reasonable specificity, that it withheld only exempt documents that could not reasonably be segregated. The FAA properly concluded that the agency could release no further information without compromising information exempt under Exemption 5. Accordingly, the FAA has complied with the FOIA's segregation requirements.

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VIII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's summary judgment in favor of the FAA.

Dated: November 21, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,309 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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STATEMENT OF RELATED CASES

Counsel for Appellee is aware of a related Ninth Circuit case filed November 20, 2017: Rojas v. FAA, CA 17-17349.

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