ORAL ARGUMENT NOT YET SCHEDULED

Nos. 13-5113, 13-5114

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
Defendant-Appellee.

On Appeal from the
United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

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October 1, 2013

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES, AND CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and D.C. Cir. Rules 27(a)(4) and 28(a)(1)(A), Appellant certifies as follows:

A. Parties and Amici

Appellant is the Electronic Privacy Information Center ("EPIC"). EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, nor affiliate. EPIC has never issued shares or debt securities to the public. EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.

The Appellee in case No. 13-5113 is the U.S. Department of Homeland Security ("DHS"). The Appellee in case No. 13-5114 is the Transportation Security Administration ("TSA). Both DHS and TSA are federal agencies subject to the FOIA.

No *amici* appeared before the district court. Citizens for Responsibility and Ethics ("CREW"), a nonprofit 501(c)(3) organization dedicated to promoting ethics and accountability in government, intends to file a brief as *amicus curiae* in this case.

B. Ruling Under Review

Appellant seeks review of two Opinions and Orders of Chief Judge Royce C. Lamberth of the United States District Court for the District of Columbia: one Opinion and Order in case number 1:10-cv-01992, and the other Opinion and Order in case number 1:11-cv-00290. The 10-1992 Order granted in part and denied in part motions for summary judgment by DHS and EPIC. *EPIC v. DHS*, 928 F.Supp.2d 139 (D.D.C. 2013). The 11-290 Order granted in part and denied in part motions for summary judgment by TSA and EPIC. *EPIC v. TSA*, 928 F.Supp.2d 156 (D.D.C. 2013). The two rulings are located in the Joint Appendix at JA 001-022, 256-276.

C. Related Cases

EPIC v. DHS was appealed from case number 1:10-cv-01992 in the United States District Court for the District of Columbia. The District Court closed this case on March 7, 2013. *EPIC v. TSA* was appealed from case number 1:11-cv-00290 in the United States District Court for the District of Columbia. The District Court closed this case on March 7, 2013. These two cases were consolidated by this Court on July 30, 2013. There are no other related cases pending before this Court or any other Court in the United States.

D. Corporate Disclosure Statement

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and

to protect privacy, the First Amendment, and other Constitutional values. EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public.

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Dated: October 1, 2013

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TABLE OF AUTHORITIES[1]

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[1] Authorities upon which we chiefly rely are marked with asterisks.

Statutes

GLOSSARY

AIT	Advanced Imaging Technology
ATR	Automated Target Recognition
DHS	U.S. Department of Homeland Security
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act
JA	Joint Appendix
TSA	Transportation Security Administration

JURISDICTIONAL STATEMENT

The district court had jurisdiction to review the Defendants' refusal to disclose records in response to EPIC's Freedom of Information Act Requests pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

This Court has jurisdiction to review this appeal pursuant to 28 U.S.C. § 1291. This appeal is from two final judgments entered by a District Court within the District of Columbia Circuit on March 7, 2013, disposing of all parties' claims. EPIC's timely notices of appeal were filed on April 19, 2013. EPIC filed a motion to consolidate the appeals on May 20, 2013, which this Court granted on July 30, 2013.

STATEMENT OF ISSUE FOR REVIEW

This appeal presents an important question of law under the Freedom of Information Act. The Appellant EPIC seeks factual information regarding evaluation and testing of the health risks and reliability of airport body scanner technology contained in documents withheld by Appellees, the Department of Homeland Security and its subcomponent, the Transportation Security Administration. The Defendants have refused to disclose factual materials sought by EPIC on the grounds that they were part of the deliberative process. The question presented is:

- Whether the District Court erred in failing to apply this Court's "inextricably intertwined" test to determine whether records containing non-deliberative, factual materials may properly be withheld in their entirety under Exemption 5 of the Freedom of Information Act.

PERTINENT STATUTORY PROVISIONS

The Freedom of Information Act

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

***

(3)(A) *** each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.
***

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's

determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)

***

(b) This section does not apply to matters that are—

***

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

***

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

STATEMENT OF THE CASE

This case arises from two Freedom of Information Act requests filed with the Department of Homeland Security ("DHS") and its subcomponent, the Transportation Security Administration ("TSA"), for records concerning the health and safety impact of airport body scanners. This Court previously determined that the agencies failed to undertake a rulemaking to solicit public comment prior to the decision to deploy these devices for primary screening in U.S. airports. *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011). And, subsequent to the agency's decision to deploy these devices, approximately half were removed from U.S. airports for

reasons related to the subject matter of EPIC's FOIA requests. *See*, *e.g.*, Ron Nixon, *Unpopular Full-Body Scanners to Be Removed from Airports,* N.Y. Times, Jan. 18, 2013, at A11.

EPIC pursued several FOIA requests concerning the TSA's decision to deploy whole body imaging devices at airports in the United States. *EPIC v. DHS*, 928 F. Supp. 2d 139, slip op. at 1 (D.D.C. 2013). (JA 001.) The use of these devices raised widespread public concern about privacy, health, and even whether the devices were effective. In 2010, the TSA began using body scanners as the primary method for screening U.S. passengers. *EPIC v. TSA*, 928 F. Supp. 2d 156, slip op. at 1 (D.D.C. 2013). (JA 256.) In response to privacy concerns, the TSA developed Automated Target Recognition ("ATR") software for the body scanner machines, which the agency claimed "auto-detect potential threat items and indicate their location on a generic outline of a person." *Id*. at 2. (JA 257.) EPIC sought information about the effectiveness of that technique as well.

EPIC v. DHS, No. 10-cv-1992

On July 13, 2010, EPIC filed a Freedom of Information Act ("FOIA") request with the DHS seeking records related to the radiation exposure and health risks to travelers posed by the body scanners. *DHS*, slip op. at 1. (JA 001.) Specifically, EPIC requested:

> 1. All records concerning TSA tests regarding body scanners and radiation emission or exposure. 2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

Id. at 2. (JA 002.) EPIC filed a FOIA action against DHS in the U.S. District Court for the District of Columbia on November 19, 2010, after exhausting administrative remedies. (Pl.'s DHS Compl.) (JA 027.)

The case was initially assigned to Judge Rodger Contreras, and the DHS filed its Answer on January 5, 2011. (DHS Answer.) (JA 037.) The parties then filed a Joint Proposed Briefing Schedule on January 20, 2011. (DHS Docket at 1.) (JA 023.) The DHS subsequently filed its Motion for Summary Judgment on September 12, 2011. (*Id.* at 2.) (JA 024.) EPIC filed its Cross Motion for Summary Judgment and Memorandum in Opposition on October 31, 2011. (*Id*. at 3) (JA 025.) The DHS filed its Memorandum in Opposition and Reply on November 18, 2011. (*Id*.) And EPIC filed its final Reply on December 2, 2011. (*Id*.) The case was reassigned to Chief Judge Royce Lamberth on January 4, 2013. (*Id*.)

EPIC v. TSA, No. 11-cv-0290

On June 15, 2010, EPIC submitted a FOIA request to the TSA seeking records related to the testing and implementation of ATR software modifications to airport body scanners. *EPIC v. TSA*, 928 F. Supp. 2d 156, slip op. at 1 (D.D.C. 2013) . (JA 256) Specifically, EPIC requested:

> 1) All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems. 2) All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins. 3) All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described in Secretary Napolitano's letter to Senator Collins. 4) All records evaluating the FBS program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

TSA, slip op. at 2. (JA 257.)

On October 5, 2010, EPIC filed a related FOIA request seeking ATR records from the DHS. *Id*. at 3. (JA 258.)

EPIC requested:

> 1. All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications; 2. All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications; 3. All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

Id. This request was forwarded to the TSA. EPIC filed suit against the TSA in the U.S. District Court for the District of Columbia on Feb. 2, 2011, after exhausting administrative remedies. (Pl.'s TSA Compl.) (JA 281.)

The case was initially assigned to Judge Amy Berman Jackson, and the TSA filed its Answer on March 16, 2011. (TSA Answer.) (JA 292.) The parties filed a Meet and Confer Statement on June 6, 2011, and the court issued its Scheduling

Order on June 13, 2011. (TSA Docket at 1.) (JA 277.) The parties then filed a Status Report on August 4, 2011. (*Id*. at 2.) (JA 278.) The TSA filed its Motion for Summary Judgment on September 16, 2011. (*Id*. at 3.) (JA 279.) EPIC then filed its Cross Motion for Summary Judgment on October 14, 2011. (*Id*.) The TSA filed its Memorandum in Opposition and Reply on November 1, 2011. (*Id*.) And EPIC filed its final Reply on November 15, 2011. (*Id*.) The case was reassigned to Chief Judge Royce Lamberth on January 4, 2013. (*Id*.)

The District Court Opinions

These cases were reassigned to Chief Judge Royce Lamberth on January 4, 2013, and opinions in both were issued on March 7, 2013. *EPIC v. DHS*, 928 F. Supp. 2d 139, slip op. at 1 (D.D.C. 2013). (JA 001.); *EPIC v. TSA*, 928 F. Supp. 2d 156, slip op. at 1 (D.D.C. 2013). (JA 256.) At issue in both cases was the application of FOIA Exemption 5, which allows agencies to withhold certain records protected by the deliberative process privilege. 5 U.S.C. § 552(b)(5). In both cases, EPIC challenged the agency's withholding of records containing purely factual information not protected by the exemption.

In *EPIC v. DHS*, EPIC challenged a number of withholdings as containing purely factual information. EPIC asserted that "[t]he agency is withholding 'fact sheets,' 'preliminary testing results,' and information regarding types of dosimeters (personal radiation monitors that could be appropriate for measuring radiation from

AIT devices).” *DHS*, slip op. at 14. (JA 014.) Despite the existence of factual information, the Court allowed all of these documents to be withheld in full. “The Court finds that all of these materials, factual or not, were properly withheld under exemption 5, because they are all part of DHS’s deliberative process regarding the future of the AIT program.” *Id*. The Court did not determine whether any of the factual materials in these documents were reasonably segregable or whether they were inextricably intertwined.

In *EPIC v. TSA*, EPIC challenged the agency’s withholding of several documents containing factual material related to the ATR program. These included a memorandum to a DHS undersecretary and four memoranda on ATR testing results and methodologies. Again, despite the existence of factual information, the Court allowed these documents to be withheld in full or in part because “they were part of the agency’s deliberative process.” *EPIC v. TSA*, 928 F. Supp. 2d 156, slip op. at 16 (D.D.C. 2013). (JA 271.) The Court did not determine whether these withheld factual materials were reasonably segregable or inextricably intertwined with deliberative materials.

This appeal followed.

Docketing of the Appeals and Consolidation

The Notices of Appeal were filed in both cases on April 16, 2013. (DHS Docket at 2; TSA Docket at 4.) (JA 026, JA 280.) Both appeals, *DHS* No. 13-5113

and *TSA* No. 13-5114, were docketed on April 19, 2013. EPIC then submitted its initial filing documents as well as a Motion to Consolidate the cases on May 20, 2013. The Government filed a Response in Opposition to the Motion to Consolidate on June 3, 2013. EPIC filed a Reply to the Government's Response on June 5, 2013. The Court then issued a Per Curiam Order on July 30, 2013 granting EPIC's Motion to Consolidate. On August 12, 2013 the Clerk issued an Order setting the briefing schedule as: Appellant Brief due 10/01/2013; Appendix due 10/01/2013; Amicus for Appellant Brief due 10/16/2013; Appellee Brief due on 11/15/2013; Appellant Reply Brief due on 11/29/2013.

Responsive Materials Sought on Appeal

EPIC seeks review of the District Court's Order authorizing the DHS to withhold the following documents from *EPIC v. DHS*, No. 10-1992. All were withheld in full under Exemption 5 as deliberative materials:

- "Draft Fact Sheet on Radiation Exposure": This document, withheld in full, contains "[e]arly, internal draft versions of a fact sheet on radiation exposure and AIT." (Coursey Decl. Ex. A. ("TES" *Vaughn* Index) 604-05.) (JA 180.)
- "Working Document on Radiation Exposure": This document, withheld in full, is an "[i]nternal working DHS document compiling estimates of radiation exposure from various types of AIT based on external, unverified data." (TES *Vaughn* Index 606.) (JA 180.)
- "Draft Fact Sheets on Health & Safety": These documents, withheld in full, are "working drafts of DHS 'fact sheet[s]' on health and safety issues related to AIT." (Beresford Decl. Ex. C ("TSL *Vaughn* Index") WHIF B.) (JA 235.)
- "Preliminary Test Results": This document, withheld in full, "is a preliminary progress report, resulting from an interagency agreement

between DHS and FDA, by the FDA concerning the testing of the effects of the L3 Provision on personal medical devices." (Beresford Decl. ¶ 39(c); TSL *Vaughn* Index WHIF L.) (JA 202)

EPIC also seeks review of the District Court's Order authorizing the TSA to withhold the following portions of its "ATR Letter of Assessment"[2] in *EPIC v. TSA*, No. 11-290:

Bates #	Pages	Document Description
468-475	7 pages partially withheld, 1 page withheld in full	Analysis of ATR's compliance with specific security performance objectives; conclusions and recommendations for future testing and evaluations.

The redacted portions of this letter were withheld under Exemption 5 as deliberative materials.

[2] (TSA Sotoudeh Decl. ¶ 38; TSA Mot. Summ. J. Ex. 1-C ("TSA *Vaughn* Index").) (JA 344-345; JA 352.)

SUMMARY OF ARGUMENT

Under the FOIA an agency seeking to withhold factual records as part of the deliberative process privilege must show that the materials are either "inextricably intertwined" with deliberative materials or that their disclosure would reveal the deliberative process. In this consolidated case, two agencies withheld factual materials responsive to EPIC's FOIA requests without satisfying either standard. The lower court concluded in both cases that the factual materials were "part of" the agencies' deliberative processes but did not find they were inextricably intertwined or that their disclosure would reveal the agency's deliberative processes. Because the District Court did not make these findings in either case, the lower court erred when it held that the contested materials were properly withheld.

ARGUMENT

FOIA Exemption 5 permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). To qualify for Exemption 5, responsive records must come from a government agency and must fall within a litigation privilege against discovery. *Dep't of Interior v. Klamath*

Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).[3] One such privilege incorporated by Exemption 5 is the deliberative process privilege, which "protects agency documents that are both predecisional and deliberative." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006); s*ee also Klamath*, 532 U.S. at 8 (covering "documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated").

While deliberative documents may be withheld, this privilege "clearly has finite limits." *EPA v. Mink*, 410 U.S. 73, 87 (1973) . Materials discoverable in civil litigation are typically not protected, especially factual materials. "[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery" and therefore is outside the scope of Exemption 5. *Id*. at 87-88. As this Court has recently explained:

> The FOIA's deliberative process privilege. . . "does not authorize an agency to throw a protective blanket over all information . . . . Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended."

[3] As the Supreme Court stressed, "disclosure, not secrecy, is the dominant objective of the Act," and, consistent with that purpose, the exemptions "have been consistently given a narrow compass." *Klamath*, 532 U.S. at 8.

Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 238 (D.C. Cir. 2008) (citing *Bristol-Myers Co. v. Fed. Trade Comm'n*, 424 F.2d 935, 939 (D.C. Cir. 1970)) (requiring the agency to disclose previously withheld scientific reports pursuant to the APA).

I. Segregation of Purely Factual Materials Is Key to the Application of Exemption 5 to Deliberative Materials

Segregability is the lynchpin of the FOIA, allowing courts and agencies to ensure that agency records that can be disclosed are disclosed to FOIA requesters. Segregability provides agencies with a precise tool to carve out sensitive portions of responsive documents, affording them the opportunity to comply with the FOIA with granularity. Thus, this Court has said that the focus of the FOIA "is information, not documents." *Stolt-Nielson Transp. Group Ltd. v. United States*, 534 F.3d 728, 733-34 (D.C. Cir. 2008) (citing *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (1977)). As a result, the FOIA creates an affirmative obligation to segregate and release all non-exempt materials; "an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Id*.

As the Court has recently explained, the discovery privileges incorporated by Exemption 5 do not override the segregability principle, but instead "work in conjunction" to ensure that agencies satisfy their duty to produce non-exempt materials even when they appear in the same record as protected materials. *Judicial*

Watch, Inc. v. DOJ, 432 F.3d 366, 369 (D.C. Cir. 2005). In order to identify deliberative materials protected under Exemption 5, "the agency has the burden of establishing what deliberative process is involved." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980). This burden "cannot be shifted to the courts by sweeping, generalized claims of exemption;" instead, the agency must provide a "detailed justification" of its exemptions and identify those portions of the materials that are non-exempt. *Mead Data Cent.*, 566 F.2d at 216.

A. Segregability Is An Affirmative Duty Under the FOIA

The agency's obligation to segregate the protected and non-protected materials from records responsive to a FOIA request derives directly from the Act. 5 U.S.C. § 552(b). As a result, district courts have developed a set of tools to review the adequacy of the agency's segregability analysis, including agency affidavits, *in camera* review, a *Vaughn* index, the disclosed portions of responsive records, and combinations thereof. *Mead Data Cent.*, 566 F.2d at 260. The agency must support its claimed exemptions with an adequate description and explanation in order to provide "the requestor with a realistic opportunity to challenge the agency's decision." *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). The court cannot find that the agency has provided the requestor with that opportunity without first finding that the agency has met its statutory obligation. *Id*.

The FOIA provides that:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made.

5 U.S.C. § 552(b). Thus, if the agency fails to "provide 'specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA,'" then the agency has not met its statutory obligation. *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (citing *Mead Data Cent.*, 566 F.2d at 258). This Court has articulated the lower court's obligation to rule on segregability as "an affirmative duty to consider the segregability issue *sua sponte*." *Id*. at 1123 (citing *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999)). *See also Juarez v. Dep't of Justice*, 518 F.3d 54, 60 (D.C. Cir. 2008) ("We recently reiterated that the district court both has an affirmative duty to consider the segregability issue *sua sponte* and that it errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability") (internal quotations and citations omitted).

As a result, a court "clearly errs when it approves the government's withholding of information under the FOIA without making an express finding of segregability." *Morley*, 508 F.3d at 1123 (citing *PHE, Inc. v. Dep't of Justice*, 983

F.2d 248, 252 (D.C. Cir. 1993)). *See also Schiller v. NLRB*, 964 F.2d 1205, 1210 (D.C. Cir. 1992) ("Because the district court approved the withholding of all five documents without entering a finding on segregability or the lack thereof, we remand this case for further proceedings to determine whether or not the documents contain passages that can be segregated and disclosed.") (abrogated on other grounds by *Milner v. Dep't of Navy*, 131 S. Ct. 1259 (U.S. 2011)); *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239 (D.C. Cir. 1991) ("[C]ourts are obliged to determine whether nonexempt material can reasonably be segregated from exempt material.").

The agency may justify withholding records under Exemption 5 where it has sufficiently explained in its *Vaughn* indices and affidavits "why there was no reasonable means of segregating factual material from the claimed privileged material." *Nat'l Whistleblower Center v. Dep't of Health & Human Servcs.*, 903 F. Supp. 2d 59, 70 (D.D.C. 2012) (citing *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 18 (D.D.C. 2004)). *See also Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) ("In a FOIA case, the Court may award summary judgment solely on the basis of information provided in affidavits or declarations when the affidavits or declarations are 'relatively detailed and non-conclusory,' and describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information

withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'") (citing *SafeCard Servs., Inc. v. SEC,* 926 F.2d 1197, 1200 (D.C. Cir. 1991); *Military Audit Project v. Casey,* 656 F.2d 724, 738 (D.C. Cir. 1981)).

But even a detailed description is not enough in all cases. Lower courts may also require *in camera* inspection of records before determining that no segregable factual material exists where "an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure." *Quinon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996). *See also Meeropol v. Meese,* 790 F.2d 942, 958 (D.C. Cir. 1986) ("[A] finding of bad faith or contrary evidence is not a prerequisite to in camera review; a trial judge may order such an inspection 'on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination.'") (citing *Ray v. Turner,* 587 F.2d 1187, 1195 (D.C. Cir. 1978)). While district courts have broad discretion to determine whether such review is necessary, that discretion is not unlimited. *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578 (D.C. Cir. 1996). In some cases "[s]ummary judgment may not be appropriate without in camera review when agency affidavits in support of a claim of exemption are insufficiently detailed." *Id*.

B. The "Inextricably Intertwined" Test Ensures That Segregable Factual Material Is Not Improperly Withheld Under Exemption 5

Factual material is not protected by Exemption 5 if it "does not reveal the deliberative process." *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (citing *Paisley v. CIA*, 712 F.2d 686, 689 (D.C. Cir. 1983)). This Court has developed a deliberative process privilege-specific test to determine whether an agency has properly segregated factual material. Under this test, agencies must disclose all factual materials that are not "inextricably intertwined" with deliberative materials. *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 372 (D.C. Cir. 2005) (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)).

The inextricably intertwined test was established by this Court in *In re Sealed Case*, in which the court held that "[t]he deliberative process privilege does not . . . protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of the documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737. Likewise, in *Judicial Watch v. Dep't of Justice*, this Court used a similar factual vs. non-factual distinction to differentiate between the attorney work-product doctrine and the deliberative process privilege. *See* 432 F.3d at 372. The test has been incorporated under Exemption 5 in this Circuit. *See*, *e.g.*, *Juarez v. DOJ,* 518 F.3d 54, 61 (D.C. Cir. 2008) ("documents may be withheld in their entirety when non-exempt portions 'are inextricably intertwined with exempt

portions.'") (citing *Mead Data Cent,* 566 F.2d at 260); *EPIC v. DOJ*, 511 F. Supp. 2d 56, 67 (D.D.C. 2007) (citing *Judicial Watch*, 432 F.3d at 372) ("Factual material is not protected under the deliberative process privilege unless it is 'inextricably intertwined' with the deliberative material.").

Factual material can come in many different forms, but it must always be segregated unless disclosing it would "inevitably reveal the government's deliberations." *Pub. Citizen v. OMB*, 598 F.3d 865, 876 (D.C. Cir. 2010) (holding that a list of agencies is factual information that must be segregated and disclosed). For example, notes recounting a meeting, even if not verbatim, are disclosable facts if they do not reflect the writer's analytical views. *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 762 F. Supp. 2d 123 (D.D.C. 2011). *See also Nat'l Whistleblower Ctr. v. Dep't of Health and Human Serv.*, 849 F. Supp. 2d 13, 38-39 (D.D.C. 2012) (holding no general exemption for handwritten notes "even though such notes inherently reveal what the notetaker thought was noteworthy"). Even when a document is overwhelmingly deliberative in nature, there are typically factual materials within that may nonetheless be segregable. A recent case held that the introduction, methodology, and "documents reviewed" sections of an otherwise exempt report were segregable factual materials that must be disclosed. *See Pub. Empls. for Envtl. Responsibility v. EPA*, 926 F. Supp. 2d 48, 59 (D.D.C. 2013) ("The Court's conclusion that Exemption 5

protects most of the report does not extend to one segment thereof. The first three sections of the document, titled 'Introduction,' 'Methodology,' and 'Documents That Were Reviewed,' are not protected by Exemption 5 because they represent 'purely factual material' that can be severed 'without compromising' the rest of the report.").

Thus, even where records relate to agency deliberations, any factual material that is not inextricably intertwined must be segregated under the FOIA. The deliberative process privilege is not a "wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy or opinion." *Mink*, 410 U.S. at 91. To the extent documents contain merely factual material, they "do not fall within the deliberative process privilege." *Williams & Connolly LLP v. SEC*, 729 F. Supp. 2d 202, 213 (D.D.C. 2010).

C. This Court Recently Held in Ancient Coin That Segregable Factual Materials Can Be Protected by the Due Process Privilege Under Certain Limited Circumstances

In *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504 (D.C. Cir. 2011), this Court held that "[p]urely factual material usually cannot be withheld under exemption 5 unless it reflects an exercise of discretion and judgment calls." *Id*. at 513. The holding in *Ancient Coin* was based on this Court's prior decisions in *Montrose Chem. Corp of California v. Train*, 491 F.2d 63 (D.C.

Cir. 1974), and *Mapother v. Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993). The Court concluded in *Ancient Coin* that factual summaries contained in an internal agency report were protected by the deliberative process privilege because they "reflect" the agency's "pre-decisional deliberative process." *Ancient Coin*, 641 F.3d at 514. But the Court made clear in *Ancient Coin* that withholding factual material was not typically allowed under Exemption 5.

The records at issue in *Ancient Coin* included a report by the Cultural Property Advisory Committee ("CPAC"), which advises the State Department's Undersecretary for Educational and Cultural Affairs on restrictions on the importation of cultural artifacts. *Id*. at 508. The plaintiffs challenged the withholding of factual summaries contained in the CPAC reports under Exemption 5. The court found that the factual summaries fell "squarely within the category of factual material protected under *Mapother* and *Montrose*" because they reflected an "exercise of judgment as to what issues are most relevant to the pre-decisional findings and recommendations." *Id*. at 513. As an example, the court noted that the summaries included "lists of events selected to show whether a given type of item has been pillaged." *Id*. at 514. The determination as to whether items on the lists requested by the Collectors' Guild came from pillaged sites was itself an agency deliberation. Thus, the draft lists of "facts" in *Ancient Coin* were actually draft lists of initial decisions, and therefore protected under Exemption 5.

It was not enough for the agency in *Ancient Coin* to show that factual material was "part of" the deliberative process in its reports, fact sheets, and data analysis. "Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks is material." *Playboy Enters., Inc. v. DOJ*, 677 F.2d 931, 935 (D.C. Cir. 1982). A fact does not become a privileged record "merely because it was placed in a memorandum with matters of law, policy, or opinion." *EPA v. Mink*, 410 U.S. 73, 91 (1974). "If this were not so, every factual report would be protected as a part of the deliberative process." *Playboy Enters.*, 677 F.2d at 935.

This Court rejected such a broad application of the deliberative process privilege in *Playboy Enterprises v. Department of Justice*, where the requestor sought production of a DOJ report regarding the treatment of an FBI informant. *Id*. at 933. The Government argued that the entire report (including the facts within) reflected the "choice weighing and analysis of facts by the task force, and is therefore protected as part of the deliberative process." *Id*. But the court was unpersuaded, and noted that, although every report necessarily contains facts selected by the author, the selection of facts is not in and of itself a protected deliberative process. *Id*. The court ultimately agreed with the lower courts conclusion that the report neither "reveals the deliberative process engaged in by

the task force nor is it *intertwined* with the policy-making process of the decision maker." *Id*. (emphasis added).

The court in *Playboy Enterprises* distinguished its prior opinion in *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), which involved summaries of evidence from an adjudicatory hearing prepared for the Administrator of the Environmental Protection Agency by his staff. *Id*. at 272. The evidence in the adjudication was all in the public record, and thus considered factual material. *Id*. However, the court in *Montrose* found that to "probe the summaries of record evidence would be the same as probing the decision-making process itself." *Id*. at 275. Allowing inquiry into "the administrative decision-maker's mental processes" during a complex adjudication is precisely the type of injury that the deliberative process privilege seeks to avoid. *Id*. 277. But even the court in *Montrose* recognized that the case was distinguishable from "a situation in which the only place where certain facts are to be found is in" the agency's internal records. *Id*. Where facts are not already available, "the Government would bear the burden of putting the record in such shape that all facts are in the public record, separate from analysis which need not be disclosed." *Id*. at 278.

The court subsequently reviewed *Playboy* and *Montrose* in *Mapother v. Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993). At issue in *Mapother* was a report by the Department of Justice Office of Special Investigations, the Waldheim

Report, which was initiated by DOJ to determine whether the activities of Kurt Waldheim, the former Secretary-General of the United Nations and former President of Austria, during World War II rendered him ineligible to enter the United States. *Id*. at 251. The court acknowledged that the "deliberative character of agency documents can often be determined through 'the simple test that factual material must be disclosed but advice and recommendations may be withheld.'" *Id*. at 253 (citing *Wolfe v. Department of Health & Human Services*, 839 F.2d 768, 773 (D.C. Cir. 1988)). Nevertheless, the court found that "[w]here an agency claims that disclosing factual material will reveal its deliberative processes," it must "examine the information requested in light of the policies and goals that underlie the deliberative process privilege." *Id*. at 253-54 (citing *Wolfe*, 839 F.2d at 774). Because the report sought contained a selective biography of Mr. Waldheim, reflecting his history in the Nazi Party and other information OSI determined was relevant to assessing his eligibility to enter the United States, the court found the "factual information" about Mr. Waldheim to be inherently reflective of the OSI's deliberative process. *Id*. at 1538. The court noted:

> In cases such as this, however, the selection of the facts thought to be relevant clearly involves "the formulation or exercise of . . . policy-oriented judgment" or "the process by which policy is formulated," *Petroleum Info. Corp*., 976 F.2d at 1435 (emphasis in original), in the sense that it requires 'exercises of discretion and judgment calls." Id. at 1438. Such tasks are not "essentially technical" in nature, id. at 1437-38; rather they are part of processes with which "[t]he deliberative process privilege ... is centrally concerned."

Id. at 1539. Unlike "essentially technical" information, which would not require a preliminary agency assessment before it could be compiled into a report, the choice of whether to include certain information from Mr. Waldheim's past reflected a preliminary policy determination on the part of the OSI. *Id.* Thus the inclusion of information on the list revealed the agency's initial determinations as to their relevance, thereby exposing the first stage of the agency's deliberative process.

This court ultimately determined in *Mapother*, after an *in camera* inspection, that the majority of the Waldheim report was protected by the deliberative process privilege because it "reflected an exercise of judgment in extracting pertinent material" for the "benefit of an official called upon to take a discretionary action." *Id*. at 255. Nevertheless, the court found one portion of the report, a chronology of military service, was "too attenuated" from the decision-making process "to be protected by the deliberative process privilege" and was reasonably segregable from other parts. *Id*. at 256. Specifically, the court found that the organization, selection of categories and facts "reflects no point of view" and thus did not reveal any protected deliberations. *Id*. The court's determination was thus a complex weighing of both the nature and context of the factual material at issue.

II. The District Court Failed to Follow this Circuit's Test for Segregating Factual Materials Where an Agency Withholds Deliberative Materials Under Exemption 5

In this case, the District Court failed to apply this Court's "inextricably intertwined" test to determine whether there were segregable factual materials contained within radiation exposure data, draft fact sheets, preliminary test results, and a letter of assessment withheld by the agency pursuant to Exemption 5. The court also failed to make the detailed factual finding necessary to hold that the records revealed the agency's deliberative process. In both opinions, the court briefly analyzed the agencies' failure to redact purely factual material. *See EPIC v. DHS*, 928 F. Supp. 2d 139, slip op. at 13-15 (D.D.C. 2013); *EPIC v. TSA*, 928 F. Supp. 2d 156, slip op. at 13-16 (D.D.C. 2013). (JA 013-021; JA 268-271.) The legal standard applied by the lower court is provided in three paragraphs, identical in both opinions, discussing this Court's decisions in *Ancient Coin*, *Montrose Chemical Corp. of California*, *Mapother*, and *Playboy Enterprises, Inc*. *See DHS*, slip op. at 13; *TSA*, slip op. at 15. (JA 013; JA 270.) None of these paragraphs address the Court's inextricably intertwined standard.

In *DHS*, the lower court held that the materials "factual or not, were properly withheld under exemption 5, because they are all part of the DHS's deliberative process regarding the future of the AIT program." *DHS*, slip op. at 14. (JA 014.) The court went on to emphasize that the fact sheets at issue were "draft or

preliminary fact sheets as well as deliberations concerning those drafts." *Id*. at 15. (JA 015.) The court then reiterated that the documents were a "part of" the deliberative process:

> Again, the drafts and deliberations surrounding these fact sheets were part of DHS's deliberations on the future of the body scanner program. Thus, whether "factual" or not, they are part of the DHS's deliberative process.

Id. Similarly, the court found that the "preliminary testing results" contained in the FDA report (TSL *Vaughn* Index WHIF L) (JA 237) were properly withheld because "[t]he fact that the 'testing' was *preliminary* is key: these preliminary results were part of the agency's deliberations in how to approach the potential risks of the body scanning technology." *DHS*, slip op. at 15. (JA 015.) The court found that "[t]he government's descriptions of these withholdings" were "sufficiently specific to justify protection under the deliberative process privilege" because "the factual material was part of the agency's deliberative process." *Id*. The court subsequently described the agency's burden under Exemption 5: "the agency must only demonstrate that each withholding, 'draft or otherwise,' was genuinely part of the agency's deliberative process." *Id*. at 21. (JA 021.)

In *TSA*, the lower court held that the ATR "Letter of Assessment" (TSA Sotoudeh Decl. ¶ 38; TSA *Vaughn* Index) (JA 344-345; JA 352) was "protected under exemption 5 because [it was] part of the agency's deliberative process." *TSA*, slip op. at 16. (JA 271.) Specifically, the court found that "[t]he Letter of

Assessment was written to assist in the deliberation of the DHS Undersecretary for Mangement regarding the implementation of ATR." *Id*. The court then distinguished these records from the ones at issue in *Playboy Enterprises* because "the factual material here was not assembled for an agency actor merely to pass along to outsiders, but rather for purely internal deliberative purposes." *Id*. Thus the court found that "the agency has provided adequately specific descriptions of its withholdings to demonstrate that these materials must be protected in order to safeguard the agency's deliberative process." *Id*.

In its analysis, the District Court failed to apply the required standards for identifying and segregating factual material outlined in this Court's prior cases. The records at issue appear to contain segregable facts based on their descriptions in the *Vaughn* indices and the agency declarations. For example, documents labeled "Fact Sheet" or "Estimates of Radiation Exposure" are almost precisely the type of "factual reports and scientific studies" that this Court said may not be exempt under Exemption 5 in *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970). The descriptions of these records in the *Vaughn* indices and agency affidavits are not specific enough to establish that the factual materials are necessarily revelatory of the agency's deliberative process. The court's finding did not satisfy the test established in *Ancient Coin,* that segregable facts in an agency's records can nevertheless be protected by the deliberative process privilege if they

reflect "an 'exercise of discretion and judgment calls." 641 F.3d 504, 513 (D.C. Cir. 2011) (citing *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993). The court's analysis collapsed the distinction between deliberative and factual materials, thereby impermissibly reducing the agency's burden to justify its withholdings in detail.

A. The Records in This Case Contain Purely Factual Material

The documents produced by the DHS and the TSA in this case contain various materials related to airport bodyscanner technologies including radiation, health and safety data, and bodyscanner system performance details. Based on the nature and descriptions of the documents in agency filings, it is clear they contain purely factual material.

EPIC v. DHS, No. 10-1992

Of the responsive documents identified in *DHS*, at least four records withheld in full pursuant to Exemption 5 contain factual material: a "Draft Fact Sheet on Radiation Exposure," (TES *Vaughn* Index 604-05) (JA 180), a "Working Document on Radiation Exposure," (TES *Vaughn Index* 606) (JA 180), two "Draft Fact Sheets on Health and Safety," (TSL *Vaughn* Index WHIF B) (JA 235), and an "FDA Testing" report. (TSL *Vaughn* Index WHIF L.) (JA 237.)

The Draft Fact Sheet on Radiation Exposure, as described in the agency affidavit, contains "draft versions" of a fact sheet developed at the direction of the

Undersecretary for Science and Technology, which contained "accurate and concise statements regarding standards required for testing Advanced Imaging Technology machines and interpretation of the results of third party testing of the machines." (Coursey Decl. ¶ 37(a)(vi).) (JA 151-152.) Even though the record contains "draft" versions, the underlying documents are fact sheets that must necessarily contain "facts." The descriptions contained in the affidavit and *Vaughn* Index do not contain any evidence that the facts in the documents are inextricably intertwined with deliberative material.

The Working Document on Radiation Exposure, as described in the agency affidavit, contains "compiled estimates of radiation exposure from various types of AIT machines based on external, unverified data." (*Id.*) (JA 152.) The agency affidavit stresses that the "data was not intended for public release and does not reflect an official position of DHS." (*Id*.) The affidavit is a clear admission that the document contains *data* that is separate from any deliberative material. The test for protection under the deliberative process privilege does not hinge on whether the agency *intended* the material to be made available for public release. The description of the data as "external, unverified data" is sufficient to ensure that it is not mistakenly attributed as an official position of DHS. Neither the description in the agency affidavit nor the description in the *Vaughn* Index provides any detail to

support the conclusion that this purely factual data is inextricably intertwined with deliberative material. (*See id*.; TES *Vaughn* Index 606.) (JA 180.)

The Draft Fact Sheets on Health and Safety contain two drafts of the AIT Health and Safety fact sheet. (TSL *Vaughn* Index WHIF B.) (JA 235.) The TSA previously indicated that the final version of this fact sheet was publicly available on the agency website. (DHS Sotoudeh Decl. ¶ 20.) (JA 066-067.) (giving the link http://www.tsa.gov/assets/pdf/ait_fact_sheet.pdf). However, the fact sheet is not currently available on the TSA website. *See* View Static 404 Page, http://www.tsa.gov/assets/pdf/ait_fact_sheet.pdf (last visited Sept. 28, 2013). The prior disclosure of this fact sheet shows that it contains factual materials that were meant for public disclosure. The agency did not provide a detailed justification for why these facts, which it previously made publicly available, could not be segregated from the deliberative portions of the draft. (*See* TSL *Vaughn* Index WHIF B; Beresford Decl. ¶ 39(a).) (JA 235; JA 202.)

The "December 23, 2010 Preliminary FDA Progress Report per the FDA-TSA Agreement: Testing of Medical Devices in and Around the L3 ProVision Advanced Imaging Technology System," as described in the agency affidavit, contains "preliminary findings regarding AIT testing results." (Beresford Decl. ¶ 39(c).) (JA 202.) These tests by the FDA on "the effects of the L3 Provision on personal medical devices" necessarily produced data, which is likely included in

the report. Even though this is an "interim report prior to the completion of testing," the data is still comprised of factual material. The agency did not provide a detailed justification for why this FDA test data could not be segregated from any deliberative material in the report. (*See* TSL *Vaughn* Index WHIF L; Beresford Decl. ¶ 39(c).) (JA 237; JA 202.)

EPIC v. TSA, No. 11-290

Of the responsive records identified in *EPIC v. TSA*, at least one record clearly contains factual material withheld under Exemption 5: an "AIT/ATR Letter of Assessment." (TSA Sotoudeh Decl. ¶ 38.) (JA 344-345.) This "Letter of Assessment," as described in the agency affidavit, contains "an analysis of ATR's compliance with specific security performance objectives." (*Id*.) In order to analyze compliance with the objectives, the assessment must necessarily review facts about the performance of the ATR system. The agency failed to segregate these facts or otherwise show that they were "inextricably intertwined" with deliberative material. (*See id*. ¶ 38; TSA *Vaughn* Index.) (JA 344-345; JA 352.)

The agency bears the burden of showing that these factual materials were inextricably intertwined with deliberative materials, and it did not provide sufficient detail to justify its failure to segregate the facts contained in these records.

B. Based on the Agency Affidavits and Vaughn Indices, the Documents at Issue Contain Segregated Factual Materials That Are Not Intertwined with Deliberative Materials

In both *EPIC v. DHS* and *EPIC v. TSA*, the agencies withheld records that contain purely factual material, and in both cases the agencies failed to reasonably segregate the facts and data from the deliberative material. Based on the agencies' own affidavits and *Vaughn* indices, the factual material appears to already be segregated within the records themselves.

The draft "fact sheets" on radiation in *EPIC v. DHS* contain "draft versions, deliberations, and back-and-fourth edits of the fact sheet." (Coursey Decl. ¶ 37(a)(vi).) (JA 151-152.) EPIC merely seeks the facts contained in these versions, which are presumably separate from the edits and deliberations. Similarly, the draft "fact sheet" on AIT Health & Safety contains nothing more than "working drafts of DHS 'fact sheet' on health and safety issues related to AIT." (TSL *Vaughn* Index WHIF B.) (JA 235.) The agency has offered no additional evidence to show that this fact sheet contains intertwined deliberative materials. These documents have been withheld in full. (*See* TES *Vaughn* Index 604-05, 606.) (JA 180.)

The working document on radiation exposure contains "compiled estimates of radiation exposure from various types of AIT machines based on external, unverified data." (Coursey Decl. ¶ 37(a)(vii); TES *Vaughn* Index 606.) (JA 152; JA 180.) This data is purely factual, limited to one page, and separate from a

deliberative analysis. Similarly, the December 23, 2010 FDA "progress report" contains information concerning the "testing of the effects of the L3 Provision on personal medical devices." (TSL *Vaughn* Index WHIF L.) (JA 237.) The report presumably contains early test results, which are segregated from any deliberative discussion.

In *EPIC v. TSA*, the "Letter of Assessment" is clearly described in the agency affidavits as a document that contains separate, segregated, sections for deliberative and factual materials. The letter contains an "analysis of ATR's compliance with specific security performance objectives, including recommendations for future testing and evaluation" at 000468-000475. (TSA Sotoudeh Decl. ¶ 38.) (JA 344-345.) The facts supporting ATR's compliance with security objectives, which have been redacted, are separate from the recommendations and the earlier discussion of "the criteria and thought process underlying the assessment and follow-on recommendation for the ATR program" at 000463-000464. (*Id*.) The facts are also separate from the discussion of the "internal policymaking progression and background deliberations that led to the conclusions in the assessment" at 000466-000467. (*Id*.)

C. The Tests for Segregating Factual Materials and Protecting Deliberative Processes Collapse Under the District Court's Analysis

The District Court concluded below that because the factual materials at issue were "part of" the deliberative process, they could be withheld with no examination of their intertwinement with the deliberative materials. *See EPIC v. DHS*, slip op. at 14 (JA 014) ("The Court finds that all of these materials, factual or not, were properly withheld under exemption 5, because they are all part of DHS's deliberative process regarding the future of the AIT program"); *EPIC* v. *TSA*, slip op. at 16 (JA 271) ("Here, the court finds that these materials are protected under exemption 5 because they were part of the agency's deliberative process."). But this analysis collapses the segregation of factual material and protection of deliberative process under Exemption 5 into one conclusory step. Under this relaxed standard, any agency could withhold all factual information held in connection with some internal decision, whether or not its disclosure would reveal the deliberative process.

Instead, the court should have determined first whether the agency had properly segregated factual material, and second whether the agency demonstrated that any otherwise segregable facts were protected under the deliberative process privilege pursuant to *Ancient Coin*. Chief Judge Lamberth recognized in a recent case, decided shortly after the two cases on appeal, that the inextricably

intertwined test applies in this Circuit. *See Soghoian v. OMB*, ___ F. Supp. 2d ___, No. 11-2203, 2013 WL 1201488 *7 (D.D.C. Mar. 26, 2013) (Lamberth, J.) ("The privilege does not protect purely factual material 'unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations'") (citing *In re Sealed Case*, 121 F.3d at 737 (D.C. Cir. 1997)). The failure to apply *In re Sealed Case* in the two cases on appeal is clear error in light of the subsequent decision in *Soghoian*.

In *EPIC v. DHS* and *EPIC v. TSA* the court concluded that because the "factual material was part of the agency's deliberative process" it could therefore be withheld. *DHS* slip op at 15 (JA 015); *TSA* slip op at 16. (JA 271.) But this is clearly not the correct standard to apply to fact sheets and test results that may accompany analysis and opinion. Under the standard adopted by the lower court, not only would the deliberations of agency officials be exempt, but so too would any reports or studies relied upon. The practical consequence would be to shield from disclosure the factual materials that could be of greatest interest to the requester and to the public. This Circuit has never suggested that the deliberative process privilege sweeps so broadly.

Unlike the reports and factual summaries considered in *Montrose*, *Mapother*, and *Ancient Coin*, the records withheld here do not reveal judgment or the exercise

of discretion. The draft fact sheets on AIT Health and Safety contain facts that were not part of a deliberation, they were prepared to be published by the agency on its website. (*See* TSL *Vaughn* Index WHIF B; DHS Sotoudeh Decl. ¶ 20.) (JA 235; JA 066-067.) The Working Document on Radiation Exposure contains body scanner radiation exposure data generated by third parties. (Coursey Decl. ¶ 37(a)(vii).) (JA 152.) And the Draft Fact Sheet on Radiation Exposure similarly contains third party test results for body scanners. (*Id*.) (JA 151-152.) The FDA Report contains the results of safety testing regarding the impact of body scanners on medical devices. (TSL *Vaughn* Index WHIF L; Beresford Decl. ¶ 39(c).) (JA 237; JA 202.) And the Letter of Assessment for AIT/ATR contains data about ATR compliance with the disclosed categories of security objectives. (TSA Sotoudeh Decl. ¶ 38; TSA *Vaughn* Index.) (JA 344-345; JA 352.)

Unlike in *Ancient Coin*, *Mapother*, or *Montrose*, the agency has not made a detailed showing as to how the disclosure of these factual materials would harm the deliberative process. Given that the agency has failed to make this showing, it is obligated to disclose these factual materials unless they are "inextricably intertwined" with deliberative materials. *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 372 (citing *In re Sealed Case*, 121 F.3d at 737). Because the District Court failed to make an adequate determination regarding the agency's segregation of

factual materials withheld under Exemption 5, this Court should reverse and remand for further disclosure by the agencies.

CONCLUSION

For the foregoing reasons, this Court should overturn the District Court's decision and remand for further disclosure of factual materials held by the DHS and the TSA that are not inextricably intertwined with deliberative materials, consistent with this Court's prior determinations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type-style requirements of Rule 32(a)(6). The brief contains 8,109 words. The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Rule 32(a)(7)(B)(iii).

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The undersigned counsel certifies that on this 1st day of October 2013, he caused the foregoing brief to be served by ECF and two hard copies by first-class mail, postage prepaid, on the following:

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