

THE FRATERNAL ORDER OF POLICE,
METROPOLITAN POLICE
LABOR COMMITTEE,

Plaintiff,

v.

THE DISTRICT OF COLUMBIA,

Defendant.

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IN THE

SUPERIOR COURT OF

THE DISTRICT OF COLUMBIA

Case No.: 4866-08

Judge Odessa Vincent

Next Event: Motions Deadline

Date: 2/23/09

* * * * *

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, the Fraternal Order of Police, Metropolitan Police Labor Committee (the "FOP" or the "Plaintiff"), by its attorneys, and in accordance with D.C. R. Civ. P. 12-I and 56, hereby moves for summary judgment against the defendant, The District of Columbia (the "District" or the "Defendant"), in the above-captioned action. As set forth in the Complaint filed in this action, this case is a straight forward dispute arising out of the FOP's request for the production of certain documents under the District of Columbia Freedom of Information Act, D.C. CODE ANN. § 2-531, *et seq.* (the "DC FOIA") from the District over the course of nearly two years (the "FOIA Request").

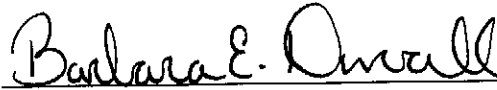
In response to the FOP's FOIA Request, the District claimed privilege to approximately 10,000 documents that are responsive to the FOP's FOIA Request. See Exhibit 8 attached to Plaintiff's Complaint. The FOP thereafter requested that the District produce a *Vaughn* index (or privilege log), reminding the District that it is the District's burden under the DC FOIA to support an assertion that certain documents are exempt from FOIA disclosure. See Exhibit 9 attached to Plaintiff's Complaint. While the District **agreed** to produce the *Vaughn* index, it has

failed to do so and instead has engaged in a long pattern and practice of delay. See Exhibit 10 attached to Plaintiff's Complaint.

In sum, it is irrefutable that the FOP is statutorily entitled to a timely and complete response from the District regarding the FOIA Request. Furthermore, the District cannot dispute that it is its burden to "sustain its action[s]" of denial and delay pertaining to this matter. DC FOIA § 2-537(b). Notwithstanding these irrefutable facts, the District has not provided the FOP with **any** support for its refusal to provide approximately 10,000 documents that it agrees are responsive to the FOP's FOIA Request. Instead, the District has delayed producing the *Vaughn* that it first agreed to produce almost nine (9) months ago, and it continues to engage in this delay contrary to the letter or spirit of the DC FOIA. Simply stated, this case may not even be before this Court if the District properly and timely had attempted to support any of its privilege assertions.

As a result of the foregoing, the factual record in this case plainly demonstrates that the District has done nothing to sustain its burden of justifying its production denials and delays pertaining to the FOIA Request. Accordingly, as set forth more fully in the attached Memorandum of Points and Authorities, the FOP is entitled to summary judgment on all claims for relief set forth in the Complaint as a matter of law. The FOP is entitled, alternatively, to summary judgment on the issue of whether the District has violated the DC FOIA by not producing the subject *Vaughn* index.

Respectfully submitted,



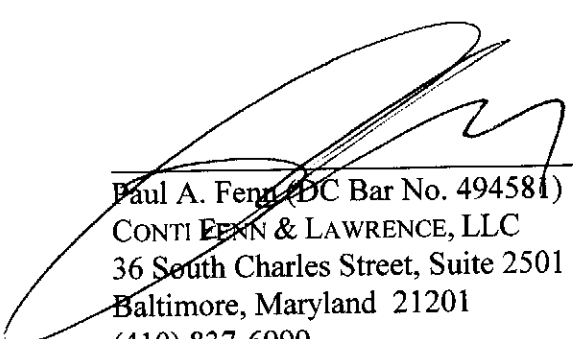
Paul A. Fenn (DC Bar No. 494581)
Barbara E. Duvall (D.C. Bar No. 984197)
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Attorneys for Plaintiff

* * *

RULE 12-I(a) CERTIFICATION

In accordance with Rule 12-I(a), the FOP, by and through its counsel, requested the consent of the District's counsel to the requested relief set forth above via e-mail on February 19, 2009. The District's counsel did not consent.



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Attorneys for Plaintiff

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**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The plaintiff, the Fraternal Order of Police, Metropolitan Police Labor Committee (the "FOP" or the "Plaintiff"), by its attorneys, and in accordance with D.C. R. CIV. P. 12-I and 56,¹ hereby submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment against the defendant, The District of Columbia (the "District" or the "Defendant"). As set forth more fully below, the FOP is entitled to summary judgment in this action as a matter of law because the District has utterly failed to provide **any** support for its refusal to provide over 10,000 documents that it concedes are responsive to the FOP's FOIA request at the core of this dispute. As a result, the District has failed to comply with its obligations under the District of Columbia Freedom of Information Act, D.C. CODE ANN. § 2-531, *et seq.* (the "DC FOIA").

¹ A copy of the FOP's Statement of Undisputed Material Facts required by Rule 12-I(k) is attached hereto as Exhibit 1.

I.
Introduction

On or about March 21, 2007, the FOP submitted a formal request for documents and information to the District and/or the District of Columbia Office of Labor Relations & Collective Bargaining (the “OLRCB”) under the DC FOIA (the “FOIA Request”). In so doing, the FOP complied with all of the requirements of the DC FOIA to entitle it to file and sustain this action. See DC FOIA §§ 2-532 and 2-537. In response to the FOIA Request, the District claimed privilege to approximately 10,000 documents responsive to the FOP’s FOIA Request. See Exhibit 8 attached to Plaintiff’s Complaint. The FOP requested that the District support its claimed privilege by producing a *Vaughn* index (or privilege log), as it is the District’s burden to support any assertion that certain documents are exempt from FOIA disclosure. See Exhibit 9 attached to Plaintiff’s Complaint. **The District conceded this obligation**, and on May 20, 2008, the District **agreed to produce** the requested *Vaughn* index. See Exhibit 10 attached to Plaintiff’s Complaint. Despite its undisputed obligation and promise to meet that obligation, the District has engaged in a pattern and practice of delaying its production of the *Vaughn* index for nearly nine (9) months, which is certainly well outside of the letter and spirit of the DC FOIA.²

Notwithstanding the fact that **nearly two years** have passed since the FOP submitted the FOIA Request, the District continues to adhere to its delay and silence tactics by not providing support for any of its assertions that certain documents are exempt from FOIA disclosure. These tactics are troubling, at best, and present a case study in the type of conduct that the District’s

² The specific documents and information requested by the FOP in the FOIA Request, and the District’s responses thereto, are set forth in detail in the Complaint and the Statement of Undisputed Material Facts (Exhibit 1) filed in this matter, which are incorporated herein fully, and affirmed under oath in the attached Affidavit (Exhibit 2).

Legislature intended to prevent by enacting the DC FOIA, which defines its explicit purpose as “minimize[ing] [the] costs and time delays” to persons requesting the production of information regarding the “the affairs of government and the official acts of those who represent them.” DC FOIA § 2-531. Accordingly, the FOP is entitled to summary judgment as a matter of law on all claims for relief set forth in the Complaint as a matter of law. The FOP is entitled, alternatively, to summary judgment on the issue of whether the District has violated the DC FOIA by not producing the subject *Vaughn* index.

II. **Analysis**

A. DC FOIA Disclosure Standard

It is well-recognized that the DC FOIA “embodies a strong policy favoring disclosure of information about governmental affairs and the acts of public officials.” Barry v. Washington Post Co., 529 A.2d 319, 321 (D.C. 1987). This policy “requires the courts to read narrowly any statutory exemptions from disclosure.” Id. (citing Dunhill v. Director, District of Columbia Dept. of Trans., 416 A.2d 244, 247 n.5 (D.C. 1980)). Additionally, in the absence of a statutory exemption, “a court has no general equitable power to prevent disclosure under [the DC] FOIA of public documents and records.” Id. (citations omitted). “The statutory exemptions are intended to be exclusive . . . and equity cannot enlarge or extend them beyond the limits set by the [DC FOIA].” Id. Moreover, “any doubts about the applicability of a particular exemption *must be resolved in favor of disclosure.*” Id. (*emphasis added*).

B. The District is Required to Support its Assertion that Certain Documents are Exempt from FOIA Disclosure.

The FOP has an unfettered right to inspect and copy “any public record of a public body,” subject only to the exceptions expressly provided for in D.C. CODE ANN. § 2-534. DC FOIA § 2-

532(a). It is well established that the burden to support an assertion that certain documents are exempt from FOIA disclosure rests on the agency making such an assertion. D.C. CODE ANN. § 2-534. It is also well established that an “agency may meet [its] burden [of demonstrating that requested documents are exempt from disclosure under FOIA] by providing the requester with a *Vaughn* index, adequately describing each withheld document and explaining the exemption’s relevance.” Mack v. Department of Navy, 259 F. Supp.2d 99, 104 (2003); see also Summers v. Dep’t of Justice, 140 F.3d 1077, 1080 (D.C.Cir 1998). A *Vaughn* index is a list describing the documents the District is withholding, providing sufficient detail to enable the requester and the Court to determine whether the documents fall within a FOIA exemption. See Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 357 (2009).

Courts have found that a *Vaughn* index is not only recommended, **but is necessary** as “courts will no longer accept conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments.” Vaughn v. Rosen, 484 F.2d 820, 826-27, 157 U.S.App.D.C. 340, 346-47 (1973). Additionally, the production of a *Vaughn* index simplifies matters as it provides the party requesting the production of documents with a “basis for deciding which, if any, such records it wishes to pursue.” Campaign v. Responsible Transplantation v. Food & Drug Administration, 511 F.3d 187, 191 (2007).

Even a cursory review of the scope of the FOP’s FOIA Request reveals the fact that none of the material requested is exempt on its face from disclosure under the DC FOIA. See D.C. CODE ANN § 2-534. Indeed, the material described in the FOIA Request relates strictly to general information. The FOP had, at the time the FOIA Request was submitted to the District, an absolute right to receive within ten (10) days (except Saturdays, Sundays, and legal public holidays) of the District’s receipt of the FOIA Request access to the subject information or

notification of denial of access with explanation of “the reasons therefore[e]” and support of those reasons. D.C. CODE ANN § 2-532(c). Despite numerous requests by the FOP to the District for compliance with the DC FOIA, the District has not followed the letter or spirit of this statutory compilation with respect to the FOIA Request as the District has failed to provide **any** support for its refusal to produce over 10,000 documents that the District itself found responsive to the FOIA Request. These actions are described in detail in the Complaint, the Statement of Undisputed Material Facts (Exhibit 1), and Affidavit of the FOP’s Chairman, Kristopher Baumann (Exhibit 2), which are all incorporated herein fully by reference.

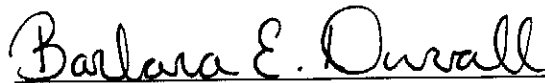
Faced with the facts set forth above, the District cannot ever generate a genuine issue of material fact regarding the FOP’s right to the relief requested herein. Significantly, as noted above, the District already has conceded in its Answer that “Defendant agreed to provide Plaintiff with a *Vaughn* index or privilege log.” See Answer ¶ 16. Notwithstanding this concession and similar admissions made over the course of several months, the District has failed to follow up on its agreement to provide a *Vaughn* index to the FOP. These failures speak volumes in light of the fact that the DC FOIA requires the District to timely and completely respond to the FOIA Requests, including providing support for its refusal to produce documents responsive to the FOIA Request. Moreover, these failures leave the record devoid of any evidence to sustain the District’s continued delays and denials pertaining to the *Vaughn* index and the material requested in the FOIA Request, as is required by DC FOIA § 2-537(b) to defeat this Motion.

III. **Conclusion**

Based upon the foregoing, the FOP is entitled to summary judgment in this matter as to all of the relief requested in the Complaint. Accordingly, the Court should enter judgment

against the District: (1) declaring that the District's actions have been unlawful; (2) compelling the District to produce any and all of the information requested in the FOIA Request; (3) awarding to the FOP its attorneys' fees and costs associated with this action in accordance with DC FOIA § 2-537(c); and (4) granting any such other relief as the Court deems appropriate. Alternatively, The FOP is entitled to summary judgment on the issue of whether the District has violated the DC FOIA by not producing the subject *Vaughn* index. Assuming the Court limits the FOP's relief at this time to the production of the Vaughn index, it should still (1) declare the District's actions unlawful under the DC FOIA; (2) compel the production of the subject Vaughn index within the next five (5) business days; (3) award to the FOP its attorneys' fees and costs associated with this action in accordance with DC FOIA § 2-537(c); and (4) grant any such other relief as the Court deems appropriate.³

Respectfully submitted,



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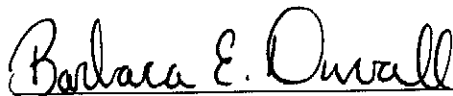
³ Alternative Draft Orders are attached hereto for the Court's consideration and convenience.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 20th day of February 2009 that I caused to be served upon the following individual via the Court's electronic filing system and via first-class, regular mail a copy of the forgoing document, as well as all attachments thereto:

Jacques Lerner, esquire
Assistant Attorney General
441 4th Street, N.W.
Washington, DC 20001

Attorneys for Defendant



Barbara E. Duvall (D.C. Bar No. 984197)
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Attorneys for Plaintiff

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IN THE
SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

Case No.: 4866-08

Judge Odessa Vincent
Next Event: Motions Deadline
Date: 2/23/09

ORDER

Upon consideration of the Plaintiff's Motion for Summary Judgment, and any opposition thereto, it is this _____ day of _____ 2009, ORDERED that:

1. The Motion for Summary Judgment is GRANTED; and further
2. The defendant's actions have been unlawful under the District of Columbia Freedom of Information Act, D.C. CODE ANN. § 2-531, *et seq.* (the "DC FOIA"); and further
3. The defendant shall produce a *Vaughn* index to the plaintiff in support of any and all of its asserted disclosure exemptions, providing the plaintiff with adequate descriptions of each and every document withheld from production sufficient to allow the plaintiff and this Court to determine whether each and every document withheld from production is proper; and further
4. This Court shall maintain jurisdiction over this action with respect to the defendant's compliance with its production obligations outlined herein; and further
5. The defendant shall reimburse the plaintiff for its attorneys' fees and costs associated with this action in accordance with DC FOIA § 2-537(c).

Date

JUDGE

Exhibit

1

THE FRATERNAL ORDER OF POLICE,
METROPOLITAN POLICE
LABOR COMMITTEE,

Plaintiff,

v.

THE DISTRICT OF COLUMBIA,

Defendant.

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IN THE

SUPERIOR COURT OF

THE DISTRICT OF COLUMBIA

Case No.: 4866-08

Judge Odessa Vincent

Next Event: Motions Deadline

Date: 2/23/09

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**PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL
FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

The plaintiff, the Fraternal Order of Police, Metropolitan Police Labor Committee (the "FOP" or the "Plaintiff"), by its attorneys, and in accordance with D.C. R. Civ. P. 12-I(k) and 56, hereby contends that there are no genuine issues regarding in the following material facts that are subject to its Motion for Summary Judgment:

1. The FOP is a private entity with its headquarters and principal place of business located at 1524 Pennsylvania Avenue, S.E., Washington, DC 20003.
2. The Defendant (referred to herein as the "Defendant" or the "District") is the government for the District of Columbia.
3. The District of Columbia Office of Labor Relations & Collective Bargaining (the "OLRBC") is an agency of the District with its headquarters and principal place of business located at 441 4th Street, N.W., Suite 820 North, Washington, D.C. 20001.

FOIA Request dated March 21, 2007

4. On March 21, 2007, the FOP submitted a formal request for documents and information to the Office of the Chief of Technology Officer ("OCTO") pertaining to the

OLRCB (the "FOIA Request"). The FOIA Request requested that OCTO (on behalf of the OLRCB) provide copies of:

- (1) All electronic mail and its content sent from or received by any District of Columbia government account maintained or used by any employee of the Office of Labor Relations and Collective Bargaining from September 1, 2005, through the present that contain information regarding or reference to any of the following subjects or names, or any possible derivations or alternative spellings of the following subjects and names:
 - (a) Metropolitan Police Department, MPD, Police, Police Department.
 - (b) Fraternal Order of Police, Metropolitan Police Department Labor Committee, FOP, Police Union.
 - (c) Gary Hankins, Hankins.
 - (d) Gregory Greene, G.I. Greene, Chairman Greene, Sergeant Greene.
 - (e) Kristopher Baumann, Kris Baumann, Baumann, Chairman Baumann, Officer Baumann, Bauman.
 - (f) Twenty Year Retirement, PSA Incentive Pay, Patrol Service Area, Step-Compression.
 - (g) Office of Police Complaints, OPC.
 - (h) Philip Eure, Director Eure, Eure.
 - (i) Thomas Sharp, Tom Sharp, Sharp.
 - (j) Charles Ramsey, Chief Ramsey, Ramsey.
- (2) All electronic mail and its content sent from or received by the District of Columbia electronic mail account: Natasha.Campbell@dc.gov or any other District of Columbia government electronic mail account maintained or used by Natasha Campbell of the Office of Labor Relations and Collective Bargaining from February 21, 2007, through the present.
- (3) All electronic mail and its content sent from or received by the District of Columbia electronic mail account: Dean.Aqui@dc.gov or any other District of Columbia government electronic mail account maintained or used by Dean Aqui of the Office of Labor Relations and Collective Bargaining from February 21, 2007, through the present.

- (4) All electronic mail and its content sent from or received by the District of Columbia electronic mail account: Jonathan.O'Neill@dc.gov or any other District of Columbia government electronic mail account maintained or used by Jonathon O'Neill of the Office of Labor Relations and collective Bargaining from February 21, 2007, through the present.

A copy of the FOIA Request is attached to the Complaint as Exhibit 1.

5. In response, OCTO e-mailed the Plaintiff, stating, in part, that Plaintiff's FOIA Request was transferred to the OLRCB. A copy of this e-mail is attached to the Complaint as Exhibit 2.

6. On April 4, 2007, the OLRCB informed Plaintiff, in part, that the disclosure of certain documents requested in Plaintiff's FOIA Request was denied based on a claim under the attorney work-product privilege. The OLRCB also demanded that Plaintiff delineate its FOIA Request further. A copy of the letter is attached to the Complaint as Exhibit 3.

7. On December 17, 2007, the OLRCB had failed to produce any documents responsive to the Plaintiff's FOIA Request. The OLRCB cited as the reason for its delay the existence of over 10,000 documents responsive to the Plaintiff's FOIA Request, which purportedly must be reviewed prior to production. A copy of the letter is attached to the Complaint as Exhibit 4.

8. On February 14, 2008, Plaintiff reasserted its demand that the OLRCB produce all documents responsive to Plaintiff's FOIA Request. A copy of the letter is attached to the Complaint as Exhibit 5.

9. On March 13, 2008, the OLRCB made available for pick-up, subject to the payment of \$281.00, 704 pages of material responsive to the FOIA Request. A copy of the letter is attached to the Complaint as Exhibit 6.

10. On March 21, 2008, Plaintiff paid the \$281.00 and requested that the OLRCB provide clarification as to whether the 704 pages that the OLRCB produced in response to Plaintiff's FOIA Request constituted the entire amount of documents that the OLRCB intended to produce. A copy of the letter is attached to the Complaint as Exhibit 7.

11. On April 3, 2008, the OLRCB produced twelve (12) additional pages of material in response to Plaintiff's FOIA Request, and it stated that the total 716 pages were the entire universe of material that the OLRCB intended to produce in response to Plaintiff's FOIA Request. The OLRCB further alleged exemptions of privacy and attorney work-product privilege as the bases upon which all additional documents were being withheld. A copy of the letter is attached to the Complaint as Exhibit 8.

12. On May 15, 2008, Plaintiff, by its counsel, informed the OLRCB that the burden to support an assertion that certain documents are exempt from FOIA disclosure rests on the agency making the assertion. Plaintiff thereby demanded that the OLRCB produce a *Vaughn* index (or privilege log) on or before May 30, 2008. Plaintiff requested that the *Vaughn* index include a list of any and all claimed privileges and exemptions for each and every document withheld, and that the index provide sufficient detail of each and every document to allow Plaintiff to determine what, if any, privileges/exemptions actually apply. A copy of the letter is attached to the Complaint as Exhibit 9.

13. On May 20, 2008, the OLRCB indicated to Plaintiff that the OLRCB would produce the requested *Vaughn* index, but requested additional time to produce the index. A copy of the letter is attached to the Complaint as Exhibit 10.

14. On May 30, 2008, Plaintiff reaffirmed to the OLRCB that Plaintiff made its FOIA Request over a year ago, and that the information required to produce the *Vaughn* index should

have been gathered during the initial review of the requested documents. In the interest of cooperation, however, Plaintiff permitted the OLRCB an extension until June 10, 2008 to produce the *Vaughn* index. A copy of the letter is attached to the Complaint as Exhibit 11.

15. On June 2, 2008, OCTO corresponded with Plaintiff, stating, in part, that it had conducted a search of the e-mails on its server and provided the materials to the OLRCB for review, possible redaction, and transfer of the final results to Plaintiff. A copy of the letter is attached to the Complaint as Exhibit 12.

16. On June 6, 2008, the OLRCB corresponded with Plaintiff, stating, in part, that it would take “some additional time” to provide the *Vaughn* index. A copy of the letter is attached to the Complaint as Exhibit 13.

17. To date, the OLRCB has not provided any other response to Plaintiff’s FOIA Request, except as described herein.

18. The FOP has complied with all of the requirements of the DC FOIA to entitle it to file and sustain this action.

19. The District has not timely or completely responded to the FOIA Request.

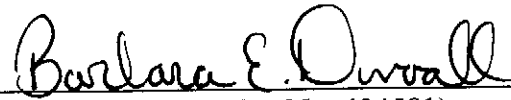
20. It is the Defendant’s burden to sustain its actions pertaining to the FOIA Requests.

21. The Defendant is required to support any assertion of exemption in support of its failure and refusal to provide the requested material under the DC FOIA.

22. The Defendant has not provided the FOP with any support for its failure and refusal to provide the requested material under the DC FOIA.

23. The time to issue discovery requests in this action has passed.

Respectfully submitted,

A handwritten signature in cursive script that reads "Barbara E. Duvall". The signature is written in black ink and is positioned above a horizontal line.

Paul A. Fenn (DC Bar No. 494581)
Barbara E. Duvall (D.C. Bar No. 984197)
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Attorneys for Plaintiff

Exhibit

2

THE FRATERNAL ORDER OF POLICE,
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* IN THE
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* Case No.: 4866-08

* Judge Odessa Vincent
* Next Event: Motions Deadline
* Date: 2/23/09

* * * * *

AFFIDAVIT OF KRISTOPHER BAUMANN

I, Kristopher Baumann, depose and state as follows:

1. I am familiar with the facts set forth herein, and if called and sworn as a witness, I would testify from personal knowledge as to the following matters.

2. I am the Chairman of the Fraternal Order of Police, Metropolitan Police Labor Committee. I am the individual primarily responsible for overseeing the request for documents that is the subject of the above-captioned action, and the responses thereto, to the extent that there have been any, from the District of Columbia.

3. I have reviewed the facts set forth in the Complaint and Statement of Undisputed Material Facts filed in the above-captioned matter, and have determined that these facts and allegations are true and correct to the best of my knowledge, information, and belief.

* * *

I solemnly affirm under the penalties of perjury and under oath that the contents of the foregoing Affidavit are true and correct to the best of my knowledge, information, and belief.



Kristopher Baumann

Date: 2-20-09