

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. 14-4365 SC
)	Case No. 14-1130 SC
OUR CHILDREN'S EARTH FOUNDATION,)	Case No. 15-2558 SC
et al.,)	
)	ORDER ON SUPPLEMENTAL BRIEFING
Plaintiffs,)	RELATED TO, GRANTING IN PART,
)	AND DENYING IN PART MOTIONS FOR
v.)	SUMMARY JUDGMENT AND ORDER TO
)	<u>SHOW CAUSE</u>
NATIONAL MARINE FISHERIES)	
SERVICE, et al.,)	
)	
Defendants.)	
)	
)	
)	

I. INTRODUCTION

Now before the Court is what remains of cross-motions for partial summary judgment in this Freedom of Information Act ("FOIA") case.¹ This includes five issues the Court held in abeyance pending three supplemental briefs requested in the Court's previous Order, ECF No. 25 ("SJ Order").² Based on supplemental briefing, evidence submitted therewith, and the reasons set forth below, the Court GRANTS IN PART and DENIES IN PART the remainder of the cross-motions, and ORDERS certain parties to SHOW CAUSE.

¹ See ECF Nos. 12 ("Mot."), 17 ("Opp'n & Cross-Mot.").
² ECF Nos. 27 ("Supp. Mot."), 28 ("Supp. Opp'n"), 30 ("Supp. Reply"). The SJ Order is available at Our Children's Earth Found. v. Nat'l Marine Fisheries Serv., No. 14-1130 SC, 2015 WL 4452136 (N.D. Cal. July 20, 2015).

1 **II. BACKGROUND**

2 The Court first granted in part and denied in part cross-
3 motions for summary judgment on similar FOIA issues in a related
4 case, Our Children's Earth Foundation v. National Marine Fisheries
5 Service, 85 F.Supp.3d 1074 (N.D. Cal. Mar. 30, 2015), and the
6 underlying facts are most fully explained in that opinion. Id. at
7 1079-1081. Relevant to the next motion considered by the Court
8 (the cross-motions partially resolved by the SJ Order), the Court
9 declined to address an alleged pattern-and-practice of FOIA
10 violations, noting that those same issues were raised in the then-
11 still-pending motion addressed by the SJ Order between the same
12 parties with a fuller evidentiary record. Id. at *8.

13 Plaintiffs are two groups of environmental advocates seeking
14 summary judgment on their claims that the remaining relevant
15 Defendant failed to comply with the FOIA in responding to
16 Plaintiffs' requests for documents. Plaintiffs also alleged that
17 there is a pattern-and-practice of such failures. The only
18 remaining, relevant Defendant is the National Marine Fisheries
19 Service (the "Fisheries Service," "NMFS," or "Defendants"), who
20 disagreed with Plaintiffs and moved for summary judgment in its own
21 right on the basis it had complied with the law. The Court
22 considered arguments by parties, briefly reviewed the facts, and
23 resolved much of the debate through the Court's SJ Order. The
24 Court adopts the fact sections from its two earlier orders and
25 incorporates them as though fully set out herein.

26 What now remains after the SJ Order are five specific issues,
27 each of which was held in abeyance pending supplemental briefing
28 ordered by the Court.

1 **III. LEGAL STANDARD**

2 Entry of summary judgment is proper "if the movant shows that
3 there is no genuine dispute as to any material fact and the movant
4 is entitled to judgment as a matter of law." Fed. R. Civ. P.
5 56(a). Summary judgment should be granted if the evidence would
6 require a directed verdict for the moving party. Anderson v.
7 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). "A moving party
8 without the ultimate burden of persuasion at trial -- usually, but
9 not always, a defendant -- has both the initial burden of
10 production and the ultimate burden of persuasion on a motion for
11 summary judgment." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz
12 Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

13 "In order to carry its burden of production, the moving party
14 must either produce evidence negating an essential element of the
15 nonmoving party's claim or defense or show that the nonmoving party
16 does not have enough evidence of an essential element to carry its
17 ultimate burden of persuasion at trial." Id. "In order to carry
18 its ultimate burden of persuasion on the motion, the moving party
19 must persuade the court that there is no genuine issue of material
20 fact." Id. "The evidence of the nonmovant is to be believed, and
21 all justifiable inferences are to be drawn in his favor."
22 Anderson, 477 U.S. at 255.

23 FOIA cases are typically decided on motions for summary
24 judgment. Yonemoto v. Dept. of Veterans Affairs, 686 F.3d 681, 688
25 (9th Cir. 2011) as amended (Jan. 18, 2012). "To carry their
26 summary judgment burden, agencies are typically required to submit
27 an index and 'detailed public affidavits' that, together, 'identify
28 the documents withheld, the FOIA exemptions claimed, and a

1 particularized explanation of why each document falls within the
2 claimed exemption.'" Id. (quoting Lion Raisins v. Dep't of Agric.,
3 354 F.3d 1072, 1082 (9th Cir. 2004) (alterations in original)).
4 These submissions are typically referred to as a Vaughn index,
5 after Vaughn v. Rosen, 484 F.2d 820, 823-25 (D.C. Cir. 1973), and
6 they must be "from 'affiants who are knowledgeable about the
7 information sought' and 'detailed enough to allow court[s] to make
8 an independent assessment of the government's claim of exemption.'" Yonemoto,
9 686 F.3d at 688 (internal alterations omitted) (quoting
10 Lion Raisins, 354 F.3d at 1079).

11 Insofar as the Court discussed the law in its SJ Order, unless
12 subsequently challenged by the parties, the Court adopts those
13 discussions and integrates them as though fully set forth herein.

14
15 **IV. DISCUSSION**

16 There are five issues for the Court to still consider. They
17 are: (1) the adequacy of the search; (2) whether Record No. 1 was
18 withheld appropriately pursuant to Exemption (b)(5); (3) whether
19 the Fisheries Service has cured its showing of segregability of
20 factual information in certain records; (4) whether the Fisheries
21 Service used appropriate cut-off dates; and (5) pattern-and-
22 practice concerns. The Court considers each in turn.

23 **A. Adequacy of the Search**

24 In its SJ Order, the Court specified four reasons why the
25 original Declaration from Gary Stern, Branch Chief of the Fisheries
26 Service's San Francisco Bay Branch, ECF No. 20 ("Stern Decl."), was
27 insufficient to establish that the search was adequate. The four
28 reasons were: (1) failure to specify who specifically searched; (2)

1 failure to clarify the precise terms used to search as opposed to
2 giving examples that might be illustrative; (3) failure to explain
3 in reasonable detail how particular folders, files, or emails were
4 selected to be included in the search; and (4) concern that Mr.
5 Stern was relying entirely on hearsay. See SJ Order at 8. In a
6 supplemental declaration filed in response to the SJ Order, Mr.
7 Stern remedied all of these concerns. He specified by name and
8 position who searched, provided precise search terms that appear to
9 the Court to be properly tailored for the relevant FOIA requests,
10 and he explained in detail how he determined which folders, files,
11 and emails were selected. See ECF No. 27-3 ("Supp. Stern Decl.")
12 ¶¶ 5-15. While there is still some hearsay included, Mr. Stern
13 himself searched, was personally involved with the search, or else
14 directly supervised the search, and accordingly is able to testify
15 as to his personal involvement. See id.

16 Plaintiffs nonetheless object on the basis of hearsay. Their
17 two grounds are unpersuasive. They first argue there must be an
18 affidavit from others who conducted the search. Yet the Court does
19 not need to have an affidavit from each person engaged in the
20 search; such a practice would be exceptionally cumbersome on the
21 government, and needlessly so. In the Ninth Circuit, as a general
22 matter "[a]n affidavit from an agency employee responsible for
23 supervising a FOIA search is all that is needed to satisfy the
24 personal knowledge requirement of Federal Rule of Civil Procedure
25 56(e)." Lahr v. National Transp. Safety Bd., 569 F.3d 964, 989
26 (9th Cir. 2009) (quoting Carney v. U.S. Dep't of Justice, 19 F.3d
27 807, 814 (2d Cir. 1994)). Applying this rule, district courts have
28 overruled comparable hearsay objections. See Council on Am.-

1 Islamic Relations, California v. F.B.I., 749 F. Supp. 2d 1104, 1119
2 (S.D. Cal. 2010) (quoting Lahr); see also Hersh & Hersh v. U.S.
3 Dep't of Health & Human Servs., No. C 06-4234 PJH, 2008 WL 901539,
4 at *4 (N.D. Cal. Mar. 31, 2008) (courts "have overruled objections
5 based on lack of personal knowledge as long as the supervisor in
6 charge of coordinating the agency's search efforts, or responsible
7 for same, has submitted an affidavit describing the search."
8 (citing Carney)). The Court finds that the affidavits submitted
9 are from the supervisor in charge of coordinating the search
10 efforts (Mr. Stern) or person responsible for (portions of) the
11 search (Ms. Malabananan), and thus OVERRULES the objection.

12 Plaintiffs also object to the limited information related to
13 the search of the Office for Law Enforcement (OLE). Ms. Malabananan
14 was personally involved in the search by forwarding requests and
15 coordinating with the Office for Law Enforcement to receive
16 responsive records in their possession. See ECF No. 19 ("Malabananan
17 Decl.") ¶¶ 20-21. While Ms. Malabananan's degree of involvement was
18 far more limited than that of Mr. Stern (and accordingly less
19 persuasive), the Court is still satisfied that the affidavit
20 provides information from a coordinator responsible for the search
21 describing a search made by a specific person at a specific agency.
22 Accordingly, the Court again OVERRULES Plaintiffs' objection.

23 Based on the foregoing analysis, the Court now considers
24 whether the agency has conducted a "search reasonably calculated to
25 uncover all relevant documents." Zemansky v. EPA, 767 F.2d 569,
26 571 (9th Cir. 1985) (quoting Weisberg v. U.S. Dep't of Justice, 745
27 F.2d 1476, 1485 (D.C. Cir. 1984)). The Court is required to
28 resolve "not whether there might exist any other documents possibly

1 responsive to the request, but rather whether the search for those
2 documents was adequate." Id. (quotation omitted) (emphasis in
3 original). Here, the Court finds the Fisheries Service has met
4 this standard.

5 To prevail on a motion for summary judgment, the agency must
6 demonstrate "beyond material doubt . . . that it has conducted a
7 search reasonably calculated to uncover all relevant documents."
8 S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No.
9 CIV. S-06-2845 LKK/JFM, 2008 WL 2523819, at *11 (E.D. Cal. June 20,
10 2008) (citing Zemansky, 767 F.2d at 571). In so doing, the agency
11 may rely on "reasonably detailed, non-conclusory affidavits and
12 declarations submitted in good faith," id., describing "what
13 records were searched, by whom, and through what process."
14 Lawyers' Comm. for Civil Rights v. U.S. Dep't of the Treasury, 534
15 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) (quoting Steinberg v. U.S.
16 Dep't of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994)). The Court
17 finds the Fisheries Service has done so here. Therefore, the Court
18 GRANTS summary judgment in favor of NMFS, and DENIES summary
19 judgment as requested by Plaintiffs.

20 **B. Whether Record Number 1 was Properly Withheld**

21 The Court next turns to whether Record No. 1 was properly
22 withheld. After review of the supplemental briefs, and given the
23 partial disclosure of the document, the Court FINDS that the
24 remainder of Record No. 1 was properly withheld.

25 Exemptions are to be narrowly construed, and "information not
26 falling within any of the exemptions has to be disclosed"
27 Yonemoto, 686 F.3d at 687. Under Exemption (b)(5), materials
28 produced as part of the agency's deliberative process or protected

1 by attorney-client privilege need not be disclosed. 5 U.S.C. §
2 552(b)(5). Exemption (b)(5) applies to "inter-agency or intra-
3 agency memorandums or letters which would not be available by law
4 to a party other than an agency in litigation with the agency." 5
5 U.S.C. § 552(b)(6). As a result, the rule protects from disclosure
6 "those documents normally privileged in the civil discovery
7 context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975).
8 There are two such privileges at issue here: attorney-client
9 privilege and the executive "deliberative process" privilege. The
10 Court previously found that "all the documents potentially covered
11 by the attorney-client privilege are covered by the deliberative
12 process privilege," SJ Order at 11, and thus focuses mainly on the
13 deliberative process here. Also per the SJ Order, the

14 [d]eliberative process privilege seeks "'to prevent
15 injury to the quality of agency decisions' by ensuring
16 that the 'frank discussion of legal or policy matters,'
17 in writing, within the agency, is not inhibited by public
18 disclosure." Maricopa Audubon Soc. v. U.S. Forest Serv.,
19 108 F.3d 1089, 1092 (9th Cir. 1997) (quoting Sears, 421
20 U.S. at 150-51). To fall within the deliberative process
21 privilege, the material withheld or redacted must be
22 "'predecisional' in nature and must also form part of the
23 agency's 'deliberative process.'" Id. at 1093 (quoting
24 Sears, 421 U.S. at 151-52) (emphasis in original).
25 Predecisional documents "may include recommendations,
26 draft documents, proposals, suggestions, and other
27 subjective documents which reflect the personal opinions
of the writer rather than the policy of the agency." Assembly of State of Cal. v. U.S. Dep't of Commerce, 968
F.2d 916, 920 (9th Cir. 1992) (quoting Formaldehyde Inst.
v. Dep't of Health & Human Servs., 889 F.2d 1118, 1122
(D.C. Cir. 1989)) (internal citations and quotation marks
omitted). Documents falling within that definition are
part of the agency's "deliberative process" if disclosing
those documents "would expose an agency's decisionmaking
process in such a way as to discourage candid discussion
within the agency and thereby undermine the agency's
ability to perform its functions." Id. (quoting
Formaldehyde, 889 F.2d at 1122).

28 SJ Order at 11.

1 The Fisheries Service's updated Vaughn Index reflects that
2 this is an "employee's draft chart and summary [which] were
3 prepared in order to assist agency decisionmakers in arriving at a
4 decision whether to issue a revised SHEP biological opinion." ECF
5 No. 27-4 Ex. A ("Supp. Vaughn Index") at 1. The Fisheries Service
6 no longer relies upon what the agency may have been doing when the
7 document was drafted, but focuses now directly on the content of
8 the document itself. With the supplemental information provided in
9 the updated Vaughn Index, the description in the supplemental
10 declaration by Ms. Malabanan, and the portion of the document
11 released, the Court can now reasonably deduce that the document
12 could "reveal the mental processes of decisionmakers" or be
13 "tantamount to the publication of the evaluation and analysis of
14 the multitudinous facts conducted by the agency" Nat'l
15 Wildlife, 861 F.2d at 1119 (citation omitted). While perhaps not
16 directly meant to assist decisionmakers arrive at a decision, it is
17 clear the author meant to educate a more senior member of the
18 office on whether and why to request a (perhaps higher-up)
19 decisionmaker arrive at a specific decision. The fact that "the
20 contents of the draft chart and the employee's summary contain a
21 number of mistakes and misinterpretations such that release . . .
22 would lead to public confusion" reinforces that this document shows
23 an internal debate, to include a mistaken personal opinion,
24 exposure of which would "discourage candid discussion within the
25 agency."³ Assembly, 968 F.2d at 920. Accordingly, Exemption
26 (b)(5) does apply. See Maricopa Audubon, 108 F.3d at 1092.

27 _____
28 ³ The Court does not reach whether this provides a separate,
independent ground to deny disclosure.

1 Plaintiffs' three objections are unavailing. Plaintiffs
2 object to Ms. Malabanan's declarations based on hearsay. For the
3 same reasons cited with respect to the first issue, above, the
4 Court rejects Plaintiffs' hearsay argument regarding the
5 declarations. See Lahr, 569 F.3d at 989; Council on Am.-Islamic
6 Relations, 749 F. Supp. 2d at 1119; Hersh, 2008 WL 901539, at *4.
7 Plaintiffs also object for lack of foundation, reasoning that Ms.
8 Malabanan lacked the personal expertise to make the claims she
9 asserts. The Court accepts unrebutted portions of her declarations
10 to the contrary. See ECF No. 30-1 ("Supp. 2d. Malabanan Decl.") ¶¶
11 7-9. In addition, the Court notes that functionally Plaintiffs'
12 foundational objection is no different from their hearsay objection
13 -- NMSF need only provide and rely on an affidavit from a person
14 supervising or responsible for the search, which is precisely what
15 they do. Accordingly, the Court rejects this foundation objection.

16 Finally, Plaintiffs argue that even were the Court to accept
17 Ms. Malabanan's testimony (which the Court does), the document may
18 be predecisional but is not deliberative within the meaning of
19 Maricopa Audubon, 108 F.3d at 1093. Yet the Fisheries Service
20 makes clear that exposure of the remainder of the document in
21 question would provide nothing more than the personal opinions of a
22 single, lower-level worker (opinions based in part on materials
23 later deemed factually erroneous) who was trying to have a frank
24 and open dialogue with a senior employee on whether and how to make
25 a recommendation to a decisionmaker.⁴ Thus revealing the document
26 in full would "expose an agency's decisionmaking process in such a
27 way as to discourage candid discussion within the agency and

28

⁴ The underlying report has been released. Supp. Reply at 3.

1 thereby undermine the agency's ability to perform its functions."
2 Assembly, 968 F.2d at 920 (quoting Formaldehyde, 889 F.2d at 1122).
3 Therefore, the Court rejects this objection.

4 Accordingly, Plaintiffs' objections are OVERRULED, the Court
5 finds the document is both predecisional and deliberative per
6 Maricopa Audubon, and therefore the Court finds the document
7 qualifies under Exemption (b)(5). Summary Judgment is thus GRANTED
8 in favor of the Fisheries Service and DENIED as to Plaintiffs.

9 **C. Segregability of Factual Information in Certain Records**

10 The Court next considers whether the Fisheries Service has
11 cured its showing of segregability of factual information in
12 certain records. The Court OVERRULES Plaintiffs hearsay and
13 foundation objections, consistent with earlier rulings herein. See
14 Lahr, 569 F.3d at 989; Council on Am.-Islamic Relations, 749 F.
15 Supp. 2d at 1119; Hersh, 2008 WL 901539, at *4; Supp. 2d. Malabanan
16 Decl. ¶¶ 1-3, 7-8. The Court also accepts that failure to justify
17 Record No. 6 was inadvertent, and considers it offered by the
18 Fisheries Service (and objected to by Plaintiffs) in a manner the
19 same as all other similarly situated records. The only issue
20 remaining is whether the segregability explanations are adequate.
21 The Ninth Circuit recently clarified:

22 It is not reasonable to interpret our precedent to
23 require the district court to take on the role of
24 document clerk, reviewing each and every document an
25 agency withholds. A district court must take seriously
its role as a check on agency discretion, but this does
not require a page-by-page review of an agency's work.

26 The district court may rely on an agency's declaration in
27 making its segregability determination. [Pac. Fisheries,
28 Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir.
2008)]. Agency affidavits that are sufficiently detailed
are presumed to be made in good faith and may be taken at
face value. [Hunt v. C.I.A., 981 F.2d 1116, 1119 (9th

1 Cir. 1992)]. In short, a district court is not required
2 to conduct an independent in camera review of each
withholding unless an agency declaration lacks sufficient
detail or bears some indicia of bad faith by the agency.

3 Hamdan v. U.S. Dep't of Justice, 797 F.3d 759, 779 (9th Cir. Aug.
4 14, 2015). Hamdan continued to explain that:

5 An agency must describe the document or information being
6 withheld in sufficient detail to allow the plaintiffs and
7 the court to determine whether the facts alleged
8 establish the corresponding exemption. Pac. Fisheries,
539 F.3d at 1148. We have not held that the manner of
that description must take any particular format, so long
as it is sufficiently detailed.

9 Hamdan, 797 F.3d at 780.

10 Hamdan then examined a series of examples "[i]n the interest
11 of clarifying [this] circuit's segregability standard." Id. The
12 first was by the Department of State ("DOS"), the second was by the
13 Federal Bureau of Investigation ("FBI"), and the third was by the
14 Defense Intelligence Agency ("DIA"). The DOS provided an
15 individualized explanation and cite the corresponding objection for
16 each record. Id. In some (but not all) cases, the DOS even noted
17 that the "withheld portions are so inextricably intertwined with
18 the non-exempt portion, that any segregable material would not be
19 meaningful." Id. Good faith was shown by evidence supporting
20 their careful review of the documents, in one instance releasing a
21 document with all but a single sentence redacted. Id. The FBI
22 provided less robust declarations but they were sufficient to allow
23 the district court to take them at face value, having identified
24 the documents by number and providing specific reasons why
25 disclosure would be harmful. Id. The FBI stated that "[n]o
26 reasonably segregable, nonexempt portions were withheld from
27 plaintiffs." Id. This was supported by the partially redacted
28 documents released. Hamdan thus found both examples passed muster.

1 Conversely, the DIA's showing was found to be insufficient.
2 There, the DIA's declarations "lack sufficient detail to allow the
3 district court to determine that the claimed exemptions apply
4 throughout all of the documents." Id. The problem stemmed from
5 little individualized information about the documents. In all
6 cases, the same reason was given and the documents were entirely
7 withheld, even though the documents varied in length and level of
8 classification. Id. at 781. Moreover, the DIA cited inconsistent
9 reasons for exemptions in its declarations versus its Vaughn Index.

10 In its SJ Order, published prior to Hamdan, the Court found
11 that the Fisheries Service had failed to meet its burden on
12 reasoning that mirrored the circumstances of the DIA. SJ Order at
13 12. The Fisheries Service withheld documents in full and merely
14 gave a blanket statement that "[t]o the best of [FOIA Coordinator
15 Ana Liza Malabanan's] knowledge, to the extent . . . there is
16 factual material . . . in the withheld portions of the . . .
17 documents listed in the Vaughn Index, that information is not
18 segregable from the withheld portions." Malabanan Decl. ¶ 126.
19 The Court found, consistent with Hamdan, that "[t]his is clearly
20 insufficient." SJ Order at 12 (citing ACLU of N. Cal. v. FBI, No.
21 12-cv-03728-SI, 2014 WL 4629110, at *9 (N.D. Cal. Sept. 16, 2014)
22 (concluding a similarly conclusory declaration was insufficient to
23 carry the agency's burden on segregability)). Rather than order in
24 camera review, the Court asked for clarification by the agency.

25 Here, like the DOS's filing, the supplemental Vaughn index
26 provides an explanation for each document and cites to the specific
27 FOIA exemption that applies. Yet like the FBI or DIA submissions,
28 the declaration was not as robust as it could have been, and like

1 the DIA submission it often repeated the same justification in the
2 same language for each of the records. Even so, like the DOS and
3 FBI, all but 5 lines on page 1 of document 45 were disclosed, 1
4 page of document 48 was disclosed, 2 pages of document 46, 51, and
5 59 were disclosed, 4 pages of document 58 were disclosed,⁵ 5 pages
6 of documents 49 and 50 were disclosed, and 8 pages of document 47
7 were disclosed; only document 22 (78 pages) and Record No. 6 (43
8 pages) were withheld in their entirety. See generally Supp. Vaughn
9 Index; Supp. 2d. Malabanan Decl. ¶ 4. In addition, the
10 supplemental Vaughn index is consistent with the declarations. See
11 ECF No. 27-4 ("Supp. Malabanan Decl.") ¶¶ 5-14. Therefore, on the
12 whole, this case seems most analogous to the submission by the FBI,
13 where the declarations are not ideal but the disclosures and cited
14 exceptions show enough good faith that the Court should accept the
15 agency's explanations at face value.

16 Accepting the agency's explanations at face value, the Court
17 finds that here the "factual material is so interwoven with the
18 deliberative material" that it is not segregable. See United
19 States v. Fernandez, 231 F.3d 1240, 1247 (9th Cir. 2000). Unlike
20 later cases applying Fernandez, the Fisheries Service clearly
21 considered each document and tried to release some portion. C.f.
22 Kowack v. U.S. Forest Serv., 766 F.3d 1130, 1135 (9th Cir. Sept. 9,
23 2014) (the Court was unable to make an independent assessment where
24 the government did not even say if it tried to segregate factual
25 information or provide enough detail to conclude that portions were
26 interwoven, per Fernandez). Insofar as Kowack suggests "a stand-

27 _____
28 ⁵ This calculation assumes that the ledger is part of the overall
34 pages of the document.

1 alone fact section" may exist and be disclosed, the Fisheries
2 Service has satisfied the Court that such sections do not exist,
3 have already been disclosed, or would be interwoven. See generally
4 Supp. Vaughn Index; Supp. Malabanan Decl.; see also Supp. Mot. at
5 3-4. Therefore, the Court finds that the Fisheries Service has
6 satisfied its obligation to segregate and disclose facts.

7 This finding expressly does not extend to the ledger in
8 Document 58. Upon closer examination, the justification for
9 withholding those 11 pages is that it was provided for review to
10 the attorney for the agency, and therefore automatically becomes
11 privileged. This is incorrect; while communications are privileged
12 and attorney work product is privileged, an otherwise unprivileged
13 document does not gain any protections simply because it was sent
14 to a lawyer for review. The Court has found it appropriate to
15 accept the supplemental Vaughn index at face value, so it must now
16 accept the explanation offered as the primary justification.⁶
17 Accordingly, the justification is inadequate. Within 10 days of
18 the date of this Order, the Fisheries Service is ORDERED to produce
19 those portions of the ledger which are not directly privileged or
20 provide an explanation why the ledger is also exempted. Plaintiffs
21 are free to challenge any withholding in a new motion, but may do
22 so only insofar as the rationale is inconsistent with this Order.

23 Accordingly, notwithstanding the Court's ORDER related to the
24 11 page ledger of Document 58, the Court GRANTS summary judgment in

25 ⁶ The Court suspects the supplemental Vaughn index is just poorly
26 worded, and that the ledger is actually a log of communication
27 between the attorney and the client Fisheries Service meant to
28 capture the question-and-answer style back-and-forth between the
two, thereby simplifying application of the attorney's advice to
specific provisions. However, such a suspicion is pure speculation
and not a proper basis for a judicial ruling.

1 favor of the Fisheries Service and DENIES summary judgment at to
2 Plaintiffs.

3 **D. Cut-off Dates**

4 The Court next turns to whether the Fisheries Service used
5 appropriate cut-off dates. In its SJ Order at 23, the Court
6 identified that this was a factual dispute, but that further
7 details from parties may resolve that dispute as FOIA cases are
8 routinely resolved on summary judgment. Parties have since
9 supplemented the record, and the Court finds that there is no
10 longer any factual dispute to further delay summary judgment.

11 The Court OVERRULES Plaintiffs' objections as irrelevant. See
12 Supp. Opp'n at 11-13. (The Court will, however, consider these
13 objections insofar as they are relevant to pattern-and-practice
14 allegations.) Plaintiffs fail to recognize or rebut that the
15 Fisheries Service provided the Court a clear date upon which the
16 searches began. See Supp. Stern Decl. ¶¶ 5, 10. While it is
17 possible that other employees began searching on a later date, Mr.
18 Stern provides specific dates that he, as the principle subject
19 matter expert ("SME"), began his search for FOIA 5 (June 27, 2014)
20 and FOIA 6 (August 13, 2014). Id. "Records responsive to a
21 request shall include those records within the Department's
22 possession and control as of the date the Department begins its
23 search for them." 15 C.F.R. § 4.5(a) (emphasis added). The Court
24 agrees that a better policy is the search start date of each
25 individual SME, see Supp. Malbanan Decl. ¶ 18(b), but finds on
26 these specific facts that Mr. Stern's search alone was sufficient
27 to establish when the Department began to search, and thus a cut-
28 off date in these particular searches.

1 Accordingly, the Court finds that the Fisheries Service
2 fulfilled its obligation by providing responsive documents up to
3 but not later than the June 27, 2014 and August 13, 2014 respective
4 cut-off dates. Therefore, summary judgment is GRANTED in favor of
5 the Fisheries Service and DENIED as to Plaintiffs, except insofar
6 as parties identify any documents that should have been produced
7 given these cut-off dates but were not. If any such documents
8 exist, the Court ORDERS they be produced or else identified to the
9 Court within 10 days of the date of this order along with any
10 applicable exemption. In identifying and producing documents,
11 parties shall exclude those documents on which the Court has
12 already ruled.

13 **E. Pattern-and-Practice Concerns**

14 Plaintiffs allege a pattern and practice claim, suggesting
15 that the responses to all FOIA matters have been consistently and
16 impermissibly slow. The Court asked parties to address two
17 pattern-and-practice concerns before the Court ruled: (1) whether
18 Case No. 15-2558 SC ("OCE III") is moot; and (2) whether OCE III
19 provides new evidence of compliance relevant to the larger, still-
20 pending pattern-and-practice concern. Upon consideration of these
21 issues and prior materials briefed, the Court now GRANTS IN PART
22 and DENIES IN PART requests for declaratory and injunctive relief.

23 Plaintiffs requested that the Court find OCE III prudentially
24 moot. Supp. Opp'n at 7. Defendants did not oppose. Supp. Reply
25 at 10. Therefore, the Court finds OCE III MOOT and accordingly OCE
26 III is hereby DISMISSED WITH PREJUDICE.

27 That done, the Court was also interested in whether the now-
28 mooted OCE III case offered an additional data point to suggest

1 that there was not a continued pattern and practice of tardiness or
2 failure to comply with the law. The Court considers several pieces
3 of new data presented via supplemental briefing relating to OCE III
4 and other relevant matters.

5 Several pieces of information suggest that insofar as there
6 may have been a pattern-and-practice, it is being corrected. OCE
7 III is itself inconclusive, as parties dispute whether or not it
8 was an instance of a late versus timely disclosure (a matter not
9 reached by the Court). However, OCE III does show a trend toward
10 more speedy disclosures. The average processing time for
11 processing 125 simple requests was a mere 9 working days, 20 at
12 most. ECF No. 27-2 ("Swisher Decl.") ¶ 9.⁷ The NMFS West Coast
13 Region appears to have an updated process in place, using modern
14 software, additional personnel, and policy changes (e.g., how the
15 cut-off date changes where there are multiple SMEs assigned) to
16 speed up its process. See Supp. Malabanan Decl. ¶¶ 15-18. These
17 changes have helped reduce the "FOIA backlog" of NMFS's parent
18 agency, the National Oceanic and Atmospheric Administration (NOAA),
19 "from 171 backlogged requests to 121 backlogged requests . . . and
20 NMFS reduced its FOIA backlog from 118 backlogged requests to 58
21 backlogged requests, representing [a] 51% decrease in the NMFS
22 backlog." Swisher Decl. ¶ 10. This progress is noteworthy and
23 quite hopeful.

24 Yet this hopeful news is eclipsed by the evidence the Court
25 has received showing an unmistakable history that the Fisheries
26 Service fails to meet its statutory deadlines under FOIA and causes

27
28 ⁷ Conversely, 260 complex requests (such as those often filed by
Plaintiffs) took an average of 111 working days.

1 Plaintiffs (and likely others similarly situated) to suffer
2 unpredictable, unreasonable delays. The fact that there was in the
3 first place a backlog of over 100 cases to so dramatically reduce
4 is itself a red flag indicating the potential for FOIA compliance
5 issues. This potential is confirmed by evidence Plaintiffs provide
6 of a pattern-and-practice of FOIA violations through affidavits,
7 briefs, FOIA response letters, and inconsistencies within the
8 NMFS's own documentation. Exhibits submitted by Plaintiffs show a
9 history of late responses, ranging but not limited to 4 days, 18
10 days, 51 days, 9 months, 10 months, and ongoing. See ECF No. 29 ¶¶
11 2-17. The fact that these responses were tardy is not disputed by
12 the Fisheries Service, who simply reminds the Court that statutory
13 deadlines are not absolute. Supp. Reply at 8-9. Yet laxity in the
14 rules cannot justify the sheer volume of the violation history
15 evidenced just between Plaintiffs and the Fisheries Service. Be it
16 concerning allegations of false reporting leading to an actual
17 delay of 2-days, see ECF No. 29, ¶ 19, or tales that a response to
18 another organization (not Plaintiffs) was delayed by 2-years, see
19 Supp. Opp'n at 4; ECF No. 28-1 Ex. 4, the evidence is clear as to
20 whether a pattern-and-practice existed in the past.⁸ Moreover,
21 Plaintiffs provide the Court a reasonable basis to believe that
22 these infractions will be ongoing. See ECF No. 28-3 ¶¶ 6-8
23 (indicating Plaintiffs will continue to make a similar volume of

24 ⁸ The Court is not persuaded by the average response times. See
25 Swisher Decl. ¶ 9-10. Whereas the average processing time for
26 simple requests looks good, the complex request processing time is
27 concerning. Also, an average can be skewed by several unusually
28 high or low numbers. That the median on complex requests is 63
working days, see Swisher Decl. ¶ 9, means that at least half of
the complex request take more than two months, and the outliers
include statutory violations significant enough to draw the average
up to 111 working days (almost half a year).

1 comparably complex FOIA requests). The Court has previously
2 granted declaratory judgment upon such a showing. See SJ Order at
3 19-21 (citing S. Yuba River Citizens League v. Nat'l Marine
4 Fisheries Serv., No. CIVS-06-2845 LKK/JFM, 2008 WL 2523819, at *6
5 (E.D. Cal. June 20, 2008) ("The consistency of the[] violations and
6 the possibility that they might recur" justified issuing
7 declaratory judgment.)).

8 In its SJ Order, the Court ordered the Fisheries Service to
9 comply with FOIA and its deadlines, finding that the Fisheries
10 Service "has failed to do so previously and the potential that
11 these offenses might continue." SJ Order at 25. The Court's
12 reasoning to then deny without prejudice further injunctive relief
13 was simple: while the Court cannot accept good faith as a shield
14 to fully protect Defendants from rebuke, the ongoing efforts of the
15 Fisheries Service to improve suggested that intervention by the
16 Court may not be necessary to fix ongoing violations. Id. at 25-
17 26. The Court stands by its earlier reasoning, and its belief that
18 some leniency in the exercise of its discretion may be merited.
19 However, the Court cannot turn a blind eye to the evidence put
20 forth by Plaintiffs.

21 Therefore, the Court hereby GRANTS declaratory relief and
22 states: (1) that the Fisheries Service has previously been engaged
23 in a pattern-and-practice of failure to meet FOIA deadlines; (2)
24 that the Fisheries Service has previously provided responses that
25 were frequently and unreasonably delayed; (3) that due to these
26 delays the Fisheries Service effectively provided no ability to
27 FOIA requestors to anticipate when data might be provided; and (4)
28 that due to these delays information was often provided after a

1 long enough period of time that the data could be out-of-date,
2 effectively negating its value and effectuating a complete denial
3 of information.

4 The Court also GRANTS a limited form of injunctive relief, and
5 ORDERS that, in addition to its earlier Declaratory Relief, and
6 insofar as any production to Plaintiffs remains outstanding in any
7 FOIA request made on or prior to September 9, 2015 (the date of the
8 last filed supplemental brief), all final results of such searches
9 be provided within 30 days of the date of this Order.

10 Yet the Court is still sympathetic to the fact that the
11 Fisheries Service continues to receive ongoing, complex FOIA
12 responses, flooding it with administrative work which interferes
13 with its primary duties -- and now the Fisheries Service will need
14 to take even more of its time to answer the below inquiries of the
15 Court. Moreover, the Court recognizes it has not provided the
16 Fisheries Service enough time since issuing its Declaratory Relief
17 to reasonably remedy this pattern-and-practice. The Court believes
18 that the current efforts of the Fisheries Services will assist in
19 this goal. Accordingly, the Court exercises its discretion to DENY
20 WITHOUT PREJUDICE any further injunctive relief at this time.

21 This grace period is subject to continued, clear, and
22 effective efforts by the Fisheries Service that it is curing its
23 prior legal violations. How precisely to continue such efforts or
24 organize an agency to best comply with the law is beyond the
25 purview of the Court. Such fixes and organization must come from
26 the Fisheries Service itself, other agencies that control the
27 Fisheries Service, the Executive, or Congress. The Court therefore
28 ORDERS the Fisheries Service to SHOW CAUSE how it is curing its

1 prior legal violations to a sufficient degree the Court should
2 continue to withhold injunctive relief. To meet this showing, the
3 Fisheries Service is ORDERED to submit a document detailing
4 precisely the status of its backlog, how the Fisheries Service
5 intends to (or has been) fixing the problem, the effectiveness of
6 recent changes in eliminating the backlog, how the Fisheries
7 Service will ensure any immediate success will persist beyond the
8 involvement of the Court, and any other information that may be
9 useful for the Court to consider. This document must be filed with
10 the Court within 30 days of the date of this Order. Based upon
11 this showing of cause, the Court will craft an appropriate
12 injunction, request a further (comparable) showing of cause, or
13 dismiss this case.

14

15 **V. CONCLUSION**

16 For the reasons set forth above, insofar as they were not
17 already resolved, the cross-motions for summary judgment are
18 GRANTED IN PART and DENIED IN PART. With the exception of
19 declaratory and injunctive relief, the Court GRANTS summary
20 judgment in favor of the Fisheries Service and DENIES summary
21 judgment to the Plaintiffs. The Court ORDERS that within 10 days
22 of the date of this Order, the Fisheries Service produce those
23 portions of the 11 page ledger which are not directly privileged or
24 provide an explanation why the ledger is also exempted. The Court
25 finds OCE III MOOT and it is therefore DISMISSED WITH PREJUDICE.
26 The Court GRANTS declaratory relief and ORDERS all final results of
27 any production to Plaintiffs still outstanding in any FOIA request
28 made on or prior to September 9, 2015 be provided within 30 days of

1 the date of this Order. Further injunctive relief is DENIED
2 WITHOUT PREJUDICE. In addition, the Court ORDERS the Fisheries
3 Service to SHOW CAUSE why an injunction should not in the future
4 issue. Accordingly, the Fisheries Service is ORDERED to file,
5 within 30 days of the date of this Order, a document detailing
6 precisely the status of its backlog, how the Fisheries Service
7 intends to (or has been) fixing the problem, the effectiveness of
8 recent changes in eliminating the backlog, how the Fisheries
9 Service will ensure any immediate success will persist beyond the
10 involvement of the Court, and any other helpful information.

11 The Court deems this Order to entirely satisfy all motions and
12 cross-motions for summary judgment in the two still-pending cases,
13 and the motions are hereby terminated. The Court also suspects
14 that upon resolution of any supplemental action required herein,
15 the two still-pending cases can be dismissed in their entirety.
16 Parties are therefore ORDERED to SHOW CAUSE via a single, joint
17 document filed within 10 days of the date of this Order, detailing
18 whether there are any further additional matters for the Court's
19 consideration (excluding responses to matters ordered herein).
20 This will allow the Court to easily determine whether or when the
21 remaining cases can be entirely dismissed upon resolution of the
22 matters ordered herein.

23

24 IT IS SO ORDERED.

25

26 Dated: October 21, 2015

27

28



UNITED STATES DISTRICT JUDGE