

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
3 SAN JOSE DIVISION

4 TANIA MCCASH,  
5 Plaintiff,  
6 v.  
7 CENTRAL INTELLIGENCE AGENCY, et  
8 al.,  
9 Defendants.

Case No. [5:15-cv-02308-EJD](#)

**ORDER DENYING WITHOUT  
PREJUDICE PLAINTIFF'S MOTION  
FOR PRODUCTION OF INDEX OF  
WITHHELD DOCUMENTS**

Re: Dkt. No. 13

10 In this action under the Freedom of Information Act ("FOIA"), Plaintiff Tania McCash  
11 moves for an order requiring the production of an index of withheld documents, or portions  
12 thereof, pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). See Docket Item No. 13.  
13 Defendants Central Intelligence Agency ("CIA"), National Security Agency ("NSA"), and United  
14 States Department of Justice (collectively, the "Government"), oppose the motion. See Docket  
15 Item No. 16. The court finds this matter suitable for decision without oral argument pursuant to  
16 Civil Local Rule 7-1(b). Accordingly, the hearing scheduled for August 27, 2015, is VACATED,  
17 and the court finds, concludes and orders as follows:

18 1. "The term 'Vaughn index' arises out of a District of Columbia Circuit decision  
19 describing a helpful device for specifying documents not produced." Fiduccia v. U.S. Dep't of  
20 Justice, 185 F.3d 1035, 1042 (9th Cir. 1999). "[T]he purpose of the index is to afford the FOIA  
21 requester a meaningful opportunity to contest, and the district court an adequate opportunity to  
22 review, the soundness of the withholding." Weiner v. Fed. Bureau of Investigation, 943 F.2d 972,  
23 977 (9th Cir. 1991) (internal quotation marks omitted).

24 2. Production of a Vaughn index is not required in every FOIA case. Fiduccia, 185  
25 F.3d at 1042-43; see Minier v. Cent. Intelligence Agency, 88 F.3d 796, 804 (9th Cir. 1996)  
26 ("[W]hen the affidavit submitted by an agency is sufficient to establish that the requested  
27 documents should not be disclosed, a Vaughn index is not required."). Indeed, even under

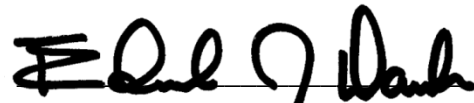
1 Vaughn, an index of withheld documents is only necessary when there exists a factual dispute  
2 regarding whether the documents fall within a disclosure exception, and such dispute cannot be  
3 resolved based solely on agency affidavits. 484 F.2d at 827-28.

4 3. Here, the Government contends that it will be able to fully substantiate disclosure  
5 exemptions in an ensuing motion for summary judgment. To that end, the Government anticipates  
6 invoking FOIA Exemptions 1 and 3<sup>1</sup> as well as an Executive Order, which it believes will result in  
7 a proper Glomar response.<sup>2</sup> Since courts “routinely allow” agencies such as the CIA and the NSA  
8 “to give a Glomar Response in order to avoid identifying its methods or targets, and their  
9 activities” (Mosier v. Cent. Intelligence Agency, No. 2:13-cv-00744-MCE-KJN, 2013 U.S. Dist.  
10 LEXIS 169502, at \*24, 2013 WL 6198197 (E.D. Cal. Nov. 27, 2013)), it is premature to order the  
11 production of a Vaughn index without the benefit of reviewing the adequacy of the Government’s  
12 summary judgment motion. Only after assessing the affidavits in support of a Glomar response  
13 can the court determine whether a Vaughn index is necessary and appropriate.

14 Accordingly, Plaintiff’s motion for an order requiring the Government to produce a  
15 Vaughn index (Docket Item No. 13) is DENIED WITHOUT PREJUDICE to being renewed, if  
16 appropriate, after the Government submits its anticipated motion for summary judgment.

17  
18 **IT IS SO ORDERED.**

19 Dated: August 20, 2015

20   
21 EDWARD J. DAVILA  
22 United States District Judge

23  
24 <sup>1</sup> Exemption 1 applies to national security information, and specifically exempts from disclosure  
25 documents that are: “(A) specifically authorized under criteria established by an Executive order  
26 to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly  
27 classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). Exemption 3 applies to  
28 records “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3).

<sup>2</sup> A “Glomar response” is a refusal to confirm or deny the existence of records. Hunt v. Cent.  
Intelligence Agency, 981 F.2d 1116, 1118 (9th Cir. 1992)